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

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLA. BAR NO. 197890
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE INTAKE
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

RICHARD EDWARD SHODA,

Petitioner,

v.

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

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner files this brief in reply to the brief of the respondent. The state will be referred to as respondent or the state.

II ARGUMENT

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT 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, on authority of its recent unanimous decisions in Eanes v. State, 20 Fla. L. Weekly S451 (Fla. August 31, 1995), and Waters v. State, 20 Fla. L. Weekly S446 (Fla. August 31, 1995), which are directly on point.

Incredibly, even though the ink is not yet dry on those opinions, respondent has asked this Court to overrule them, as well as the prior opinions in State v. Summers, 642 So. 2d 742 (Fla. 1994), and State v. Roundtree, 644 So. 2d 1358 (Fla. 1994), which are only a year old.[1]

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

---

[1]Equally incredibly, respondent has asked this Court to grant oral argument, a further waste of the taxpayers' money.

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.[2]

In Eanes v. State, *supra*, this Court specifically approved Jost and Straughan to the extent that they were in harmony with State v. Roundtree. Likewise, in Waters v. State, *supra*, this Court specifically noted that it had extended the reasoning of State v. Summers to community control in State v. Roundtree.

Respondent continues to argue its charade that probation and community control are different, which was the basis of the lower tribunal's decisions in Eanes, Waters, and in the instant case. Even another panel of the lower tribunal has recognized the fallacy of that position. In Gardner v. State, 656 So. 2d 933 (Fla. 1st DCA 1995), Judge Ervin wrote, with the concurrence of Judge Joanos, and the special concurrence of Judge Wolf:

> Although the actual sentences imposed in *Roundtree* are not identified in either the supreme court or the Fourth District's

[2]One wonders why the Attorney General conceded the error in the Third District in *Mathis v. State*, 649 So. 2d 279 (Fla. 3rd DCA 1995), and in the Fifth District in *Jost*, but now takes the opposite position.

> opinions, one must assume that Roundtree's sentences did include community control terms, since the supreme court is only required to answer real questions in controversy. Thus, **the rule established in *Roundtree* is that when a probationary term is imposed upon a revocation of either probation or community control that all time previously served on either probation or community control must be credited.**
>
> * * *
>
> If the court opts to impose incarceration together with probation, then under *Bragg v. State*, 644 So. 2d 586 (Fla. 1st DCA 1994), because a probationary term is involved, credit must be given for all time served in prison and/or jail and probation. **Application of *Roundtree* to *Bragg* would result in credit being required for all time sent on community control as well.**

Gardner v. State, 656 So. 2d at 939; footnote omitted; bold emphasis added. In Waters, *supra*, this Court specifically relied on the treatment of the issue in Bragg v. State, 644 So. 2d 586 (Fla. 1st DCA 1994).

In any event, this Court's quartet of recent decisions - State v. Summers, State v. Roundtree, Waters v. State, and Eanes v. State -- demonstrate that any combination of prison, probation and community control, which result in terms exceeding the statutory maximum allowed by the legislature, are illegal in Florida. It does not matter if the defendant violates probation and receives a new term of community control upon revocation, or if the defendant violates community control and receives a new term of probation upon revocation. Under this Court's decisions, he is entitled to credit for the time he previously was under supervision.

Apparently the state cannot accept the fact that it has lost the battle in this Court already in four cases, and wants to lose again in a fifth. With all of the new Draconian sentencing statutes now in place, it is time for the state to find another battle to fight.

III CONCLUSION

Based upon the foregoing arguments and authorities, as well as those cited in the initial brief, the petitioner respectfully requests that the excessive new community control order be vacated.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Chief, Appellate Intake
Florida Bar No. 197890
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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 14 day of September, 1995.

P. DOUGLAS BRINKMEYER