IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,540

ANITA FRANCOIS

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FLORIDA, THIRD DISTRICT
(CERTIFIED CONFLICT)

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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-vs-

THE STATE OF FLORIDA

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**ON PETITION FOR DISCRETIONARY REVIEW
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(CERTIFIED CONFLICT)**

INTRODUCTION

This is a petition for discretionary review following a certified question posed by the Third District Court of Appeal. The symbol "T" will be used to refer to the trial transcript. The petitioner will be referred to by proper name or as Petitioner and the respondent will be referred to as Respondent or the State.

STATEMENT OF THE CASE AND FACTS

The State charged the petitioner, Anita Francois, by information, with two counts of fraud, in violation of section 409.325, Florida Statutes. (R. 1-2).

On April 17, 1989, the defendant entered a plea of nolo contendere to both charges. (R. 39). The trial court withheld adjudication for both counts, placed the defendant on a two year probationary term, and ordered the defendant to make restitution in the amount of $3,748.00 as a special condition of the probation. (R. 10-11).

On October 2, 1990, the State filed an affidavit alleging that the defendant violated the conditions of the probationary order. (R. 17-21). On May 2, 1991, the trial court found that the defendant violated the order of probation, and entered an order modifying the probation order by extending the probationary term for an additional two years.[1] (R. 27).

On June 17, 1993, the defendant admitted to violating the terms of her probation as alleged in an affidavit filed on April 30, 1993. (R. 5). The court subsequently extended the defendant's probationary term to June 17, 1994. (R. 4, 5).

On June 29, 1994, the defendant admitted to violating probation. (R. 89). Following this admission, the court extended the defendant's probation through

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[1]The modification order also waived the cost of supervision, ordered the defendant to successfully complete the Alternative Program and ordered her to pay restitution in the amount of $3,748.00. (R. 27).

June 28, 1995. (R. 5). The defendant agreed to the extension. (R. 89).

Subsequent to an amended affidavit of violation of probation, the court held a probation hearing on July 7, 1995. The court found that the defendant violated her probation and sentenced her to ninety days of incarceration for each count and entered a criminal order of restitution totaling $1,810.02. (R. 33). The sentences for each count run concurrently. (R. 42).

The defendant moved to vacate the sentences on the ground that the trial court did not have jurisdiction to entertain the June 1994 or June 1995 affidavits of violation of probation where the five year maximum probation term for the third degree felonies terminated in June of 1994. (R. 48). The trial court denied the defendant's motion to vacate the sentences. (R. 4; 47-49). Ms. Francois filed a timely notice of appeal. (R. 50-51).

The Third District Court of Appeal affirmed the trial court's decision. *Francois v. State*, 21 Fla. L. Weekly D1551 (July 3, 1996). The court held that credit for time served on probation should be calculated to begin on the "date of entry of the probation order, but would cease at the date the court found that a probation violation occurred, or if that date cannot be ascertained, then the date of the filing of the affidavit of violation of probation." *Id.* The court recognized that this holding conflicted with the following cases decided by the Fourth and Fifth District Courts of Appeal which addressed this issue: *Hughes v. State*, 667 So. 2d 910 (Fla. 4th DCA) *rev. denied*, 674 So. 2d 413 (Fla. 1996); *Fellman v. State*, 673 So. 2d 155 (Fla. 5th DCA 1996); *Marchessault v. State*, 659 So. 2d 1315 (Fla. 4th

DCA 1995) *Gordon v. State*, 649 So. 2d 326 (Fla. 5th DCA 1995); *Kolovrat v. State*, 574 So. 2d 294 (Fla. 5th DCA 1991). *Francois*, 21 Fla. L. Weekly D1551.

SUMMARY OF ARGUMENT

The Petitioner entered a plea of nolo contendere to two third degree felonies and the trial court ordered her to serve a two year probationary sentence commencing on April 17, 1989. The statutory maximum period of probation for a third degree felony is five years. This five-year maximum period of probation for the third degree felony offenses elapsed on April 17, 1994. However, Petitioner remained on probation continuously from April 17, 1989 until July 7, 1995.

Below, Petitioner challenged the trial court's imposition of a probation order on June 29, 1994 as well as the subsequent revocation of probation and imposition of a jail term on July 7, 1995.

The Third District Court of Appeal affirmed the revocation order and found that no credit should be given for the time interval existing between the date of a probation violation, if known, or alternatively, the date an affidavit of violation of probation is entered, and revocation. This holding is contrary to the decisions of both the Fourth and Fifth District Courts of Appeal. Hence, the court below certified a direct conflict.

Petitioner argues that to calculate credit for time previously served on probation, the trial court must calculate the time period which commences when the probation order is entered until the order is revoked. The reasoning employed by the Third District Court of Appeal ignores the fact that a probationer remains under the supervisory authority of the state until a revocation order is entered. Therefore, any credit for probation must include the time period which elapses from the time

an affidavit is filed until a revocation hearing is held. Further, a revocation hearing could be postponed to such an extent that a probationer could exist under the state's authority for a time period which exceeded the statutory maximum. Finally, adherence to the reasoning below would create a disincentive for probationers to attempt to obey probation conditions.

The decision below also questioned the applicability of this Court's decision in *Summers v. State*, 642 So. 2d 742, 744 (Fla. 1994), to orders of probation which were entered prior to the issuance of the decision. The *Summers* case mandates that where defendant's probation is revoked and a new probationary term imposed, the trial court must credit the defendant for the time already served toward the new probationary term when necessary to ensure that the total term of probation does not exceed statutory maximum. Failure to apply this case to all instances where a probationary term is revoked and a new probationary term imposed, would permit exactly what this Court sought to avoid in *Summers*: *ad infinitum* extensions of a probationary term.

ARGUMENT

IN CALCULATING CREDIT FOR TIME PREVIOUSLY SERVED ON PROBATION, CREDIT SHOULD BE DETERMINED BASED UPON THE TIME SATISFACTORILY COMPLETED ON PROBATION WHICH COMMENCES ON THE DATE THE PROBATION ORDER IS ENTERED AND TERMINATES ON THE DATE THE REVOCATION ORDER IS ENTERED.

Petitioner entered a plea of nolo contendere to two third degree felonies and the trial court ordered her to serve a two year probationary sentence commencing on April 17, 1989. (R. 10-11). The trial court extended the probation term past the five year statutory maximum until July 7, 1995 when it sentenced Petitioner to serve ninety days in the Dade County jail. Credit must be given for time previously served on probation toward any newly imposed probationary term when necessary to ensure that the total probation period does not exceed the statutory maximum for the offense. *State v. Summers*, 642 So. 2d 742, 744 (Fla. 1994). Therefore, credit must be awarded for the five years of probation Petitioner served (from April 17, 1989 until April 17, 1994), and the trial court erred by ordering an additional probation period and a subsequent jail term.

When granting credit for time served previously on probation, credit must be calculated by determining the amount of time served on probation commencing from the date of entry of the probation order and ceasing on the date of entry of a revocation order. This reasoning complies with that of *State v. Summers*, 642 So. 2d 742, 743 (Fla. 1994), in which this Court held that where a defendant's

probation is revoked and a new term imposed, the trial court must credit the defendant for the time already served on probation toward the new term of probation. *Summers*, 642 So. 2d at 743. In *Summers,* the trial court revoked the defendant's probation and would not credit him with time served previously on probation for the same offense. This Court rejected the trial court's ruling and 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." 642 So. 2d at 744.

The Third District Court of Appeal asserts below that no credit should be given for the time period between entry of the affidavit of probation and the order revoking probation. This reasoning is flawed on three grounds. First, it does not recognize that the probationer remains under the controlling arm of the state during the time interval between entry of the affidavit and the revocation order. This is demonstrated by the fact that an affidavit can be amended to include subsequent violation allegations. *Kolvorat v. State*, 574 So. 2d 294 (Fla. 5th DCA 1991) (initial affidavit alleged that defendant failed to pay restitution, amended affidavit added that defendant failed to surrender herself to county jail). Therefore, probation does not cease when an affidavit is filed. Indeed, the affidavit acts only as a charging document and the probationer remains under supervisory restraint. "Only a valid order of revocation, and not the issuance of an arrest warrant, terminates probation." *Hughes v. State*, 667 So. 2d 910, 912 (Fla. 4th DCA 1996), *rev.*

denied 676 So. 2d 413 (Fla. 1996). The court below appears to recognize this continuous supervisory authority of the State because it implies that if a violation is not found to have occurred, the probationer would receive credit for the time which intervened between the entry of the affidavit and the revocation hearing. *Francois*, 21 Fla. L. Weekly at D1551. This reasoning appears to create a *post hoc* justification for denying credit for time served while a probationer is under state supervision. Such a justification thwarts the constant and consistent application of Florida law. *Summers,* 642 So. 2d at 644 (credit for time previously served on probation must be ascribed to ensure statutory maximum is not exceeded and to prevent ad infinitum probationary term extensions).

Secondly, the reasoning below contravenes the policy underlying *Summers*, because a revocation hearing could be postponed for such a length of time that a probationer could actually be under the control of the state for a period which would exceed the statutory maximum. Indeed, in the instant case, a total of 333 days elapsed between the filing of affidavits or violation dates and revocation hearings.[2]

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[2]Where an affidavit was filed on October 16, 1990 and a revocation hearing was held on May 2, 1991, a time interval of 198 days elapsed. (R. 17-18, 27) Where the alleged violations occurred on April 26, 1993 and revocation hearing was held on June 17, 1993, a time interval of 52 days elapsed. (R. 5, 28-31). Where an affidavit was filed on June 13, 1994 and a revocation hearing was held on June 29, 1994, a time interval of 16 days elapsed. (R. 32, 89). Where the alleged violation occurred on May 1, 1995, and a revocation hearing was held on July 7, 1995, a time interval of 67 days elapsed. (R. 38, 33).

The unwieldy nature of the computation scheme advocated below must be recognized. For example, the first affidavit of probation alleged numerous violation

Finally, to excise the time period between the affidavit and the revocation order would only dissuade probationers from continued compliance with the probation order. In a case, such as that at bar, where restitution was a condition of probation, a probationer would be disinclined to continue paying restitution -- a clear detriment to the restitution beneficiary.

When calculating the amount of probation served, the time a defendant awaits resolution of the affidavits of violation must be included, as well as the periods previously served on probation or community control. *Fellman v. State*, 673 So. 2d 155 (Fla. 5th DCA 1996). "[T]he court must consider the time served from the date probation was imposed to the date of revocation." *Hughes*, 667 So. 2d 910, 912. "Only a valid order of revocation, and not the issuance of an arrest warrant, terminates probation." *Hughes* at 912; *Marchessault v. State*, 659 So. 2d 1315 (Fla. 4th DCA 1995). Indeed, "[p]robation is not normally suspended or tolled retroactively unless the probationer absconds from supervision." *Hughes*, 667 So. 2d at 912; *Gordon v. State*, 649 So. 2d 326 (Fla. 5th DCA 1995); *Kolovrat v. State*, 574 So. 2d 294, 297 (Fla. 5th DCA 1991). *Watson v. State*, 497 So. 2d 1294, 1294 (Fla. 1st DCA 1986).

The holdings reached in *Summers* and *Hughes* must be adhered to in the present case. The record here reflects the following case history:

- Following a nolo contendere plea to two third degree felonies,

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dates. The Third District gives no direction as to how to deduct days of probation under such circumstances.

Petitioner was placed on probation for two years on April 17, 1989. (R. 10-11).

- An affidavit alleging violation of probation was filed on October 16, 1990. (R. 17-18). On May 2, 1991, the trial court modified the Petitioner's probation and extended the probation period to May 2, 1993. (R. 26-27).

- An affidavit of violation of probation was filed on April 30, 1993. (R. 28). On June 17, 1993, the Petitioner admitted to violating the probation order and the probationary term was extended to June 17, 1994. (R. 4-5).

- On June 13, 1994, an affidavit of violation of probation was filed. (R. 32). On June 29, 1994, Petitioner agreed to extend the probation period until June 29, 1995). (R. 5 R. 89. 3-5).

- On June 9, 1995 an Affidavit of Violation of Probation was filed. (R. 35). The affidavit was amended on July 5, 1995. (R. 38). Pursuant to a hearing on July 7, 1995, the trial court found that Petitioner violated the terms of probation, revoked the order of probation and sentenced Petitioner to serve ninety days in the Dade County Jail. (R. 41-42).

The foregoing demonstrates that Petitioner was serving probation continuously from April 17, 1989 (commencement of the initial probation term), until July 7, 1995 (commencement of her jail sentence). Since a probationer is entitled to credit for the time already served on probation toward a new probation term, *Summers*, 642 So. 2d at 743, Petitioner is entitled to credit for the five years she spent on probation from April 17, 1989 until April 17, 1994.

II.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO CONSIDER THE STATE'S UNTIMELY FILED AFFIDAVIT OF VIOLATION OF PROBATION.

The Third District Court of Appeal questioned whether *State v. Summers*, 642 So. 2d 742 (Fla. 1994), should be applied to the instant case and cases in a similar posture where the initial probation order was entered prior to the *Summers* decision. The court held *Summers* inapplicable to the instant case on the ground that its retroactive application would permit Petitioner to benefit from the protracted probationary term. Therefore, the court held that Petitioner was untimely in her challenge to the probationary term because she challenged its legality when the trial court sentenced her to incarceration. *Francois v. State*, 21 Fla. L. Weekly D1551.

Summers must be held to apply to all cases in which probation is revoked and a new probationary term is entered where it is necessary to ensure that the total term of probation does not exceed the statutory maximum for the offense. A contrary holding would permit the type of action this Court aimed to prevent in *Summers*: "'ad infinitum' extensions of a probationary term that is otherwise subject to a statutory maximum." *Summers*, 642 So. 2d at 744; *Schertz v. State*, 387 So. 2d 477 (Fla. 4th DCA 1980 (statutory maximum must be observed when modifying or extending probation). Furthermore, where the five year statutory maximum period of state authority expired on April 17, 1994, the trial court was without any jurisdiction to subsequently extend the probationary term or find

Petitioner in violation of a probation order. Therefore, Petitioner could not, and did not, benefit from the extension of the probation from April 17, 1994 until July 7, 1995 when the order of probation was revoked and she subsequently served the entire jail sentence imposed.[3]

The Third District relied upon *Villery v. Florida Parole and Probation Commission*, 396 So. 2d 1107 (Fla. 1980), for the proposition that *Summers* should not be applied to the instant case where the original probation order was entered prior to the *Summers* decision. *Francois*, 21 Fla. L. Weekly at 1552. *Villery* is inapposite because it addressed the length of incarceration permissible in a split sentence, 396 So. 2d 1107, not the trial court's jurisdiction to enter a probationary term where the statutory maximum probationary period has expired.

In *Villery*, this Court concluded that where incarceration was imposed as a condition of probation, the incarceration term could not exceed one year. 396 So. 2d at 1111-12. The Court held, retroactively, that "incarceration, pursuant to the split sentence alternatives found in sections 948.01(4) and 948.03(2), which equals or exceeds one year is invalid." *Id.* At 1111. *Villery* addressed the legality

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[3]Indeed, were the Third District's reasoning to prevail, Petitioner would serve five consecutive years of probation (April 17, 1989 until April 17, 1994) and remain subject to an additional 250 day probationary term. The 250 days would represent the days which intervened between the filing of affidavit of violation of probation or date of violation, and revocation orders from April 17, 1989 and April 17, 1994. (Where an affidavit was filed on October 16, 1990 and a revocation hearing was held on May 2, 1991, a time interval of 198 days elapsed. (R. 17-18, 27) Where the alleged violations occurred on April 26 1993 and revocation hearing was held on June 17, 1993, a time interval of 52 days elapsed. (R. 5, 28-31)).

of the length of sentences imposed pursuant to statutory authority. By contrast, in cases where probationary terms are imposed by the court after the statutory maximum period of probation has been served, a court is wholly without jurisdiction to impose any sentence. *See Summers*, 642 So. 2d at 742.

In the instant case, the probationary term limit and the trial court's jurisdiction, expired on April 17, 1994. The maximum period of probation permitted for the charged third degree felonies was five years. Here, Petitioner was originally placed on probation on April 17, 1989 and therefore, the trial court's jurisdiction over this case ceased on April 17, 1994. Hence, the affidavits filed on June 13, 1994 and June 9, 1995 were untimely, and the trial court did not have jurisdiction to impose additional probation, following the June 13, 1994 affidavit. Nor did it have jurisdiction to impose a jail term following the June 5, 1995 affidavit because "any sentence for violating an illegally-imposed period of probation is also illegal," *Bover v. State*, 671 So. 2d 828 (Fla. 3d DCA 1996). Therefore, all restitution payments made pursuant to the trial court's unlawful orders to pay restitution subsequent to April 17, 1994, should be reimbursed[4].

A trial court is "without authority" to extend a period of probation beyond the maximum permissible sentence for the underlying offense. *Olson v. State*, 654

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[4]Petitioner is entitled to full reimbursement of restitution monies paid pursuant to the unlawful and non-jurisdictional orders of restitution. Should the complainant institution, Aid to Families with Dependent Children wish to attempt to collect any money from Petitioner, statutory law mandates that it do so through the appropriate procedure pursuant to section 960.29, Florida Statutes.

So. 2d 304, 305 (Fla. 3d DCA 1995), *quoting Moore v. State*, 623 So. 2d 795, 797 (Fla. 1st DCA 1993); *accord Conrey v. State*, 624 So. 2d 793, 794 (Fla. 5th DCA 1993); *Teasley v. State*, 610 So. 2d 26, 27 (Fla. 2d DCA 1992) *rev. denied*, 618 So. 2d 1370 (Fla. 1993); *see also State v. Summers*, 642 So. 2d 742, 744 (Fla. 1994) ("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").

That portion of a probationary period which exceeds the statutory maximum is "void and cannot serve as a basis for a further sentence or probation by the trial court." *Bouie v. State*, 360 So. 2d 1142, 1144 (Fla. 2d DCA 1978); *see also Cheney v. State*, 640 So. 2d 103, 105 (Fla. 4th DCA 1994) ("Sentences which exceed the maximum permitted by law are considered void to the extent by which they exceed the statutory maximum.").

Moreover, when a probationary period expires, the court is divested of all jurisdiction over the probationer unless, prior to that time, the appropriate steps were taken to revoke or modify the probation. *State v. Hall*, 641 So. 2d 403 (Fla. 1994); *Carrol v. Cochran*, 140 So. 2d 300 (Fla. 1962); *Aguiar v. State*, 593 So. 2d 1225 (Fla. 3d DCA 1992); *Amaya v. State*, 653 So. 2d 1112 (Fla. 3d DCA 1995); *Davis v. State*, 623 So. 2d 579 (Fla. 3d DCA 1993); *Purvis v. Lindsey*, 587 So. 2d 638 (Fla. 4th DCA 1991). The state must file the affidavit of violation of probation before the termination of the probationary period; otherwise, the trial court is

"without subject matter jurisdiction." *Aguiar* at 1225. Because the State failed to file a timely affidavit of violation of probation in the instant case, subject matter jurisdiction did not exist.

Because the statutory limits are jurisdictional they cannot be waived. "It is well settled that a defendant cannot confer jurisdiction on the trial court by waiver, acquiescence, estoppel, or consent since jurisdiction is established solely by general law." *White v. State*, 404 So. 2d 804, 805 (Fla. 2d DCA 1981); see *Evans v. State*, 657 So. 2d 180, 180 (Fla. 1st DCA 1994). Therefore, Petitioner's agreement to extend the probationary term in 1994 did not preclude her from challenging the illegally imposed probationary term and jail sentence.

In particular, it is well established that "a defendant cannot by agreement confer on a judge authority to exceed the penalties established by law." *Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991); *see also, e.g., Novaton v. State*, 610 So. 2d 726, 728 n. 3 (Fla. 3d DCA 1992) (a waiver cannot be effective when the sentence is "void," "that is, for example, to the extent it exceeds the statutory limit"), *decision approved, opinion disapproved in part on other grounds*, 634 So. 2d 607 (Fla. 1994); *Conrey*, 624 So. 2d at 794 (a trial court cannot impose an illegal sentence of probation pursuant to a plea bargain); *Purvis*, 587 So. 2d at 639 (defendant cannot acquiesce in a sentence of probation which exceeds statutory maximum); *Reed v. State*, 616 So. 2d 592, 593 (Fla. 4th DCA 1993) (a defendant cannot agree to be sentenced beyond the statutory maximum).

In *Reed*, a defendant pled guilty to a third-degree felony and was sentenced

to three years' incarceration followed by two years' probation. He was ordered to pay several thousand dollars in restitution. An affidavit of violation of probation was subsequently filed. The defendant pled guilty to the violation and accepted the state's offer to be placed on community control followed by an additional three years of probation, against the advice of defense counsel who argued that the new sentence was illegal because the total sanctions were greater than the five year maximum for the offense. The district court of appeal reversed the sentence, and specifically rejected the state's argument that the defendant agreed to the new sentence because he wanted more time to pay the restitution. The court explained:

> What the state overlooks, however, is that a defendant *cannot* acquiesce in an illegal sentence, *Purvis v. Lindsey*, 587 So. 2d 638 (Fla. 4th DCA 1991). Therefore, despite appellant's wishes, he cannot agree to be sentenced beyond the statutory maximum.

Reed, 616 So. 2d at 593 (emphasis is original).

In *Purvis*, the defendant plead guilty to a misdemeanor and agreed to be sentenced to a term of probation which exceeded the statutory maximum for the offense. Subsequently, within the period of probation imposed but outside the maximum statutory period, the state filed an affidavit of violation of probation. The trial court denied the defendant's motion to terminate probation and scheduled a violation hearing. The district court of appeal granted the defendant's petition for a writ of habeas corpus, holding that the trial court lacked jurisdiction to proceed with a violation of probation hearing. The court rejected the state's argument that

the defendant had waived his right to contest the illegal sentence:

> We ... reject the state's contention that petitioner waived his right to contest his illegal sentence because the sentence was the result of a negotiated plea agreement. A defendant cannot acquiesce in an illegal sentence, ***, and can attack an illegal sentence at any time.

Purvis, 587 So. 2d at 639 (citations omitted).

Here, the trial court did not have the authority to extend the period of probation beyond the five-year limit, *Olson* at 305; *Moore* at 797; *see Summers* at 744, nor did it have the authority to entertain an affidavit of violation of probation filed after that five-year period had expired, *Hall*; *Aguiar*; *Purvis*. Petitioner could not give the court that authority. *Larson* at 1371; *Novaton*, 610 So. 2d at 728 n.3; *Purvis* at 639; *Reed* at 593; *Conrey* at 794. The trial court's order revoking Petitioner's probation must be vacated.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner urges this Court to respond to the certified question by declaring that a court must strike unannounced probation and community control conditions which later appear in a written sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 6th day of August 1996.

Suzanne M. Froix
SUZANNE M. FROIX
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,540

ANITA FRANCOIS,

Petitioner,

vs.

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

THE STATE OF FLORIDA,

Respondent

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INDEX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1996

ANITA FRANCOIS a/k/a
ANITA FRANCES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 95-2419

LOWER
TRIBUNAL NO. 88-15910

Opinion filed July 3, 1996.

An appeal from the Circuit Court for Dade County, Jennifer D. Bailey and Bernard S. Shapiro, Judges.

Bennett H. Brummer, Public Defender, and Suzanne M. Froix, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Steven Groves, Assistant Attorney General, for appellee.

Before NESBITT, COPE and FLETCHER, JJ.

COPE, J.

Anita Francois appeals an order revoking her probation and sentencing her to incarceration. The principal questions presented are (1) how to calculate credit for time served on probation, and

(2) how to apply State v. Summers, 642 So. 2d 742 (Fla. 1994), to probation orders imposed prior to the date of the Summers decision.

In 1989 defendant-appellant Francois pled nolo contendere to two counts of public assistance fraud under section 409.325, Florida Statutes, a third degree felony. She was initially placed on two years' probation.[1] In 1990, 1993, 1994, and 1995, affidavits of violation of probation were filed. The trial court found the defendant in violation in each instance. In 1990, 1993, and 1994, the court extended the probationary period. The 1994 extension was specifically accomplished by stipulation of the state and the defendant.

Upon hearing the 1995 revocation proceeding, the trial court found the defendant in violation of her probation for failure to make restitution payments, revoked her probation, imposed adjudication of guilt, and sentenced the defendant to ninety days' incarceration.[2] The court also imposed a criminal order of restitution. Defendant has appealed.

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[1] There was a discrepancy between the written probation order and the trial court's oral pronouncement. The state has demonstrated the existence of a transcription error. The written order is correct.

[2] Defendant has completed her 90-day sentence. However, because the trial court had previously withheld adjudication of guilt, and only adjudicated her guilty of the two felony charges at the time of the 1995 revocation, there is still a live controversy.

I.

In State v. Summers, the Florida Supreme 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."[3] Id. at 744. Defendant states that she is entitled to credit for all time satisfactorily completed on probation. She asserts that time "satisfactorily completed" includes all time from the date that the probation order was entered, through the date of the order revoking probation. She states that in this case, each order of revocation of probation (except the final one) was accompanied by an order extending the probation date. Consequently, she reasons that her probationary period ran in one unbroken sequence beginning with the original probation order entered April 17, 1989. She calculates, therefore, that her probationary term expired on April 17, 1994. Consequently, under defendant's reasoning, the trial court lost jurisdiction over the defendant on April 17, 1994, and had no jurisdiction to entertain the June 1994 or June 1995 affidavits of violation of probation. See Fellman v. State, 21 Fla. L. Weekly D1183 (Fla. 5th DCA May 14, 1996). She contends, therefore, that the 1995 revocation order now under review must be

[3] We do not interpret Summers as addressing the question of how to calculate time served on probation, and more particularly, the question whether a defendant is entitled to credit for time served after he or she has violated probation.

reversed.

We disagree with the defendant's method of computing time. In our view the defendant is entitled to credit for time satisfactorily completed on probation. As we see it, this means that no credit should be given for the time periods in which the defendant is in violation of the probation order. Thus, credit for time spent on probation would begin with the date of entry of the probation order, but would cease at the date the court found the probation violation occurred, or if that date cannot be ascertained, then the date of the filing of the affidavit of violation of probation. The order revoking probation relates back to the date that the probation violation occurred.[4]

A probation order contains conditions which are properly viewed as imposing "legal constraint" on the defendant--so long as the conditions are obeyed. Upon violation of the probation order in a material way--especially by commission of a new crime, but also if other material violations occur--it is to our way of thinking unreasonable to continue to grant the defendant credit

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[4] By way of analogy, if the processes of the court have been set in motion to revoke probation prior to the expiration of the probationary period, such as by issuance of an arrest warrant or the filing of an affidavit of violation of probation, that is sufficient to vest the court with jurisdiction to adjudicate the violation even though the probationary period expires before the revocation hearing is held. Carroll v. Cochran, 140 So. 2d 300, 301 (Fla. 1962); Fryson v. State, 559 So. 2d 377, 378 (Fla. 1st DCA 1990). Even though the revocation hearing is held after expiration of the probationary period, the order of revocation is in substance deemed to relate back to the date of initiation of the revocation process.

for time served on probation, when the defendant is not abiding by the probation conditions.

We acknowledge that the Fourth and Fifth Districts follow a contrary rule. As stated in Hughes v. State, 667 So. 2d 910 (Fla. 4th DCA 1996), "[i]n calculating the amount of credit, the court must consider the time served from the date probation was imposed to the date of revocation." Id. at 912 (citation omitted); see also Fellman v. State, 21 Fla. L. Weekly at D1183; Marchessault v. State, 659 So. 2d 1315 (Fla. 4th DCA 1995); Gordon v. State, 649 So. 2d 326, 328 (Fla. 5th DCA 1995). However, no credit will be given if the probationer absconds from supervision. Hughes v. State, 667 So. 2d at 912; Gordon v. State, 649 So. 2d at 328 & n.3; Kolovrat v. State, 574 So. 2d 294, 297 (Fla. 5th DCA 1991). The logic of the Fourth and Fifth District rule appears to be that the defendant remains obliged (at least in theory) to obey the probation order until such time as it has been revoked or the probationary term has expired. To our way of thinking, the fact that the probation order remains outstanding is not a reason to grant the defendant credit if the defendant is not obeying the order. Likewise, we fail to see why one type of violation--absconding from supervision--would cause credit for time served on probation to cease, while allowing probationers guilty of other violations--including commission of new law violations--to continue

to receive credit for probation time served.[5] We certify direct conflict with the Fourth and Fifth District cases just cited.

In sum, we think that probation must be administered so as to create incentives for good behavior and obedience to the conditions of probation. Credit should be withheld for the time period subsequent to the date of violation.[6]

II.

The state contends that regardless of how the time is calculated, the defendant cannot accept the benefits of a probation order and then challenge the legality of the probation order after violation of probation. We agree.

Under the probation statute, upon violation of probation the trial court may revoke probation and impose any sentence allowed by law. § 948.06(1), Fla. Stat. Prior to the decision of Summers in September 1994, it was thought that if the trial court decided to impose a new term of probation, the court could impose any term of probation within the legal maximum, without giving credit for time previously served on probation. See State v. Holmes, 360 So. 2d

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[5] Where a defendant is incarcerated, it makes sense to grant credit for each day of time served unless the defendant has absconded, because there is a substantial deprivation of liberty for each day that the defendant is in custody. The analogy does not hold when applied to the very different circumstances of probation.

[6] Were it not for the analysis in Part II of this opinion, we would remand for calculation of credit for time served. However, for the reasons stated in Part II of this opinion a remand is unnecessary in this case.

380, 383 (Fla. 1978); see also State v. Summers, 642 So. 2d at 743.

In the present case the trial court in 1993 and 1994 entered orders extending the probationary period for an additional year on each occasion. Each one-year extension was less than the five year statutory maximum. Defendant did not appeal the 1993 and 1994 probation orders, and in fact, in 1994 stipulated to the one-year extension.

After the defendant's 1993 and 1994 probation orders were entered, the Florida Supreme Court announced State v. Summers. Defendant did not move to modify her probation order based on Summers. In June, 1995, an affidavit of violation of probation was filed. Defendant again argued for an extension of her probationary period, but the trial court found the defendant to be in violation and imposed ninety days incarceration. After incarceration had been imposed, defendant for the first time raised her argument under State v. Summers that her term of probation should be treated as having expired prior to the filing of the affidavit of violation.

The question presented is how State v. Summers should be applied to otherwise lawful probation orders which were entered prior to September 22, 1994, the date that Summers was decided. We find instructive the approach taken by the Florida Supreme Court in dealing with a comparable issue in Villery v. Florida Parole and Probation Commission, 396 So. 2d 1107 (Fla. 1980). In Villery, the court interpreted another portion of chapter 948, the probation

statute, which authorized trial courts to impose split sentences of incarceration followed by probation. Under Villery-type split sentences, the term of incarceration was imposed as a condition of probation. Often the period of incarceration the defendant was required to serve would last for a number of years.

In Villery, the Florida Supreme Court concluded that where incarceration was imposed as a condition of probation, the incarceration term could not exceed one year. 396 So. 2d at 1111-12. The court held that "incarceration, pursuant to the split sentence alternatives found in sections 948.01(4) and 948.03(2), which equals or exceeds one year is invalid." Id. at 1111. This ruling was held to be retroactive. Id.

The question was then presented about how to deal with Villery-type split sentences which had already been imposed. The court took the position that where the incarceration portion of the split sentence exceeded one year, the sentence was voidable. Forbert v. State, 437 So. 2d 1079, 1080-81 (Fla. 1983); Brod v. State, 437 So. 2d 152, 153 (Fla. 1983); Beech v. State, 436 So. 2d 82, 83-84 (Fla. 1983). Thus, "one who has been given a split sentence probation contrary to the mandate of this [Villery] decision is entitled upon application to have the illegal order corrected." Villery, 396 So. 2d at 1111-12. The Villery decision described in some detail the various resentencing alternatives

which were available to the trial court. Id. at 1112.[7] Insofar as pertinent here, Villery stated that at the time of resentencing, "[i]f a condition of probation is found to have been violated, the court may modify or continue the probation or may revoke the probation and impose any sentence which it might originally have imposed before placing the defendant on probation." Villery, 396 So. 2d at 1112 (citation omitted).

In a post-Villery case analogous to the present one, a defendant completed his incarceration term and violated his post-incarceration probation. Whitchard v. State, 459 So. 2d 439 (Fla. 1984). After being sentenced to incarceration the defendant contended on appeal that his underlying split sentence was illegal in violation of Villery. This court noted that the challenge to the legality of the probation was not raised until after defendant had violated probation. "In similar cases we have held consistently that a guilty defendant may not accept and enjoy a probation, then challenge it as illegal after violating its terms." Id., citing Preston v. State, 411 So. 2d 297 (Fla. 3d DCA), rev. denied, 418 So. 2d 1280 (Fla. 1982); King v. State, 373 So. 2d 78 (Fla. 3d DCA 1979), cert. denied, 383 So. 2d 1197 (Fla. 1980). See

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[7] Essentially the trial court was given the discretion to reduce the probationary term, or resentence the defendant to any lawful sentence subject to certain limitations. Id. In some cases this resulted in the defendant being resentenced to a longer period of incarceration than the term originally imposed. See Forbert v. State, 437 So. 2d at 1080; Brod v. State, 437 So. 2d at 153; Beech v. State, 436 So. 2d at 83.

also Warrington v. State, 660 So. 2d 385 (Fla. 5th DCA 1995); Bashlor v. State, 586 So. 2d 488 (Fla. 1st DCA 1991).

We therefore conclude that defendant's challenge to the legality of the probationary term came too late, as it was not raised until after she had enjoyed the benefit of the extended probationary term, and after she had violated probation. Even if she had timely raised the issue of the legality of the probationary term, she only would have been entitled to a resentencing, not to outright discharge.

For the reasons stated, the convictions and sentences are affirmed.

Affirmed; direct conflict certified.