IN THE SUPREME COURT OF FLORIDA

RICHARD EDWARD SHODA,

Petitioner,

v.

CASE NO. 86,259
1DCA CASE NO. 94-3846

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 plea transcript will be as "P" followed by the appropriate page number, in parentheses. Citations to the sentencing transcript will be as "T."

The First District Court of Appeal, in Shoda v. State, 20 Fla. L. Weekly D1810 (Fla. 1st DCA August 10, 1995), ruled against petitioner and affirmed in part 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 August 14, 1995.

The same issue presented here is also pending before this Court in Waters v. State, case no. 85,267, and in Eanes v. State, case no. 84,787.

II STATEMENT OF THE CASE AND FACTS

By information filed February 7, 1990, under lower court case no. 90-52, petitioner was charged with armed trespass (R 2). On June 21, 1990, upon a no contest plea (R 3-4), he was placed on five years probation (R 7-8).

On October 20, 1993, an affidavit of violation of probation was filed, alleging that petitioner had driven under the influence causing property damage and bodily injury, had possessed marijuana, and had possessed an open alcohol container (R 14-15).

By information filed November 9, 1993, under lower court case no. 93-1284, petitioner was charged with DUI with serious bodily injury and felony possession of marijuana (R 24-25).

On April 21, 1994, he entered an admission to the probation violation and a plea of no contest to the new charges, in exchange for two years community control and three years probation (R 31-32; P 1-5).

He appeared for sentencing on October 7, 1994. His probation was revoked (R 36), and on both the VOP and the new charges, he was placed on two years community control followed by three years probation, with several special conditions (R 37-42; T 39-41).

On November 7, 1994, a timely notice of appeal was filed in both cases (R 43). On January 11, 1995, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued that his new sentence on case no. 90-52, of two years community control plus three years probation, was excessive, because he had already served over three years of probation since he was sentenced in 1990, and because he did not received credit for that time against his new terms of community control and probation.

Respondent agreed that petitioner was entitled to credit against his new probationary term, on authority of State v. Summers, 642 So. 2d 742 (Fla. 1994), but disagreed that he was entitled to credit against his new community control term.

The lower tribunal agreed with respondent's position, granted credit against the new probationary term, and denied credit against the new community control term, but certified the question whether petitioner was entitled to credit for the time spent on probation against his new sentence of community control. Appendix.

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 armed trespass, a third degree felony, is five years. Petitioner, in 1990, originally received five years probation and served over three years of it. Then in 1994 he received two years community control and another three year probationary term. The total of these sanctions exceeds the statutory maximum.

The lower tribunal seems to have adhered to its lonely view that there is a distinction between community control and probation, when it comes time to credit time previously spent on probation. This is a distinction without a difference. Since credit for time spent on probation must be given against a new term of probation, credit for time spent on probation must also be given against a new term of community control, being a more restrictive limitation on liberty.

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 two year community control order.

IV ARGUMENT

UPON REVOCATION OF PROBATION AND THE IMPOSITION OF A NEW COMMUNITY CONTROL SENTENCE, THE TRIAL COURT MUST GIVE CREDIT FOR TIME PREVIOUSLY SERVED ON PROBATION TOWARDS THE NEWLY IMPOSED COMMUNITY CONTROL SENTENCE.

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 armed trespass, a third degree felony, is five years. §§775.082(3)(d), 810.08(2)(c), Fla. Stat. Petitioner, in 1990, originally received five years probation and served over three years of it. Then in 1994 he received two years community control and another three year probationary term. The total of these sanctions exceeds the statutory maximum.

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 received community control and probation, while Mr. Summers received only probation. But that is a distinction without a difference, since time spent on probation must count toward the total sanction imposed in a case. Moreover, time spent on probation must be credited

against the community control portion of 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, 651 So. 2d 203 (Fla. 5th DCA 1995), that the holding of State v. Summers, requiring credit for time spent on probation, was extended by this Court in State v. Roundtree to 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; bold emphasis added. 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.

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

Likewise, in Ogden v. State, 605 So. 2d 155 (Fla. 5th DCA 1992), 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.

Moreover, 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 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; bold emphasis added.[1]

The lower tribunal stated its lonely 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. 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*.[2]

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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*, but now takes the opposite position.

[2]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

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 third degree felony would no longer be five 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 five years of probation, then violate it, and receive two years of community control, then violate it, and finally receive five years of prison.

The First District erred when it ruled in this matter that

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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*.

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 two year community control order because it is excessive.

V CONCLUSION

Based upon the foregoing arguments and authorities, the petitioner respectfully requests that the excessive new community control 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 Vincent Altieri, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, on this 22 day of August, 1995.

P. DOUGLAS BRINKMEYER

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

RICHARD EDWARD SHODA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 94-3846

Opinion filed August 10, 1995.

An appeal from the Circuit Court for Okaloosa County. Jack Heflin, Judge.

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; James W. Rogers, Senior Assistant Attorney General; Vincent Altieri, Assistant Attorney General, Tallahassee, for Appellee.

VAN NORTWICK, J.

Appellant, Richard Edward Shoda, appeals separate community control and probation orders entered upon his revocation of probation for a third degree felony offense. We reverse the order imposing three years probation because the trial court

failed to give Shoda credit for time previously served on probation. As a result, the imposition of Shoda's successive three-year probationary term constitutes a sentence in excess of the statutory maximum. We affirm the trial court's order imposing two years community control because the trial court was not required to give credit against that sentence for time previously served on probation.

On June 21, 1990, in Case No. 90-52, Shoda was placed on five years probation after pleading no contest to armed trespass, a third degree felony. On October 20, 1993, an affidavit of violation of probation was filed alleging that Shoda had committed new offenses. At approximately the same time, he was charged with DUI with serious bodily injury and felony possession of marijuana (Case No. 93-1284). Shoda admitted the probation violation and pled no contest to the new charges. Thereafter, Shoda's probation was revoked and, on both the probation violation and the new charges, he was placed on two years community control followed by three years probation. Separate community control and probation orders were entered in each case. In this appeal, Shoda challenges the orders imposed for the probation violation in Case No. 90-52.

The state concedes that, as to Shoda's probation sentence, the trial court was required to give Shoda credit toward his new three-year probationary term for the time that he previously served on probation. State v. Summers, 642 So. 2d 742 (Fla.

1994). However, the state argues, and we agree based on this court's prior decisions applying Summers, supra, and State v. Roundtree, 644 So. 2d 1358 (Fla. 1994), that the trial court was permitted to give Shoda a new community control sentence without the necessity of crediting against that sentence time previously served on probation. Eanes v. State, 648 So. 2d 174 (Fla. 1st DCA 1994); Gardner v. State, 20 Fla. L. Weekly D1095, D1097 (Fla. 1st DCA 1995).

In addition, we certify the following question to the Florida Supreme Court as a question of great public importance:

> UPON REVOCATION OF PROBATION AND THE IMPOSITION OF A NEW COMMUNITY CONTROL SENTENCE, MUST THE TRIAL COURT GIVE CREDIT FOR TIME PREVIOUSLY SERVED ON PROBATION TOWARDS THE NEWLY IMPOSED COMMUNITY CONTROL SENTENCE?

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

MICKLE AND BENTON, JJ., CONCUR.