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

REPLY BRIEF OF PETITIONER ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner will refer to respondent's answer brief as "AB," followed by the appropriate page number, in parentheses.

II ARGUMENT

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT 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 On December 20, 1993, petitioner's probation was revoked (R 58).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.

Respondent disputes that this Court has already decided the issue in State v. Roundtree, 644 So. 2d 1358 (Fla. 1994) (AB at 9-11).

The Fifth District has recognized, in Phillips v. State, 20 Fla. L. Weekly D485 (Fla. 5th DCA February 24, 1995), that the holding of State v. Summers, 642 So. 2d 742 (Fla. 1994), requiring credit for time spent on probation, was extended by this Court in State v. Roundtree to time spent on community control.

The Third District has also recognized, in Mathis v. State, 649 So. 2d 279 (Fla. 3rd DCA 1995), that the holding of State v. Summers, requiring credit for time spent on probation, applies equally to time spent on community control:

> Defendant also argues, and the state concedes, that the defendant is entitled to have his probationary period credited with time spent on probation or community control. Such credit is required by the Florida Supreme Court's recent decision in State v. Summers, 642 So. 2d 742 (Fla. 1994). The trial court did not, of course, have the benefit of Summers at the time of the defendant's sentencing proceeding. On remand appropriate credit must be allowed in accordance with Summers.

649 So. 2d at 280; emphasis added.[1]

The lower tribunal stated its position that "community control and probation should not be treated alike" in Eanes v. State, 648 So. 2d 174 (Fla. 1st DCA 1994), review pending, case no. 84,787. Respondent notes that the issues here and in

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[1]One wonders why the Attorney General conceded the error in the Third District in Mathis, and in the Fifth District in Jost v. State, 631 So. 2d 1131 (Fla. 5th DCA 1994) (cited in petitioner's initial brief at 9), and in the First District in the instant case, but now takes the opposite position.

Eanes are the same (AB at 11), but fails to address petitioner's contention in his initial brief at 10, note 3, that Eanes was wrongly decided in light of State v. Roundtree, supra.

The First District's position is contrary to the holdings of every other appellate court which has considered the question.

Moreover, the First District's position is contrary to this Court's decision in State v. Roundtree, supra, which petitioner argued in his initial brief at 8 had already decided this issue. Respondent claims that this Court did not extend the holding of State v. Summers to community control in State v. Roundtree (AB at 9-11). But respondent fails to even discuss Phillips v. State, supra, which recognized exactly that.

The First District erred when it ruled in this matter that it did not have to follow the decisions of this Court in State v. Summers and State v. Roundtree. Those cases 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.

III CONCLUSION

Based upon the foregoing arguments and authorities, as well as those expressed in the initial brief, 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 7 day of April, 1995.

P. DOUGLAS BRINKMEYER