IN THE SUPREME COURT OF FLORIDA,

JESSE WATERS, JR.,

Petitioner,

v. CASE NO. 85,267

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES — PAGE(S)

TABLE OF CITATIONS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Jesse Waters, Jr., defendant and appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. This Court currently has for review a case involving the same issue as in the instant case. Eanes v. State, No. 84,787 (Fla. 1995).

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with the Petitioner's version of the case and facts.

SUMMARY OF ARGUMENT

Section 921.161, Florida Statutes (1991), and Florida case law does not entitle the petitioner to credit for time that he previously served on community control against a newly imposed sentence of incarceration and probation.

ARGUMENT

ISSUE I

WHETHER 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?

The petitioner argues that the trial court erred by not giving him credit for time that he had previously served on community control and probation against his newly imposed sentence of probation and incarceration, in order to insure that his punishment did not exceed the statutory maximum. The petitioner contends that the district court of appeal's distinction between time previously spent on probation and time previously spent on community control is a distinction without a difference. Consequently, the petitioner concludes that he is entitled to credit for the year that he spent on community control against his newly imposed sentence for 10 years of probation.

The petitioner's argument is without merit because he is not entitled to credit where his sentence does not exceed the statutory maximum. Because community control is not the functional equivalent of probation, the petitioner is not entitled to receive credit for time he previously spent on community control against his new probation sentence. Thus, this Court should affirm the district court's decision.

The issue in the instant case is the First District Court of Appeal's certified question in Waters v. State, 20 Fla. L. Weekly D489 (Fla. 1st DCA Feb. 24, 1995). This Court has discretionary jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. The issue of whether the petitioner is entitled to credit for time he previously served on community control against his newly imposed probationary sentence raises a legal question. Because this issue raises a legal question, the appropriate standard of review is de novo. Padavano, Phillip J., Florida Appellate Practice, §5.4(B)(1993 ed.)

Section 948.06(1), Florida Statutes (1991),[1] provides that a trial court, which revokes a sentence of probation or community control, may "impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control." If the probationer has already served part of his or her sentence in jail, the trial court must give the probationer credit for time previously served while incarcerated, but not for the time spent on probation. § 948.06(2), Fla. Stat. (1993); State v. Holmes, 360 So. 2d 380, 383 (Fla. 1978); Priest v. State, 603 So. 2d 141 (Fla. 2d DCA 1992). However, if the trial court decides to impose further probation, it must credit the probationer with the previous time spent on probation. State v. Summers, 642 So. 2d 742 (Fla. 1994). In other words, if upon

[1] The 1991 version of the statute applies in this case because the trial court originally placed the Petitioner on community control and probation on June 4, 1991. (R 43-48).

revocation of probation, the trial court reinstates probation, "the combined periods of probation cannot exceed the maximum incarcerative period permitted by statute for the underlying offense." Moore v. State, 623 So. 2d 795, 797 (Fla. 1st DCA 1993). The same reasoning requires that upon revocation of community control, an offender must be allowed credit for that portion of community control he or she successfully completed prior to the violation. Lastinger v. State, 629 So. 2d 324 (Fla. 2d DCA 1993).

Section 948.06(1) authorizes a trial court to sentence a probation or community control violator to any term of imprisonment permitted by the sentencing statute regardless of whether the current term of imprisonment and the prior terms of probation or community control exceed the original statutory maximum. For instance, a third-degree felon who completes four years of a five-year probationary term and then violates his probation, could be sentenced to five years incarceration even though the five and four year terms exceed the five-year term authorized for a third-degree felony.

The law does not support the petitioner's position that a trial court must credit prior time served on community control against the newly imposed probationary sentence in order to avoid exceeding the statutory maximum sentence. Likewise, it does not mean that when a trial court sentences an offender to prison upon revocation of community control, that the trial court must credit

prior time served in community control against the newly imposed incarcerative sentence. Community control is not the functional equivalent of jail for the purpose of credit for time served. Swain v. State, 553 So. 2d 1331, 1333 (Fla. 1st DCA 1989). Nor is community control the functional equivalent of probation. Williams v. State, 629 So. 2d 174, 176 (Fla. 2d DCA 1993). Thus, upon revocation of a defendant's probationary sentence, which included a previous sentence for community control, a trial court can impose probation without giving credit for time previously served on the community control. Moreover, upon revocation of a defendant's community control sentence, the trial court can impose an incarcerative sentence without giving credit for time previously served on community control or probation. Swain, 553 So. 2d at 1333; § 948.06(2).

In sum, the foregoing rules of law show that: 1) a defendant is entitled to credit for time previously served while incarcerated against a newly imposed incarceration sentence; 2) a defendant is entitled to credit for time previously served on probation against a newly imposed probationary sentence if needed to avoid giving a sentence which exceeds the statutory maximum sentence; and 3) a defendant is entitled to credit for time previously served on community control against a newly imposed community control sentence if needed to avoid giving a sentence which exceeds the statutory maximum sentence. Thus, it is clear that a defendant is entitled to receive credit against his or her

newly imposed sentence for "like things" in instances where the sentence may exceed the statutory maximum.

Applying these rules of law to the facts in the instant case, it is clear that the district court correctly held that the petitioner was not entitled to credit for time he previously served on community control against his newly imposed sentence for probation. First, the record shows that the petitioner pled nolo contendere to violating section 893.13, Florida Statutes (1991), the purchase of cocaine, a second-degree felony which carries a maximum sentence of 15 years. (R 34). Second, the record shows that the trial court placed the petitioner on community control for one year, followed by 10 years on probation. (R 43-48). Third, the record shows that after serving his one year on community control and approximately one year and five months of his 10 year probationary sentence, the petitioner violated his probation. (R 53-54). Fourth, the record shows that upon revoking the petitioner's probation, the trial court sentenced the petitioner to 3½ years incarceration with credit for 55 days the petitioner had already served to be followed by 10 years of probation. Because community control is not the functional equivalent of probation, the trial court properly denied the petitioner credit for the one year he served on community control. Moreover, the record shows that the trial court properly denied the petitioner credit for the time he previously served on probation because the sentence for 10 years of probation when

taken in conjunction with the 1 year and 5 months of probation, which the petitioner had already served, did not exceed the statutory limit of 15 years. Thus, the trial court properly sentenced the petitioner in the instant case.

The petitioner's contention that this Court may have already answered the instant case's certified question adversely to the State's position in State v. Summers, 642 So. 2d 742 (Fla. 1994), and State v. Roundtree, 644 So. 2d 1358 (Fla. 1994), is without merit. In Summers, this Court addressed the Second District Court of Appeal's certified question of whether a trial court, upon revocation of probation, must credit previous time served on probation toward any newly-imposed term of probation so that the total probationary term is subject to the statutory maximum for a single offense. Summers, 642 So. 2d at 743 (quoting Summers v. State, 625 So. 2d 876, 880 (Fla. 2d DCA 1993)). This Court reasoned that "to treat a term of probation like a 'sentence' or term of incarceration in this context could result in probation being extended ad infinitum beyond the statutory maximum each time probation is revoked." Summers, 642 So. 2d at 744. This Court found that the "the legislature did not intend to allow such 'ad infinitum' extensions of a probationary term that is otherwise subject to a statutory maximum." Id. at 744. Thus, this Court held that

> upon 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.

In State v. Roundtree, 644 So. 2d 1358, 1359 (Fla. 1994), this Court addressed Fourth District Court of Appeal's certified question of whether a trial court, upon revocation of probation (and/or community control), must credit prior time served on probation (and/or community control) toward a newly imposed probationary term so that the total probationary term served and to be served does not exceed the maximum sentence allowed by law. Roundtree, 644 So. 2d at 1358-59 (quoting Roundtree v. State, 637 So. 2d 325, 326 (Fla. 4th DCA 1993)). This Court held that "[w]e recently answered the certified question in State v. Summers, 642 So. 2d 742 (Fla. 1994). Because the decision under review is in harmony with our decision in Summers, we approve it." Roundtree, 644 So. 2d at 1359. Turning to the district court of appeal's decision in Roundtree, the opinion shows that the district court held that

> The state acknowledges that Appellant is entitled to a credit for the time previously spent on probation because the total time on probation, by combining the probation time served prior to the violation with the subsequent probationary term, exceeds the statutory maximum. Additionally, we can discern no reason for not applying the same reasoning when combining time spent on community control with a subsequent probation.

Roundtree, 637 So. 2d at 326 (citations omitted). Reading the district court's decision in Roundtree in light of this Court's decision in Summers, the law is clear that a trial court must give a defendant credit for time he or she had previously served on probation against a newly imposed probationary sentence in order to avoid exceeding the statutory maximum. Despite the broad language in Roundtree, the holding in Summers does not stand for the proposition that a defendant is entitled to receive credit for time he or she had previously served on community control against a newly imposed probationary sentence. Thus, it is clear that this Court has not previously answered the narrow question that is presented by the instant case.[2]

Finally, the State recognizes that in Fraser v. State, 602 So. 2d 1299 (Fla. 1992), this Court addressed whether section 921.161, Florida Statutes (1985), required that a defendant receive credit for time that he spent on community control against a newly imposed sentence of incarceration. Id. at 1300. The facts in Fraser show that the trial court gave the defendant a downward departure sentence without providing contemporaneous written reasons. Id. at 1299. The State appealed the departure sentence, and the district court reversed the sentence. Id. at 1300. However, the district court certified the question of whether

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[2] This Court currently has for review Eanes v. State, 19 Fla. L. Weekly D2427 (Fla. 1st DCA Nov. 18, 1994), which raises the same issue as in the instant case. Eanes v. State, No. 84,787 (Fla. 1995).

section 921.161 required that the defendant receive credit for the time he spent on community control against his newly imposed sentence of incarceration. Id. This Court found that the defendant in Fraser was successfully completing his community control sentence when informed "through no fault of his own" that the trial court had imposed an illegal sentence. Id. Consequently, this Court reasoned that "it would be unfair and inequitable to penalize him for a clerical mistake for which he was not responsible." Id. Thus, this Court held that under the facts in Fraser the law entitled the defendant for credit he served on community control against his incarceration sentence.

This Court's decision in Fraser, however, is not applicable to the facts in the instant case. Unlike Fraser, the facts in the instant case do not show that the petitioner was serving a sentence which later turned out to be unlawful. Rather, the record shows that the trial court imposed the new sentence of incarceration and probation after revoking the petitioner's probation. (R 78-81). These distinguishing facts show that it would not be unfair or inequitable to penalize the petitioner for his violation of probation by not crediting his time spent on community control against his new incarceration or probationary sentence. Thus, it is clear that the rule of law developed in Fraser is not applicable to the facts in the instant case.

Based on the foregoing analysis, it is clear that the district court properly denied the petitioner credit for time that he

served on community control against his newly imposed sentence of incarceration and probation. Thus, this Court should affirm the district court's decision below, and answer the certified question in the negative.

CONCLUSION

Based on the above cited legal authorities, the Respondent respectfully requests this Honorable Court to affirm the judgment rendered in this case, and to answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Chief Appellate Division, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 31st day of March 1995.

Thomas Crapps

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