D/S w/att

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86,312

STATE OF FLORIDA,

Petitioner,

vs.

ANTHONY LANCASTER,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS.....ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2-3

SUMMARY OF THE ARGUMENT.....4

ARGUMENT.....5-9

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT.

CONCLUSION.....10

CERTIFICATE OF SERVICE.....10

TABLE OF CITATIONS

Griffen v. Singletary,
638 So. 2d 500, ... 4, 5, 6, 7, 8

Hardee v. State,
534 So. 2d 706 (Fla. 1988) 5, 8

Lancaster v. State,
20 Fla. L. Weekly D1345
(Fla. 4th DCA June 7, 1995) 4, 5, 7, 9

Mancini v. State,
312 So. 2d 732 (Fla. 1975) 5

Orosz v. Singletary,
20 Fla. L. Weekly S150
(Fla. March 30, 1995) 2, 3, 4, 5, 7, 9

State v. Green,
547 So. 2d 925 (Fla. 1989) 9

Tripp v. State,
622 So. 2d 941 (Fla. 1993) 4, 5, 9

STATUTES

Florida Statutes 944.278 (1993) 6, 7, 8, 9

PRELIMINARY STATEMENT

Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Although not entirely apparent from the face of the Fourth District's opinion in this cause, the record below reveals that in May, 1987, Respondent was charged with second degree murder (A 1); in November 1987, he was sentenced a term of 17 years in prison followed by 20 years probation (A 2-3). Respondent was released and apparently violated the terms of his probation, because in July 1993, he was sentenced to a probationary term of 10 years after serving 9 months of community control (A 4-7). In May 1994, Respondent was again alleged to have violated his probation (A 8-9); after a hearing, he was found guilty of violating his probation, Respondent's probation was revoked (A 10), and on August 17, 1994, he was sentenced to a 30 year term in prison (A 11-15). Respondent appealed.

On appeal, the Fourth District found that Respondent's 30 year sentence, even with the two cell 'bump up' for each violation of probation, exceeded the guidelines in effect at the time Respondent committed his crime (A 16-17). The Court further found that Respondent was properly awarded credit for all time previously served, by the trial court's order which expressly provided:

> Defendant is allowed credit for 334 days county jail credit served between date of arrest as a violator and date of resentencing. The Department of Corrections shall apply original jail credit awarded and shall compute and apply credit for time served and unforfeited gain-time awarded during prior service of case number [87-351].

(A 14, 17-18). The Fourth District further held that pursuant to this Court's decision in Orosz v. Singletary, 20 Fla. L. Weekly

S150 (Fla. March 30, 1995), if Respondent had completed his original sentence prior to 1993, he was entitled to be credited not only with earned gain time but also with previously awarded administrative gain time and provisional credits (A 18-19). The Fourth District, citing Orosz held that "[t]o retroactively cancel administrative gain time and provisional credits would unconstitutionally violate a defendant's constitutional rights against ex post facto laws and bills of attainder." (A 18-19).

Petitioner's motions for rehearing and stay of mandate were denied (A 20, 21).

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction pursuant to Article V, Section 3 of the Florida Constitution and Rule 9.030(a)(2)(A)(iv), to review the instant case. The opinion of the Fourth District Court of Appeals conflicts with this Court's decisions in Griffen v. Singletary, 638 So. 2d 500 (Fla. 1994), Orosz v. Singletary, 20 Fla. L. Weekly S150, *revised opinion* 20 Fla. L. Weekly S238 (Fla. June 15, 1995, and Tripp v. State, 622 So. 941 (Fla. 1993). In Griffen and Orosz, this Court held that retroactive cancellation of administrative gain time and provisional credits does not violate ex post facto prohibitions. In Lancaster, the Fourth District held that retroactive cancellation of such provisional credits **does** violate ex post facto prohibitions.

Moreover, in Tripp, this Court held that a defendant would was being sentenced for violation of probation was not entitled to credit for previously awarded administrative gain time and provisional credits as part of "credits for time served. In Lancaster, the Fourth District held that a defendant was entitled to credit for administrative gain time and provisional credits if he had completed the incarcerative portion of before he violated his probation.

As the decision of the Fourth District in this case expressly and directly conflicts with prior decisions of this Court, this Court has and should exercise it jurisdiction to review this case.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioner seeks review of the decision in Lancaster v. State, 20 Fla. L. Weekly D1345 (Fla. 4th DCA June 7, 1995), in order to resolve the conflict created by that decision and the decisions of this Court in Griffen v. Singletary, 638 So. 2d 500 (Fla. 1994), Tripp v. State, 622 So. 2d 941 (Fla. 1993), and Orosz v. Singletary, 20 Fla. L. Weekly S150, *revised opinion* 20 Fla. L. Weekly S283 (Fla. June 15, 1995).

Under Article V, Section 3(b)(3) of the Florida Constitution, this Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. [Emphasis added]. Thus "conflict" jurisdiction is properly invoked when the district court announces a rule of law which conflicts with a rule of law previously announced by the Supreme Court or by another district. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Jurisdiction founded on "express and direct conflict" does not require that the district court below certify or even directly recognize the conflict. The "express and direct" requirement is met if it can be shown that the holding of the district court is in conflict with another district court or the supreme court. *See*: Hardee v. State, 534 So. 2d 706 (Fla. 1988).

In Lancaster, the defendant was before the Fourth District on an appeal from the sentence imposed after it was found he violated

the terms of his probation. Two issues were before the Court -- the legality of the length of his sentence under the guidelines and the award of credit for gain time earned on his original sentence before he violated his probation. The Fourth District determined that the length the sentence was illegal, and that the trial court could properly delegate to DOC the task of determining the amount of unforfeited gain time awarded to Respondent on his original sentence. Conflict was created in the instant case when the Fourth District went further and determined that the cancellation of provisional credits and administrative gain time pursuant to § 944.278 Fla. Stats., violates the ex post facto prohibitions where a defendant has completed the incarcerative portion of a split sentence before § 944.278 became effective. In this regard, the Fourth District ruled that,

> a defendant who committed an offense prior to October 1, 1989 and completed his sentence prior to the enactment of section 944.278, Florida Statutes (1993), has a vested right to previously awarded administrative gain time and provisional credits. [Citation Omitted.] To retroactively cancel administrative gain time and provisional credits would unconstitutionally violate a defendant's constitutional rights against ex post facto laws and bills of attainder.

(A 18-19).

The Fourth District's determination that the retroactive cancellation of provisional credits and administrative gain time under § 944.278 can violate ex post facto prohibitions expressly and directly conflicts with this Court's decision in Griffen v. Singletary, *supra*. There, this Court held that due to the nature

of provisional credits and administrative gain time, the cancellation of these overcrowding credits could not violate the ex post facto clauses of the constitution. Id. at 501. In addressing § 944.278, this Court held:

> the ex post facto clauses of both the federal and state Constitutions do not prohibit the legislature from passing, nor DOC from enforcing, legislation that limits or eliminates the availability of this particular species of credit or gain time, whatever name it is given.

Id. at 501. Contrary to this Court's holding in Griffen, the Fourth District in Lancaster has expressly held that the cancellation of overcrowding credits is violates ex post facto laws.

The decision in Lancaster also expressly and directly conflicts with a portion of this Court's decision in Orosz, *supra*. In Orosz, this Court reaffirmed that the retroactive cancellation of overcrowding credits under § 944.278 is not subject to ex post facto prohibitions:

> Orosz asserts that the retroactive cancellation of administrative gain time and provisional credits previously applied on both his first and second sentences is a violation of his constitutional protection against ex post facto law and bills of attainder. We have previously upheld the statute against such attacks, see, Griffen v. Singletary, 638 So. 2d 500 (Fla. 1994), and we reaffirm that decision today to the extent that it applied to Orosz's second sentence.

Id. at S151. The portion of the decision in Lancaster, which holds that retroactive cancellation of early release credits violates ex post facto laws, expressly and directly conflicts with the above-

quoted portion of this Court's decision in Orosz, and well as with this Court's decision in Griffen.

Apparently the Fourth District is unaware that this conflict exists and believes instead that it has simply followed this Court's decision in Orosz. However, the express and direct conflict requirement for this Court's jurisdiction does not require that a court recognize the conflict. *See*: Hardee, *supra*. While it is true that this Court determined that § 944.278 could not be applied to Orosz's first sentence, it was not because the application would violate ex post facto prohibitions. The issue of whether ex post facto clauses apply to overcrowding credits is a settled question of law. It is also the question which the Fourth District has decided contrary to this Court's decisions and the question on which conflict exists.[1]

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[1] Orosz committed a robbery in 1975 and was sentenced to 35 years. In 1975, §944.27(2), provided that for purposes of awarding and forfeiting gain time, cumulative sentences should be treated as one overall term. In 1979, while in prison, Orosz was convicted of battering a correctional officer and was sentenced to a consecutive 10 year term. However, before Orosz committed his second offense, the statute was amended to provided that for purposes of awarding gain time *concurrent* sentences should be treated as if they were one sentence. Orosz completed his first sentence in 1991, and began serving his 10 year sentence. When § 944.278 was enacted in 1993, DOC applied the statute to cancel the overcrowding credits awarded on *both* Orosz's sentences.

The new issue of law presented in Orosz was one of statutory construction, that is whether Orosz was serving one continuous sentence when § 944.278 went into effect in order to allow DOC to cancel the overcrowding credits that had been awarded on Orosz 35 year term. This Court found that since Orosz had completed the 35 year term in 1991 and had begun serving the 10 year term, he was not presently serving the 35 year term in 1993. Based on Legislative changes between 1978 and 1983, this Court determined that Orosz's two sentences could not be cumulated into one term and thus DOC could not cancel provisional credits on a sentence which

Finally, there is conflict between this Court's decision in Tripp v. State, 622 So. 2d 941 (Fla. 1993), and the decision in Lancaster. In Tripp, this Court held that "credit for time served" which is to be awarded by a court under authority of State v. Green, 547 So. 2d 925 (Fla. 1989), upon resentencing for violation of probation, does not include provisional credits or administrative gain time. Tripp at 942, n.2. In Lancaster, the Fourth District determined a defendant has a vested right to the award of these credits if he satisfied the incarcerative portion of a split sentence before enactment of §944.278. Despite this Court's explicit determination in Tripp that "credit for time served" does **not** include overcrowding credits, Lancaster holds that these credits must be awarded when the incarcerative portion of the sentence was satisfied before the enactment of § 944.278. The decision in Lancaster thus directly conflicts with this Court's holding in Tripp.

The decision in Lancaster has already produced confusion in court's of this state. It expressly and directly conflicts with previous decisions of this Court because it holds that cancellation of overcrowding credits are subject to ex post facto prohibitions and that these credits are a part of "credit for time served" to be awarded to defendants upon resentencing for violations of probation.

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had been completed. Thus this Court's decision in Orosz, was based on issues of statutory construction and not ex post facto prohibition considerations. This Court's determination that ex post facto prohibitions do not apply to overcrowding credits was not altered by Orosz.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court ACCEPT jurisdiction of this cause to resolve the conflict between the decision of the Fourth District and the decisions of this Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Jurisdictional Brief of Petitioner" has been furnished by Courier to: ANTHONY CALVELLO, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 8th day of September, 1995.

Of Counsel