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IN THE SUPREME COURT OF THE STATE OF FLORIDA

KEVIN YOUNG,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 88,916

AMENDED
PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, the State of Florida, was the appellee and prosecution, respectively. In the brief, the parties will be referred to as they appear before this Court.

The following symbol will be used:

"R"	Record on appeal
"T"	Transcript of trial

STATEMENT OF THE CASE AND FACTS

Petitioner, a juvenile, was informed against in Case No. 92-22088 for robbery with a deadly weapon (R 24). Following his plea of guilty, he was adjudged guilty of that offense (R 27), as well as of a charge of aggravated assault with a firearm in Case No 92-22435 (R 44), to which he had also entered a plea of guilty (R 48). On March 5, 1993, Petitioner was sentenced in each case as a youthful offender to serve concurrent terms of two and a half years in prison to be followed by two years community control (R 29-31, 32-33; 50-52). Credit was given in each case for 86 days already served. A written order justifying the imposition of adult sanctions was filed the same day (R 34-36; 58-60).

In March, 1995, Petitioner was charged with violating his community control (R 37; 61). Following an evidentiary hearing on the allegations of probation violation, the trial court found that Petitioner had violated his community control as alleged in the affidavit (R 19). Petitioner's community control was revoked and, on May 12, 1995, he was sentenced in Case No. 92-22088 to a term of five years and a half years in prison (R 40-42). In Case No. 92-22435, he was sentenced to a concurrent term of five years in prison (R 64-66).[1] Both sentences include credit for 724 days of previous incarceration. They were within the recommendation of the sentencing guidelines (one cell bump-up from the original three and a half to four and a half year sentence recommendation) (R 43; 67).

On direct appeal of Petitioner's conviction and sentence, the Fourth District Court of Appeal upheld the trial court's denial of credit on Petitioner's prison sentence for the time that he spent on community control, but certified the following question to this Court:

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[1]These are the sentences which were orally pronounced by the trial court (R 21). The written sentences are transposed, so that the five year sentence appears to be imposed in Case No. 92-22088 (armed robbery) (R 40) and the five and a half year sentence is attached to Case No. 92-22435 (R 64), a sentence which would be illegally excessive for aggravated assault, a third degree felony, by six months. This clerical error should be corrected on remand.

IS A DEFENDANT ENTITLED TO CREDIT FOR TIME SPENT ON PROBATION/COMMUNITY CONTROL WHEN A NEW SENTENCE OF INCARCERATION IS IMPOSED FOR VIOLATION OF THE PROBATIONARY PORTION OF A SPLIT SENTENCE AND THE NEW PERIOD OF INCARCERATION, WHEN COMBINED WITH THE PROBATION/COMMUNITY CONTROL PREVIOUSLY SERVED, EXCEEDS THE STATUTORY MAXIMUM FOR THE CRIME CHARGED?

SUMMARY OF THE ARGUMENT

A defendant is entitled to credit for time spent on community control when a new sentence of incarceration is imposed for violation of the probation or community control portion of a split sentence and the new period of incarceration, when combined with the community control previously served, exceeds the statutory maximum for the crime charged. Community control is a more significant restraint of a defendant's liberty than probation. A defendant who is confined to his own home is as much restrained as is a defendant confined in a jail. To deny credit results in the defendant's service of a term of confinement in excess of that authorized by statute.

ARGUMENT

POINT

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT CREDIT ON HIS SENTENCES FOR THE TIME HE SERVED ON COMMUNITY CONTROL.

In the present case, Petitioner was originally sentenced as a youthful offender to serve concurrent terms of two and a half years in prison to be followed by two years community control on his convictions for aggravated assault, a third degree felony,[2] and armed robbery, a first degree felony.[3] After revocation of his community control, Petitioner was sentenced to serve five and a half years in prison on the armed robbery conviction and a concurrent five year prison term for aggravated assault (R 21). Although credit was given for 724 days of prior incarceration, no credit was given for the time that Appellant was on community control. Since five years is the maximum sentence for a third degree felony, Section 775.082(3)(a), Fla. Stat. (1991), the failure to credit the time on community control resulted in a sentence which was in excess of the statutory maximum.

In Summers v. State, 642 So. 2d 742, 743 (Fla. 1994), 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 insure that the total term of probation does not exceed the statutory maximum for that offense. Subsequently, in Roundtree v. State, 644 So. 2d 1358, 1358-1359 (Fla. 1994), this Court extended the Summers rationale to community control, holding that time spent on probation *or* community control must be credited to a newly imposed term of probation for the same offense, so that the total of *probation and community control* does not exceed the statutory maximum for the offense. Finally, in Waters v. State, 662 So. 2d 332 (Fla. 1995), this Court held that a trial

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[2]Section 784.021(2), Fla. Stat. (1991).

[3]Section 812.13(2)(a), Fla. Stat. (1991).

court must, 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.[4]

This Court has thus steadily moved to a recognition that a defendant may not be required to serve a term longer than that which is authorized by law, whether the vehicle for State-sanctioned punishment is incarceration, community control, or probation. Particularly in the case of community control, this Court has long agreed that community control is more coercive than probation. Fraser v. State, 602 So. 2d 1299 (Fla. 1992). Under the terms of community control, a defendant is virtually confined to house arrest; his movements are severely restricted, and his exits from home are strictly monitored, usually only for the purpose of going to and from work. In fact, community control does not differ significantly from work release as implemented by various prisons and jails in this State. The only difference is that the defendant on community control returns to his own residence at night, while the person on work release returns to an institution. But as Justice Boyd stated in State ex rel. Argersinger v. Hamlin (dissent, joined by Ervin, C.J., and Adkins, J.), 236 So. 2d 442, 444 (Fla. 1970), *reversed* 407 U.S. 25, 92 S.Ct. 2006, 32 l.Ed. 2d 530 (1972): "From the inside, all jails look alike." A defendant is therefore entitled to credit for the time he serves as a result of his crime, whether that time is in jail or in prison. Adams v. Wainwright, 275 So. 2d 235 (Fla. 1973). Similarly, whether the place of confinement is a residence or a prison, the defendant confined there is nevertheless subjected to incarceration. After all, "Stone walls do not a

[4]This Court so held, although it noted that Section 948.06(2), Fla. Stat. provides that "No part of the time that the defendant is on probation or community control shall be considered as any part of the time that he shall be sentenced to serve."

prison make, or iron bars a cage."[5] Whether a defendant is confined to his home or to a prison cell, his confinement is no less complete, and the accident of his placement should not affect the way in which that confinement is treated when credit is awarded on a sentence.

As the Fourth District Court of Appeal acknowledged, disregarding this principle leads to anomalous and inequitable results.

> For instance, a defendant sentenced to 15 years probation on a second degree felony who violates probation in his fourteenth year would be in jeopardy of being sentenced to prison for 15 years. Thus, his combined periods of incarceration and probation would total 29 years even though the statutory maximum for a second degree felony is only 15 years. Incredibly, the defendant would have suffered state-imposed sanctions of 29 years for fifteen year offense.

Young v. State, ___ So. 2d ___ (Fla. 4th DCA July 31, 1996).

In Warrington v. State, 660 So. 2d 385, 387 (Fla. 5th DCA 1995), the Fifth District Court of Appeal appears to have declined to permit this result when it ordered the trial judge to give the defendant credit on his prison sentence, following the violation of conditions of his community control, for the time he spent on community control. The instant case requires the same action, and this court should apply the rationale of Waters to hold that where community control is revoked, a defendant be given credit on his subsequently-imposed prison sentence for time previously spent on community control, so that his total term of imprisonment and community control do not exceed the statutory maximum for the offenses for which he is convicted.

Pursuant to the principle announced and applied in Waters, 662 So. 2d 332, it was error to fail to credit Petitioner with the time served on community control. Petitioner's sentence must therefore be reversed and remanded for correction of this omission.

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[5]Richard Lovelace, "To Lucasta, Going Beyond the Seas."

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that the decision of the Fourth district Court of Appeal in the instant case be vacated and this cause remanded with directions that Petitioner's sentence be corrected to include credit for the time he spent on community control.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MYRA J. FRIED, ESQ., Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 15th day of OCTOBER, 1996.

Of Counsel

IN THE SUPREME COURT OF THE STATE OF FLORIDA

KEVIN YOUNG,

Petitioner,

vs. CASE NO. 88,916

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S APPENDIX

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1996

KEVIN YOUNG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-1815.

Opinion filed July 31, 1996

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William P. Dimitrouleas, Judge. L.T. Case No. 92-22088 CF10A and 92-22435 CF10A.

Richard L. Jorandby, Public Defender, and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellee.

STEVENSON, J.

The question in the present case is whether a defendant whose community control is revoked may be sentenced to a term of incarceration, which, when added to the time previously served on community control, exceeds the statutory maximum for the convicted offense. We answer the question with a reluctant yes.

Appellant, Kevin Young, was sentenced as a youthful offender to serve concurrent terms of two and a half years in prison to be followed by two years community control on convictions for aggravated assault, a third degree felony, and armed robbery with a deadly weapon, a first degree felony. After revocation of community control, Young was sentenced to five and a half years in prison on the armed robbery conviction and a concurrent five year prison term for the aggravated assault.

Although Young was given credit for 724 days of prior incarceration, the trial court did not take into consideration the time that appellant spent on community control. Since five years is the maximum sentence for a third degree felony (section 775.082(3)(a), Fla. Stat. (1991)), Young argues that the trial court's failure to give credit for the time which Young spent on community control resulted in a sentence which exceeded the statutory maximum on the aggravated assault conviction. Fatal to appellant's argument is the incorrect foundational premise that the time previously served on community control may be taken into account in determining whether the newly imposed term of incarceration exceeds the statutory maximum.

We agree with the state that Young's sentence must be approved because the trial court was not required to give Young credit for time served on community control against his new sentence of incarceration. See State v. Holmes, 360 So. 2d 380, 383 (Fla. 1978), holding limited by, State v. Summers, 642 So. 2d 742 (Fla. 1994). See also § 948.06(1), Fla. Stat.(1993) (upon revocation of probation the court may "impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control") and § 948.06(2), Fla. Stat. (1993) (upon revocation of probation "[n]o part of the time that the defendant is on probation or in community control shall be considered as part of any time that he shall be sentenced to serve."). Taken together, these statutory provisions mean that upon revocation of probation or community control, the defendant will not be entitled to receive credit for time served on probation or community control against a newly imposed period of incarceration.

We answered with a reluctant yes to the question presented because this conclusion means that the legislature intended to permit a defendant to be

able to serve a period of probation or community control and incarceration, which when combined together, could exceed the legislatively mandated statutory maximum for the offense. Such an interpretation could lead to some curious and seemingly harsh results. For instance, a defendant sentenced to 15 years probation on a second degree felony who violates probation in his fourteenth year would be in jeopardy of being sentenced to prison for 15 years. Thus, his combined periods of incarceration and probation would total 29 years even though the statutory maximum for a second degree felony is only 15 years. Incredibly, the defendant would have suffered state-imposed sanctions of 29 years for a fifteen year offense. Nevertheless, where the legislative directive is clear on its face, there is no room for different interpretation by the judiciary. The legislature is empowered to determine the permissible range of punishments for violations of penal law.

In Summers v. State, 642 So. 2d 742 (Fla. 1994), the 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. 642 So. 2d 743. In Roundtree v. State, 644 So. 2d 1358,1358-1359 (Fla. 1994), the court extended this reasoning to community control and held that time spent on probation or community control must be credited to a newly imposed term of probation for the same offense so that the total term of probation and community control does not exceed the statutory maximum for an offense. Recently, in Waters v. State, 662 So. 2d 332 (Fla. 1995), the supreme court extended the reasoning of Roundtree and Summers to the situation where a defendant was sentenced to a split term of probation and incarceration after a revocation of community control. The court held that in imposing a split sentence following revocation of probation, the combination of new sanctions may not exceed the statutory maximum for the underlying offense and that the defendant must be given credit for probation or community control previously served against any new probation or community control imposed. 662 So. 2d at 332.

Appellant argues that the holding in Waters suggests that our supreme court may now be of the opinion that the total amount of sanctions that a defendant may be required to endure in any given criminal case may not exceed the legislatively mandated statutory maximum for the offense or offenses committed. However, the supreme court has not made that pronouncement directly and such an interpretation would seem to fly in the face of the relevant statutory provisions. Indeed, in Summers, Roundtree and Waters the supreme court has only said that upon resentencing after revocation of probation or community control, the defendant must receive credit for incarceration previously served against incarceration newly imposed and credit for probation or community control previously served against probation or community control newly ordered. Accord Meader v. State, 665 So. 2d 344, 345 (Fla. 4th DCA 1995). This only satisfies the statutory directives that upon revocation of probation or community control, the court may award any sentence which it might have originally imposed and that time previously spent on probation or community control cannot be considered as part of any time that the defendant is subsequently sentenced to serve.

We affirm Young's sentence. Because the issue in this case arises frequently and affects numerous criminal defendants within this district and throughout the state, we certify to the supreme court the following as a question of great public importance:

Is a defendant entitled to credit for time spent on probation/community control when a new sentence of incarceration is imposed for violation of the probationary portion of a split sentence and the new period of incarceration, when combined with the probation/community control previously served, exceeds the statutory maximum for the crime charged?

We also correct, without remand to the lower court, the scrivener's error wherein the court clerk transposed the case numbers for the armed robbery

and aggravated assault charges so that it erroneously appears that Young was sentenced to five years incarceration for the armed robbery charge and that he was sentenced to five and a half years incarceration for the aggravated assault charge. The judgment is hereby corrected to reflect that Young was sentenced to five and a half years incarceration for the armed robbery conviction and five years for the aggravated assault charge.

Affirmed; judgment modified to correct scrivener's error.

DELL and POLEN, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy Petitioner's Appendix has been furnished to MYRA J. FRIED, ESQ., Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 8 day of OCTOBER, 1996.

TATJANA OSTAPOFF
Assistant Public Defender