IN THE SUPREME COURT OF FLORIDA

JESSE WATERS, JR.,

Petitioner,

v.

CASE NO. 85,267
1DCA CASE NO. 94-104

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the appellant below and will be referred to as petitioner in this brief. The state will be referred to as respondent or the state.

The one volume record on appeal will be designated as "R" followed by the appropriate page number, in parentheses. Citations to the transcripts will be as "T" followed by the appropriate page number, in parentheses.

The First District Court of Appeal, in Waters v. State, 20 Fla. L. Weekly D489 (Fla. 1st DCA February 24, 1995), ruled against petitioner and affirmed the lower court's sentence entered upon a revocation of probation, but certified a question of great public importance. That opinion is attached hereto as an appendix. Timely notice of discretionary review was filed on March 1, 1995.

II STATEMENT OF THE CASE AND FACTS

By information filed April 2, 1991, petitioner was charged with purchase of cocaine (R 7). On June 4, 1991, upon a plea of no contest (R 34-35) petitioner was placed on community control for one year, followed by 10 years probation (R 43-48).

On October 26, 1993, an affidavit for violation of probation was filed, alleging several violations (R 53-54). Petitioner was in custody on November 8, 1993 (R 63). On November 16, 1993, petitioner admitted the violations (T 24).

On December 20, 1993, petitioner's probation was revoked (R 78). He was adjudicated guilty and sentenced to a 3 1/2 year prison sentence, with credit for 55 days served, to be followed by 10 years of probation (R 69-74; 79-81; T 7-8).

On January 19, 1994, a timely notice of appeal was filed (R 95), and the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued that his new split sentence of 3 1/2 years in prison, plus 10 years probation, was excessive, because he had already been sentenced in 1991 to community control for one year, followed by 10 years probation. Respondent agreed that this case would be controlled by this Court's disposition of the certified question in State v. Summers, 642 So. 2d 742 (Fla. 1994).

The lower tribunal affirmed, but certified the question whether petitioner was entitled to credit for the time spent on community control and probation against his new split sentence of prison and probation. Appendix.

Timely notice of discretionary review was filed on March 1, 1995.

III SUMMARY OF ARGUMENT

This Court must answer the certified question in the affirmative.

A court cannot impose a sentence greater than the statutory maximum for the crime. The statutory maximum for purchase of cocaine is 15 years. Petitioner originally received one year community control, followed by 10 years probation. Then he received 3 1/2 years in prison, followed by another 10 years probation. The total of these sanctions exceeds the statutory maximum.

The lower tribunal seems to have made a distinction between previous time spent on community control and previous time spent on probation. This is a distinction without a difference. Since credit for time spent on probation must be given, time spent on community control, being a more restrictive limitation on liberty, must also be given.

This Court has already decided this issue. This Court has held that credit must be given for time served on probation, when imposing another probation order after a violation. This Court has also held that credit must be given for time served on community control and probation, when imposing another probation order after a violation. Otherwise, the defendant is subject to supervision long after the statutory maximum for the crime.

The decisions of other appellate courts are in accord with petitioner's position.

This Court must answer the certified question in the affirmative, and reverse the new 10 year probation order.

IV ARGUMENT

A TRIAL COURT MUST, UPON REVOCATION OF PROBATION FOLLOWING COMPLETION OF COMMUNITY CONTROL, CREDIT TIME PREVIOUSLY SERVED ON PROBATION AND COMMUNITY CONTROL TO ANY NEWLY IMPOSED TERM OF IMPRISONMENT AND PROBATION FOR THE SAME OFFENSE, SO THAT THE TOTAL PERIOD OF COMMUNITY CONTROL, PROBATION, AND IMPRISONMENT ALREADY SERVED AND TO BE SERVED DOES NOT EXCEED THE STATUTORY MAXIMUM FOR A SINGLE OFFENSE.

This Court must answer the certified question in the affirmative.

Petitioner originally received one year community control, followed by 10 years probation, on June 4, 1991 (R 43-48). On December 20, 1993, petitioner's probation was revoked (R 58). He was adjudicated guilty and sentenced to 3 1/2 years in prison, with credit for 55 days served, to be followed by 10 years of probation (R 69-74; 79-81; T 7-8).

The total of these sanctions exceeds the statutory maximum. Purchase of cocaine is a second degree felony, with a maximum 15 year sentence. §§775.082(3)(c), 893.13(1)(a)1., Fla. Stat. Petitioner's new sentence is illegal when added to the 11 year term of the original sentence, which commenced on June 4, 1991 (R 43-48).

Under the new order, petitioner will be in prison or on probation until June 20, 2007, a period of 16 years from the original sentencing date. See Blackburn v. State, 468 So. 2d 517 (Fla. 1st DCA 1985); Carter v. State, 606 So. 2d 680 (Fla. 2nd DCA 1992); Ogden v. State, 605 So. 2d 155 (Fla. 5th DCA 1992); and Teasley v. State, 610 So. 2d 26 (Fla. 2nd DCA 1992), review denied, 618 So. 2d 1370 (Fla. 1993).

The lower tribunal had previously held in Moore v. State, 623 So. 2d 795 (Fla. 1st DCA 1993), that:

> When probation is revoked, the trial court can sentence up to the maximum period of incarceration permitted by statute. See, §948.06(1), Fla. Stat. (1989). However, if probation is reinstated, as it was in this case, the combined periods of probation cannot exceed the maximum incarcerative period permitted by statute for the underlying offense.

Id. at 797.

The Second District, in an en banc opinion, agreed with this principle, but certified the question. Summers v. State, 625 So. 2d 876 (Fla. 2nd DCA 1993). Petitioner submits that this Court has already decided the issue in State v. Summers, 642 So. 2d 742 (Fla. 1994):

> Accordingly, we approve the decision below, and hold that upon a revocation of probation credit must be given for time previously served on probation toward any newly-imposed probationary term for the same offense, when necessary to ensure that the total term of probation does not exceed the statutory maximum for that offense.

Id. at 744.

The only difference between State v. Summers and the instant case is that petitioner originally received community control and probation, while Mr. Summers received only probation. But that is a distinction without a difference, since time spent on community control, just like time on probation, must count toward the total sanction imposed in a case. Moreover, time spent on community control must count toward the total sanction, since that is a more restrictive

penalty than probation. Fraser v. State, 602 So. 2d 1299 (Fla. 1992).

Even if this Court did not decide this precise issue in State v. Summers, it did so in another recent case. In Roundtree v. State, 637 So. 2d 325 (Fla. 4th DCA 1994), the defendant was sentenced to another probationary term which followed his original probationary term. The Fourth District did say, however, that it could see "no reason for not applying the same reasoning [of State v. Summers] when combining time spent on community control with a subsequent probation." Id. at 326. The court certified the following question:

> Must a trial court, upon revocation of probation (and/or community control), credit prior time served on probation (and/or community control) toward a newly imposed probationary term to that the total probationary term served and to be served does not exceed the maximum sentence allowed by law?

Id. at 326. This is almost identical to the question certified in the instant case.

This Court approved the Fourth District decision, and held on authority of State v. Summers that the district court decision in Roundtree was consistent with State v. Summers. State v. Roundtree, 644 So. 2d 1358 (Fla. 1994).

The Fifth District has recognized, in Phillips v. State, 20 Fla. L. Weekly D485 (Fla. 5th DCA February 24, 1995)[1],

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[1]Coincidentally, it was decided the dame day as petitioner's appeal.

that the holding of State v. Summers, requiring credit for time spent on probation, was extended by this Court in State v. Roundtree to time spent on community control.

In Jost v. State, 631 So. 2d 1131 (Fla. 5th DCA 1994), as in State v. Roundtree, the appellate court granted relief to the defendant, but certified the following question to this Court:

> Must a trial court, upon revocation of probation, credit previous time served on probation to any newly imposed term of community control and probation so that the total period of community control and probation does not exceed the statutory maximum for a single offense?

Id. at 1132. In Jost, the state conceded that the defendant's sentence was illegal, and so as a result neither party in the case pursued a ruling from this Court, although the question was certified.[2]

In Straughan v. State, 636 So. 2d 845 (Fla. 5th DCA 1994), the Fifth District dealt with a situation like petitioner's where the defendant received both probation and community control sentences, the total of which exceeded the statutorily provided maximum sentence. The court held that the two forms of punishment, taken together, cannot exceed a statutory

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[2]The state in the instant case conceded below that the issue had been decided by the lower tribunal in Moore, supra, and would be controlled by this Court's decision in State v. Summers.

sentence maximum. Again, the question was certified, and the state did not seek further review by this Court.

Likewise, in Ogden v. State, supra, the court found that community control, while more severe than probation, was analogous to probation "in that a defendant is not sentenced to probation or community control, but placed on probation or community control in lieu of being sentenced [to prison]." Id. at 159. The court held that the trial court erred when it placed the defendant on probationary and community control terms which exceeded the statutorily mandated maximum sentence.

The lower tribunal stated its position that "community control and probation should not be treated alike" in Eanes v. State, 19 Fla. L. Weekly D2427 (Fla. 1st DCA November 18, 1994), review pending, case no. 84,787. That position is contrary to the holdings of every other appellate court which has considered the question. Moreover, it is contrary to this Court's decision in State v. Roundtree, supra.[3]

The lower tribunal's reliance on Bragg v. State, 644 So. 2d 586 (Fla. 1st DCA 1994), to affirm the instant case, is equally mystifying. In Bragg, Judge Foster, much like in the

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[3]At the time the lower tribunal made that statement, it acknowledged conflict with the Fifth District's Jost and Straughn decisions, and the Fourth District's Roundtree decision, but noted that Roundtree was pending review. This Court decided State v. Roundtree five days later. One wonders why the lower tribunal affirmed the instant case on authority of Eanes, and continued to adhere to its position, since Eanes was clearly wrongly decided in light of State v. Roundtree.

instant case, placed the defendant on probation with some county jail time to serve, and he spent two years, nine months, and ten days under supervision. When he violated probation, he received a new split sentence of 4 1/2 years in prison followed by another term of eight years probation.

The undersigned argued the new split sentence was excessive under State v. Summers, supra, because the total sanction imposed exceeded the statutory maximum of 15 years for a second degree felony. The lower tribunal agreed that the statutory maximum had been exceeded by three months and ten days.

Since the lower tribunal in Bragg reversed a new split sentence, one may wonder why the lower tribunal cited it as authority for affirmance in the instant case. Since Bragg dealt with a prior term of probation only, and not community control, one may wonder why the lower tribunal cited it at all in the instant case.

A ruling from this Court which does not grant relief to the petitioner from his excessive sentences would create an absurd result, as well as a precedent which would foster further miscarriages of justice. Community control is certainly not as restrictive as prison. but it is more restrictive than probation. Community control is not sufficiently different from probation to warrant the denial of credit for time served on one toward a sentence of the other.

The legislature never intended the result achieved by the lower court and the First District Court of Appeal in this

case. Probation and community control, whether taken together or alone, were not intended to run on ad infinitum. That was the rationale for this Court's decision in State v. Summers, supra.

If the decision in this case is upheld by this Court, the maximum sentence for a second degree felony would no longer be 15 years. Rather, the maximum sentence would be whatever terms of probation, community control, and prison the judge chose to impose. A defendant could serve almost 15 years of probation, almost two years of community control, and finally 15 years of prison.

The First District erred when it ruled in this matter that such a result was appropriate. Rather, the holdings of the other districts, cited to in this brief, as well as the decisions of this Court in State v. Summers and State v. Roundtree, show that combined sentences of probation and community control, which result in terms exceeding the statutory maximum allowed by the legislature, are illegal in Florida.

This Court must answer the certified question in the affirmative, especially because it already has in State v. Summers and State v. Roundtree, and reverse the new 10 year probation order because it is excessive.

V CONCLUSION

Based upon the foregoing arguments and authorities, the petitioner respectfully requests that excessive new probation order be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Thomas Crapps, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, on this 10 day of March, 1995.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

herein could properly be amended to include benefits for appellant, Effie Lee Stallings, as a dependent beneficiary.

Walter Stallings died in a compensable automobile accident on January 13, 1990 while employed by the appellee F.M.C. Corporation. He was survived by his mother, the appellant Effie Lee Stallings, and by a brother, Isham Stallings. On January 27, 1993, Isham Stallings filed a claim for benefits on the Division's "Claim for Benefits" form, requesting "[d]eathbenefits (sic) pursuant to Chapter 440.16; funeral expenses; penalties and interest; attorney's fees & costs (21 day rule)." On February 12, 1993, nearly three years after the death of Walter Stallings and before any motion to dismiss the pending claim, the appellant's counsel filed an "Amendment to Claim Filed," stating the addition of appellant Effie Lee Stallings as an additional beneficiary to the original claim. The order on appeal recites a "status conference" agreement that, at the hearing on the merits, Isham Stallings was "dropped" as a party by his counsel but his stated voluntary dismissal did not dismiss his claim for funeral expenses. The JCC found that Effie Lee Stallings received substantial support from the decedent and was therefore dependent. The JCC denied her claim for dependent benefits, however, holding that her amendment constituted a separate and distinct claim from that of Isham Stallings and, as such, had not been timely filed.

Section 440.16, Florida Statutes, lists the beneficiaries entitled to claim compensation for death benefits under the Workers' Compensation Act. Section 440.19(1)(d) bars the right to compensation for death benefits "unless *a claim* therefor . . . *is filed* within 2 years after the death." *Id.* (Emphasis added.) The appellees do not dispute that Isham Stallings filed a timely claim for death benefits and have not appealed the JCC's finding that the appellant was dependent upon the decedent. Because the JCC awarded funeral expenses on the basis of Isham Stallings' claim, the award implicitly acknowledged that his claim had been filed in a representative capacity to request benefits under the statute. We conclude that it constituted a pending timely claim, and appellant's amendment to that claim properly sought her dependency benefits. In view of the unchallenged finding that she was dependent, she was entitled to death benefits under the statute.[1]

The judge of compensation claims order is REVERSED and the cause remanded for further consistent proceedings. (ZEHMER, C.J., and DAVIS, J., CONCUR.)

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[1] We note that this result is in accord with an interpretation of a similar workers' compensation limitation statute in another state, *Whitsell v. Academy Auto Mart*, 227 N.Y.S.2d 510, 16 A.D.2d 846 (N.Y.App. 1962), *app. den'd*, 12 N.Y.2d 642, 185 N.E.2d 552, 232 N.Y.S.2d 1026 (N.Y. 1962), and with a federal court's interpretation of the limitation of action under Florida's Wrongful Death Act, *Talan v. Murphy*, 443 So.2d 207 (Fla. 3rd DCA 1983), *rev. den'd* 451 So.2d 849 (Fla. 1984).

* * *

Workers' compensation—Temporary total disability—Temporary partial disability—No error in permitting claimant to continue to rely on advice of treating physician against return to work until clear communication to claimant of release or changed status—No error in accepting treating psychiatrist's assessment of claimant's incapacity for offered dispatcher's job—Error to award penalties on past due benefits where penalty claim was withdrawn

OKALOOSA COUNTY SHERIFF'S DEPARTMENT and HEWITT, COLEMAN & ASSOCIATES, INC., Appellants, v. RONALD J. TERRY, Appellee. 1st District. Case No. 94-600. Opinion filed February 24, 1995. An appeal from an order of the Judge of Compensation Claims. Michael J. DeMarko, III. Counsel: Mary E. Ingley of McConnaughhay, Roland, Maida & Cherr, P.A., Tallahassee, for appellants. Woodburn S. Wesley, Jr., Ft. Walton Beach, for appellee.

(WENTWORTH, Senior Judge.) This is an appeal by employer/carrier Okaloosa County Sheriff's Department and Hewitt, Coleman & Associates, Inc., from a workers' compensation order dated January 31, 1994, for temporary total disability benefits from April 1, 1989 to May 20, 1992, and for temporary partial benefits thereafter through January 26, 1993. Insofar as the order also awarded a statutory penalty on past due benefits, we reverse based on a record showing that the penalty claim had been withdrawn. The order is otherwise affirmed.

No error has been shown in the judge of compensation claim's (JCC) reference to *Gill v. USX Corp.*, 588 So. 2d 1035 (Fla. 1st DCA 1991), to permit a claimant to continue to rely on the advice of his treating physician against return to work until clear communication to claimant of a release or changed status. The record here reflects no such notice. Nor did the JCC err in rejecting conflicting opinions and accepting the treating psychiatrist's assessment of claimant's incapacity for an offered dispatcher's job.

Reversed in part, affirmed in part, and remanded. (ZEHMER, C.J., and DAVIS, J., CONCUR.)

* * *

Criminal law—Sentencing—Revocation of probation or community control—Credit for time served—Question certified whether trial court, upon revocation of probation following completion of community control, must credit time previously served on probation and community control to any newly imposed term of imprisonment and probation for the same offense, so that the total period of community control, probation, and imprisonment already served and to be served does not exceed the statutory maximum for a single offense

JESSE WATERS, JR., Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-104. Opinion filed February 24, 1995. An appeal from the Circuit Court for Bay County. Clinton E. Foster, Judge. Counsel: Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, Thomas Crapps, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) We affirm the judgment and sentence imposed following revocation of Appellant's probation. *Eanes v. State*, 19 Fla. L. Weekly D2427 (Fla. 1st DCA Nov. 18, 1994) (on motion for certification); *Bragg v. State*, 644 So. 2d 586 (Fla. 1st DCA 1994). We certify the following as a question of great public importance:

> MUST A TRIAL COURT, UPON REVOCATION OF PROBATION FOLLOWING COMPLETION OF COMMUNITY CONTROL, CREDIT TIME PREVIOUSLY SERVED ON PROBATION AND COMMUNITY CONTROL TO ANY NEWLY IMPOSED TERM OF IMPRISONMENT AND PROBATION FOR THE SAME OFFENSE, SO THAT THE TOTAL PERIOD OF COMMUNITY CONTROL, PROBATION, AND IMPRISONMENT ALREADY SERVED AND TO BE SERVED DOES NOT EXCEED THE STATUTORY MAXIMUM FOR A SINGLE OFFENSE?

AFFIRMED. (BARFIELD, MINER and MICKLE, JJ., CONCUR.)

* * *

Criminal law—Sentencing—Credit for time served

NEAL WALKER, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-3492. Opinion filed February 24, 1995. An appeal from the Columbia County Circuit Court, Paul S. Bryan, Judge. Counsel: Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Wendy S. Morris, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) We affirm the trial court's habitual offender sentence. Pursuant to our opinion in *Harris v. State*, 634 So. 2d 1158 (Fla. 1st DCA 1994), however, this case is hereby remanded to the trial court with directions to determine the amount of time that appellant served in jail prior to sentencing and to award appellant the appropriate jail time credit on his sentence. (WEBSTER, MINER and BENTON, JJ., CONCUR.)

* * *

Civil procedure—Error to rely on matters outside four corners of complaint when dismissing third-party complaint with prejudice

FIRST NATIONAL LIFE INSURANCE COMPANY, Appellant, v. RACHEL