IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 11 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RICHARD EDWARD SHODA,

Petitioner,

v. CASE NO. 86,259

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NUMBER 0325791

VINCENT ALTIERI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NUMBER 0051918

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

CONSTITUTIONS AND STATUTES

IN THE SUPREME COURT OF FLORIDA

RICHARD EDWARD SHODA,

Petitioner,

v. CASE NO. 86,259

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Richard Edward Shoda, defendant/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 and the Petitioner's brief will be by the symbols "R" and "PB," respectively, followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with Petitioner's statement of the case and facts, however, would add that the question certified below is whether:

> Upon revocation of probation and 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?

Shoda v. State, infra.

SUMMARY OF ARGUMENT

Section 948.06(1), Florida Statutes (1989), does not entitle Petitioner to credit for time previously served on probation against a newly-imposed term of community control.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT MUST CREDIT TIME SERVED ON PROBATION AGAINST PETITIONER'S NEW COMMUNITY CONTROL SENTENCE, ARISING OUT OF HIS VIOLATION OF PROBATION?

Petitioner argues that the trial court erred by not crediting him with time previously served on probation against his new term of community control, in order that his punishment not exceed the statutory maximum sentence. Petitioner claims that the district court's distinction between probation and community control is a distinction without a difference. Consequently, Petitioner concludes that the three-plus years that he served on probation should be credited against his newly-imposed two year term of community control.

Petitioner's argument is without merit because it violates section 948.06(1), Florida Statutes (1989). In addition, probation is not the functional equivalent of community control, therefore, Petitioner is not entitled to have his newly-imposed community control credited with time previously served on probation. Accordingly, Petitioner's newly-imposed community control does not exceed the statutory maximum 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 Shoda v. State, 20 Fla. L. Weekly D1810 (Fla. 1st DCA Aug. 10, 1995). This Court has discretionary jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. The issue of whether Petitioner is entitled to

credit for time previously served on probation against his newly-imposed community control sentence raises a legal question; therefore, the appropriate standard of review is de novo. Pavadano, Phillip J., Florida Appellate Practice, §5.4(B)(1993 Ed.).

Petitioner relies on this Court's recent decisions in Eanes v. State, No. 84,787, slip op. (Fla. Aug. 31, 1995)(pending motion for rehearing), and Waters v. State, No. 85, 267, slip op. (Fla. Aug. 31, 1995)(pending motion for rehearing), for the proposition that time previously served on probation must be credited against a newly-imposed community control term to avoid exceeding the statutory maximum sentence. (Notice of Supplemental Authority 8/31/95). In Waters, this Court reviewed the following certified question:

> 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?

Waters, supra, at 1. This Court answered the certified question in the affirmative, stating that its decision was consistent with its previous decisions in Summers, infra, and Roundtree, infra. Waters, supra, at 4. This Court reasoned that "[i]f the trial court includes probation as part of a sentence upon revocation of probation, the trial court must give credit for any time previously served on probation together with other sanctions (including jail and prison credit) and the time previously served on probation

total more than the statutory maximum for the underlying offense." Id. (quoting Bragg v. State, 644 So. 2d 586, 587 (Fla. 1st DCA 1994)). However, Waters and Eanes[1] are not dispositive of the instant case because both cases: (1) violate section 948.06(1); (2) exceed and/or contradict this Court's prior case law; and (3) violate at least three sentencing policy concerns.

First, section 948.06(1), Florida Statutes (1989),[2] provides that a trial court, that revokes a sentence of probation or community control, may "impose any sentence which it might have originally imposed before placing the probationer on probation or the offender 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). Accordingly, 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

---

[1] The analysis developed below for Waters equally applies to this Court's decision in Eanes because in that case, this Court only held that it answered the certified question in the negative, and then stated its reliance on Roundtree without elaboration. Eanes, supra, at 2.

[2] The 1989 version of the statute applies in this case because the trial court originally placed the Petitioner on probation on June 21, 1990. (R 8).

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. Thus, the Waters decision, which adds up probation, community control and incarceration indiscriminately, violates section 948.06(1).

Second, the Waters decision exceeds and/or contradicts this Court's prior case law. In Holmes, supra, this Court reviewed the question of whether the combined terms of a split sentence, that included terms of incarceration and probation, could exceed the maximum sentence for that offense. Id. at 381. This Court held that when probation is revoked, a trial court may impose any sentence that it might have originally imposed minus jail time previously served, but that credit need not be given for time spent on probation against a newly-imposed incarcerative sentence. Id. at 383. Thus, a newly-imposed prison sentence need not be credited with time previously served on probation. Therefore, Holmes did not credit a new sentence with time served on an unlike prior sentence. In contrast, Waters makes no distinction between the three different types of punishment and credits each with the others. See supra. Thus, Waters contradicts Holmes.

Moreover, this Court exceeded the Summers requirement that previous sentences be credited against newly-imposed like sentences. See State v. Summers, 642 So. 2d 742 (Fla. 1994). 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. Id. 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 "legislature did not intend to allow such 'ad infinitum' extensions of a probationary term that is otherwise subject to a statutory maximum." Id. 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 other words, if upon 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 Summers holding was proper because both the previous and new punishments were "like" and, therefore, failure to hold such could result in probation ad infinitum. See supra. Consequently, the Waters decision is without the rationale of the Summers decision (that probation could go on ad infinitum) because the crediting of a previous like sentence to a newly-imposed sentence makes punishment ad infinitum impossible. See infra. Moreover, because in Summers the previous and newly-imposed

sentences were both probation, it does not require that probation and community control be treated alike. Thus, Summers is not dispositive of the instant case.

In State v. Roundtree, 644 So. 2d 1358 (Fla. 1994), this Court addressed the 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. Id. 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). Thus, to the extent that Roundtree equates probation with community control, and requires that they be credited to each other interchangeably, the decision is in line with Waters and, therefore, violates section

948.06(1), which entitles the trial court to sentence a probation or community control violator with any sentence that might have originally been imposed, minus time previously served on a like sentence. See Holmes and Summers, supra. Accordingly, a previous sentence need not be credited against a newly-imposed sentence unless they are "like". Thus, previously served probation need not be credited against a newly-imposed term of community control.

Applying these rules of law to the facts in the instant case, it is clear that the district court correctly held that Petitioner was not entitled to credit for time previously served on probation against his newly-imposed community control. First, the record shows that Petitioner pled nolo contendere to violating section 810.09(1), (2)(c), Florida Statutes (1989), armed trespass, a third-degree felony which carries a maximum sentence of five years. (R 2-8). Second, the record shows that the trial court placed Petitioner on probation for five years. (R 5). Third, the record shows that after serving three-plus years on probation, Petitioner violated his probation. (R 14). Fourth, the record shows that upon revoking Petitioner's probation, the trial court sentenced Petitioner to two years community control, followed by three years probation without any credit for his probation already served, against either portion of his new sentence. Thereafter, the district court properly credited Petitioner's newly-imposed probation with his previously served probation because they are like punishments. However, because probation is not a like punishment to community control, the district court properly denied Petitioner credit for the three-plus years he served on probation

against his newly-imposed community control. Shoda, supra. This result is consistent with section 948.06(1), Holmes, and Summers; thus, this Court must answer the certified question in the negative and affirm the district court's decision below.

Finally, there are three practical reasons this Court should affirm the district court's decision below: (1) the ad infinitum rationale, properly relied upon in Summers, is a red herring as used by Petitioner in this case; (2) the trial courts' sentencing discretion will be unduly hampered, otherwise; and (3) to rule otherwise would relieve criminals of a deterrent against violating their probation or community control. First, as mentioned above, the Summers decision ended the possibility that a criminal's punishment could go on forever. By requiring that time previously served be credited against a newly-imposed like sentence, this Court permanently foreclosed sentences running forever because each of the three kinds of punishment became limited by the statutory maximum sentence and, therefore, became limited in total. Thus, having eliminated punishment ad infinitum in Summers, it is misleading to argue post-Summers that a certain result is needed to avoid that same undesired consequence.[3] Thus, Petitioner's claim, in the instant case, that punishment ad infinitum would result from

---

[3] Note, whether or not a defendant spends more time on probation or community control than he or she is originally sentenced depends on the defendant's conduct, and it is their failure to live within the guidelines of their lesser punishment that results in their continued punishment. Therefore, concern for the longevity of subsequent punishments for the same offense should focus on the continued criminal behavior of defendants and not on the discretion of trial court's to deter such acts with more severe punishment, or additional rehabilitation.

an affirmance of the decision below is a red herring and should not be relied upon. (PB 11).

Second, crediting a newly-imposed sentence with time previously served whether or not the punishments are "like" deprives the trial court of discretion to fashion a sentence that would best serve the rehabilitative interests of the convict and the safety interests on the public. See Straughan v. State, 636 So. 2d 845, 849 (Fla. 5th DCA 1994)(Sharp, J., dissenting). Consequently, trial courts might tend to sentence imprisonment where they might have previously fashioned a more strict nonincarcerative punishment. Otherwise, if a probationer violates probation at the end of their term, which happens to be equal to or the greater part of their maximum sentence, then the trial court would be unable to fashion a proper violation of probation sentence. Thus, trial courts' discretion will be unduly hampered.

This leads to the third concern, that probationers will not face a deterrent against violating their probation. If trial courts are unable to impose more community control for a probation violation, or prison for a community control violation, there will be no deterrent against offenders violating their nonincarcerative punishment. Lack of a deterrent against such a violation precludes rehabilitation of the probationer, and threatens the safety of the public by releasing probationers without incentive to live within the law. Thus, failure to affirm the lower court's decision below would deprive trial courts' of the ability to deter violations of probation or community control. Accordingly, this Court should not

make its decision in this case based on its holdings in Waters and Roundtree and, instead, should only credit previous punishments to newly-imposed punishments that are "like." Thus, time previously served on probation must not be credited against a newly-imposed community control term for the same offense; thus, the district court's decision below must be affirmed.

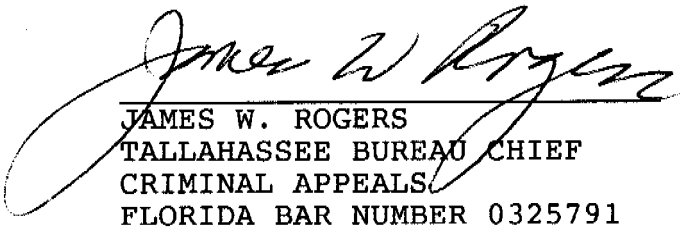
The State recognizes that Waters appears to treat probation, community control, and imprisonment as totally fungible. However, rehearing will be sought in both Waters and Eanes because they usurp legislative authority to prescribe punishment. Should Waters become final without rehearing, the State urges this Court to recede therefrom for the reasons set out above.

CONCLUSION

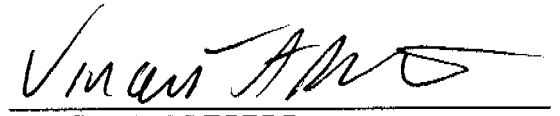
Based on the above cited legal authorities, the Respondent respectfully requests this Honorable Court to affirm the judgment rendered in this case, and to answer the certified question in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF
CRIMINAL APPEALS
FLORIDA BAR NUMBER 0325791



VINCENT ALTIERI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NUMBER 0051918

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE
TCR 95-111513

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MR. P. DOUGLAS BRINKMEYER**, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 11 day of September, 1995.

Vincent Altieri
Assistant Attorney General