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IN THE SUPREME COURT OF FLORIDA

CASE NO. *89,572*

LARRY HORTON,

Petitioner,

v

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This is the initial brief on the merits by the petitioner/defendant Larry Horton from an order of this Court accepting conflict jurisdiction of the decision from the Third District Court of Appeal in Horton v. State, 684 So.2d 257 (Fla. 3d DCA 1996). The Third District's decision was from the defendant's appeal following hearings before the Honorable Ruth Becker, Circuit Judge, Sixteenth Judicial Circuit, Monroe County, Florida.

Citations to the record are abbreviated as follows:

(RI) - Vol. I of Clerk's Record on Appeal in Third District

(RII) - Vol. II of Clerks Record on Appeal in Third District

(RIII) - Vol. III of Clerks Record on Appeal in Third District

(A) - Appendix attached hereto containing decision from Third District

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The petitioner/defendant was charged by information on December 4, 1985, with two counts of lewd and lascivious act in violation of g800.04, Florida Statutes (1985). (RI: 11) On January 30, 1986, the defendant entered a plea of guilty to the lewd and lascivious charge in count 1, a second degree felony, and the state nolle prossed count 2. (RI: 17, 95)

At the sentencing hearing on March 27, 1986, the judge withheld adjudication and placed the defendant on community control for a period of 2 years to be followed by a term of 5 years probation with the special condition of 17 days in jail, credit for time served. (RI: 19-20, 98)

On June 17, 1987, the defendant filed a motion for discharge from community control and to substitute regular probation in that he had complied with all the terms and conditions of community control and his doctor and probation officer recommended the change. (RI: 21, 26-27) On December 21, 1987, the judge ordered that the defendant be transferred from community control to regular probation and to commence his 5-year probation. (RI: 28) The defendant served a total of 17 days in jail and 28 months on probation/community control on this sentence.

On July 13, 1988, the defendant was arrested in Broward County on an unrelated case; he subsequently pled guilty to four counts of lewd and lascivious assault and was sentenced to 15 years in prison. (RI: 29, 67)

On July 15, 1988, an affidavit of violation of probation was filed in Monroe County in this case alleging the defendant violated his probation by being "arrested" in the Broward County case and by having contact with a child under 18 years of age without consent of his probation officer. (RI: 29) A warrant for the defendant's arrest for this violation of probation was issued in Monroe County on July 25, 1988. (RI: 30,37)

A detainer was placed against the defendant on this violation of probation; the defendant was sent from the Broward County Jail to the custody of the Florida Department of Corrections state prison system to serve his Broward County sentence without transferring him to Monroe County to resolve the probation violation charges against him. (RI: 68) Although the defendant requested transfer to Monroe County to resolve the probation violation case, the state did not do so and the detainer operated as a perpetual "hold" on the defendant in prison, interfering with his ability to earn gain time and

preventing him from participating in programs while incarcerated. (R: 34) The defendant remained in the custody of the Department of Corrections serving his Broward County sentence until its expiration on December 28, 1994, for a total of approximately 5½ years. (RI: 30, 68) The defendant was then released to the detainer and immediately returned to Monroe County on this probation violation warrant on December 30, 1994. (RI: **30,68)**

The defendant appeared in court in Monroe County on January 19,1995, to answer the charges of violating his probation, (RI: 31)

On March **16,** 1995, the defendant entered an admission to violation of probation and the judge revoked the probation. (RI: 54-56; RIII: 1-11) The judge adjudicated the defendant guilty of the lewd and lascivious act in count 1 on the original Monroe County case and placed him on community control for 3 months to be followed by 10 years probation. (RI: 54-60; RIII: 1-11) The judge's oral pronouncement of sentence and the written order of community control and the order of probation do not credit the defendant with any previous time served on probation in this same case. (RI: 54-60; RIII: 1-11)

On September **13,** 1995, the defendant filed a motion for writ of corum nobis and/or motion for post conviction relief and/or motion to correct illegal sentence and/or motion to set aside and vacate plea and/or conviction. (RI: 65) In the motion, the defendant claimed: (1) his attorneys who represented him at his original sentence and subsequent violation of probation and sentencing were ineffective for failing to raise several illegalities; **(2)** his original sentence imposed on March 27, 1986, was illegal because he had been given an illegal combination of jail time, community control and probation; (3) his violation of probation was illegal because his original sentence placing him on probation was illegal;

(4) his violation of probation was illegal because a defendant may not be violated merely for being arrested; (5) his subsequent sentence entered on violation of probation was illegal because his probation was illegally violated and he was not given proper credit for time previously served on probation. (RI: 65-75)

On October 25, 1995, the judge entered a written order without an evidentiary hearing denying the defendant's motion. (RI: 85) The defendant filed a motion for rehearing and although the judge initially granted the rehearing to the extent she would reconsider certain issues, the judge subsequently vacated her order granting the rehearing and entered an order denying rehearing. (RI: **106;** RII: 56-58; RIII: **15-24)**

The defendant appealed to the Third District Court of Appeal raising the issues (1) the defendant's original sentence was an illegal combined sentence of jail, community control and probation; (2) **it** was error to violate the defendant on this illegal sentence; (3) it was error to revoke his probation for mere arrest; and **(4)** his new sentence imposed after violation of probation failed to properly credit him with probation time sewed and exceeded the statutory maximum. With respect to issue **4,** the defendant argued that when he was returned to Monroe County and his probation was revoked and he was sentenced on the revocation on March **16, 1995,** the maximum split sentence of community control and probation that could be imposed was **15** years (because he was being sentenced for the single offense of lewd and lascivious act in violation of $800.04, which is a second degree felony punishable by **a** maximum sentence of 15 years imprisonment) with credit for the time previously spent on community control and probation on that charge and the time spent in jail. However, the sentence that was imposed on March **16,** 1995, on the

defendant's violation of probation exceeds this **15** year maximum because the defendant was not given proper credit for time served on probation and in jail. The defendant alleged he was entitled to credit on his reimposed probation for all time spent on his original probation, including the time spent in prison on the Broward County case between the filing of the probation violation affidavit and the revocation order, citing to Fellman v. State, 673 So.2d 155 (Fla. 5th DCA 1996), as well as Gordon v. State, 649 So.2d **326** (Fla. 5th **DCA** 1995), and Kolovrat v. State, 574 So.2d **294** (Fla. 5th **DCA 1991).**

The Third District issued its decision on December **4, 1996,** finding that issues **1,** 2, and 3 lacked merit, and affirming the defendant's sentence on issue **4,** the probation credit time served issue. With respect to this credit time served issue, the Third District stated that the defendant was not entitled to credit for time served for the period of time between the filing of the affidavit of violation of probation and the date probation was finally revoked because the proper calculation of this time served ends on the date the probation violation "has occurred, as determined by the court, or, if that date cannot be ascertained, on the date the affidavit of probation violation is filed," and not the date the revocation order is entered, and because the defendant was not entitled to credit for probation for time spent in jail on an unrelated charge awaiting an adjudication of the probation violation charge. (A: 2) The Third District expressly and directly ruled contrary to the Fifth District's decision in Fellman and instead based its ruling on its earlier decision in Francois v. State, 676 So.2d **1041** (Fla. 3d DCA **1996),** review aranted, **683** So.2d 483 (Fla. **1996)** (No: **88,540),** presently pending in this Court, which held that credit for time spent on probation begins on the date the probation order is entered but ends on the date the probation

violation has occurred, **as** determined by the court, or, if that date cannot be ascertained, on the date the affidavit of violation is filed, not ruled upon. The Third District further acknowledged that its holding was contrary to the Fourth District's decision in Hughes v. State, 667 So.2d 910,912 (Fla. 4th **DCA** 1996), review denied, 676 So.2d 413 (Fla. 1996), in which the court stated that in calculating the amount of such credit, "the court must consider the time sewed from the date probation was imposed to the date of revocation," and that "only a valid order of revocation, **and** not the issuance of an arrest warrant, terminates probation." **(A:** 2)

The defendant then filed his notice of discretionary review and jurisdictional brief seeking conflict jurisdiction in this Court. On April 30, 1997, this Court accepted jurisdiction and ordered that initial briefs on the merits **be** filed.

SUMMARY OF ARGUMENT

The defendant submits the trial judge failed to properly credit him with all probation time served prior to the revocation of his probation on March 16, 1995, as required by this Court's decisions in State v. Summers, 642 So.2d 742 (Fla. 1994), and Waters v. State, 662 So.2d 332 (Fla. 1995). The defendant was originally sentenced on March 27, 1986, to 2 years community control followed by 5 years probation with the special condition of 17 days in jail, credit time served. (RI: 19-20, 98) He served 21 months of his community control and the 17 days jail and was serving his term of probation when the affidavit of violation of probation was filed on July 15, 1988. (RI: 29) His probation was not revoked, however, until March 16, 1995, which is a little over 9 years probation/community control calculated as per Fellman v. State, 673 So.2d 155 (Fla. 5th DCA 1996), and Hughes v State, 667 So.2d 910 (Fla. 4th DCA 1996), review denied, 676 So.2d 413 (Fla. 1996), from the date probation was imposed on March 27, 1985, to the date of the revocation of probation on March 16, 1995. (RI: 54-56; RIII: 1-11) The defendant's new sentence of 10 years probation and 3 months community control results in a combined sentence of over 19 years probation/community control, which is well over the statutory maximum of 15 years for a second degree felony. Accordingly, the defendant was entitled to a little over 9 years credit time served. Thus, his sentence entered on March 16, 1995, is illegal and the decision of the Third District Court of Appeal must be quashed, the defendant's sentence reversed and the case remanded to the trial court for resentencing.

ARGUMENT

THE TRIAL COURT **FAILED** TO PROPERLY CREDIT THE DEFENDANT WITH TIME PREVIOUSLY SERVED ON PROBATION AND WHEN THIS CREDIT FOR TIME SERVED **IS** PROPERLY CREDITED, THE DEFENDANT'S NEW SENTENCE OF 10 YEARS PROBATION AND 3 MONTHS COMMUNITY CONTROL EXCEEDS THE STATUTORY MAXIMUM OF 15 YEARS FOR **A** SECOND DEGREE FELONY AND CONSEQUENTLY, THE THIRD DISTRICT'S DECISION MUST BE QUASHED AND THE DEFENDANT'S SENTENCE REVERSED AND REMANDED FOR RESENTENCING.

The defendant submits the trial judge failed to properly credit him with all probation time served and thus, his sentence entered on March 16, 1995, is over the statutory maximum for the offense and is therefore illegal. Consequently, the decision of the Third District must be quashed and the defendant's sentence reversed and the case remanded to the trial court for resentencing.

This case began on December 4, 1985, when the defendant was charged by information with two counts of lewd and lascivious act in violation of 5800.04, Florida Statutes (1985). (RI: 11) On January 30, 1986, the defendant entered a plea of guilty to one count of lewd and lascivious act and the state nolle prossed count 2. (RI: 17, 95) Lewd and lascivious act in violation of 5800.04 is a second degree felony with a statutory maximum punishment of 15 years imprisonment. §775.082(3)(c), Fla. Stat. (1985). At the sentencing hearing on March 27, 1986, the judge withheld adjudication and placed the defendant on community control for a period of 2 years to be followed by a term of 5 years probation with the special condition of 17 days in jail, credit time served. (RI: 19-20, 98)

On July 15, 1988, an affidavit of violation of probation was filed and a warrant for the defendant's arrest for this violation of probation was issued on July 25, 1988. (RI: 29-30, 37) On March 16, 1995, the defendant entered an admission to violation of probation. (RI: **54-56;** RIII: 1-11) The judge revoked his probation, adjudicated him guilty of lewd and lascivious act and placed him on community control for 3 months to be followed by 10 years probation. (RI: 54-60; RIII: 1-11) The judge's oral pronouncement of sentence and the written order of community control and the order of probation do not credit the defendant with any previous time served on probation **or** community control. (RI: 54-60; RIII: 1-11)

This sentence is illegal because the judge failed to give the defendant credit for time previously served on probation and community control before having his probation revoked; when this credit is properly given to the defendant, the resulting sentence exceeds the statutory maximum of 15 years imprisonment for a second degree felony.

Florida law is quite clear that when a defendant violates probation and is then given another nonincarcerative sentence of either community control or probation or a combination of both, as the defendant here, the defendant must be given credit for all the time he previously served on probation or community control. In State v. Summers, 642 So.2d **742** (Fla. 1994), this Court held that upon revocation of a defendant's probation, credit must be given for the time previously sewed 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. In Waters v. State, 662 So.2d 332 (Fla. 1995), this Court extended Summers to community control and *to* split

sentences and held that upon revocation of probation, the court must credit time served on probation and community control to any newly sentenced term of probation imposed as part of a split sentence if the total sanction exceeds the statutory maximum.

In the present case, neither the judge's oral pronouncement of sentence upon revocation of probation on March 16, 1995, nor the judge's written sentence give the defendant credit for any time previously served on probation or community control. (RI: 54-60; R:III: 1-11) Under Summers and Waters, the judge erred in failing to award such probation credit time served if the reimposition of probation and community control, when added to the previous probation and community control, exceeds the statutory maximum of 15 years for the second degree felony.

In calculating the amount of time to be awarded for time previously spent on probation or community control, the court determines the amount of time served on probation commencing from the date of entry of the probation order and ending on the date of entry of the revocation order, not the date of the affidavit of violation of probation. Hughes v. State, 667 So.2d 910, 912 (Fla. 4th **DCA** 1996), rev. denied, 676 So.2d 413 (Fla. 1996); Fellman v. State, 673 So.2d **155** (Fla. 5th **DCA** 1996); Gordon v. State, 649 So.2d 326 (Fla. 5th **DCA** 1995). In Gordon, the Fifth District held that upon revocation of probation, the time **a** defendant has served on probation or community control for a given offense must be credited toward any new term of probation imposed for that offense in order to insure that the total period of probation does not exceed the statutory maximum. In calculating this amount of credit for time served on probation, the court rejected the state's position that a defendant was only entitled to receive credit for time that he was on

probation and not in violation of any of the conditions of probation. The court stated that "probation is not normally suspended or tolled retroactively unless the probationer absconds from supervision." 649 So.2d at 328. Accord Ogden v. State, 605 So.2d 155 (Fla. 5th DCA 1992); Kolovrat v. State, 574 So.2d 294, 297 (Fla. 1991). In Fellman, the court held the defendant's sentence imposed after a third violation of probation was illegal because after calculating all the defendant's time already served on probation and crediting it to the defendant's newly imposed probation following the third revocation, the amount exceeded the statutory maximum for the offense. 673 So.2d at 155.

The underlying reasoning of these cases is that probation does not cease when an affidavit of violation is filed or an arrest warrant is issued. The filing of an affidavit or warrant for violation of probation does not stay the running of the probationary period. Hall v. State, 641 So.2d 403 (Fla. 1994); Clark v. State, 402 So.2d 43 (Fla. 4th DCA 1981). Probation can only be terminated "by a valid order or revocation or the running of its term, and not by the mere execution of an arrest warrant for violation of probation." Watson v. State, 497 So.2d 1294 (Fla. 1st DCA 1986). Consequently, a defendant continues to serve his probation despite the filing of the affidavit and warrant. "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); Marchessault v. State, 659 So.2d 1315 (Fla. 4th DCA 1995). Indeed, until the defendant's probation is revoked, the defendant remains under probation supervision during the interval between entry of the affidavit and the revocation order and the affidavit can be amended to include subsequent violation allegations. Kolovrat 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). Certainly, if a violation were found not to have occurred and the probation was not revoked, the defendant continues on probation with credit for **all** the time spent between the affidavit and revocation hearing. State v. Summers, 642 So.2d 742 (Fla. 1994). And as previously noted, "[p]robation is not normally suspended or tolled retroactively unless the probationer absconds from supervision." Huahes v. **State,** supra at 912; Gordon v. State, 649 So.2d 326 (Fla. 5th DCA 1995); Kolovrat v. State, supra at 297; Watson v. State, 497 So.2d 1294 (Fla. **Ist DCA** 1986).

In **so** calculating the defendant's time here, it can be seen the defendant's new 10 year term of probation with the 3 month term of community control following his March 16, 1995, revocation of probation brings the defendant over the 15 year statutory maximum for the second degree felony. The defendant was originally sentenced on March 27, 1986, to 2 years community control followed by 5 years probation with the special condition of 17 days in jail, credit time served. (RI: 19-20, 98) He served 21 months of his community control and the 17 days jail and was serving his term of probation when the affidavit of violation of probation was filed on July 15, 1988. (RI: 29) His probation was not revoked, however, until March 16, 1995, which is a little over 9 years probation/community control calculated from the date probation was imposed on March 27, 1985, to the date of the revocation of probation on March 16, 1995. (RI: 54-56; RIII: 1-11) The defendant's new sentence of 10 years probation and 3 months community control results in **a** combined sentence of over 19 years probation/community control, which is well over the statutory

maximum of 15 years for a second degree felony. Accordingly, the defendant was entitled to a little over 9 years credit time served.'

Consequently, the court erred in failing to award the defendant proper credit for time served on probation and the court's sentence on March 23, 1995, is over the statutory maximum and is illegal. The Third District's decision below that no credit should be given for the time period between entry of the affidavit of violation and the order revoking probation as per its earlier decision in Francois v. State, 676 So.2d 1041 (Fla. 3d DCA 1996), review granted, 683 So.2d 483 (Fla. 1996) (Case No: 88,540), is incorrect. Francois

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[1] It should not matter that the defendant was incarcerated in prison on an unrelated charge from the date of the affidavit until the date of the revocation of probation. In Gordon v. *State*, 649 So.2d 326, 328 (Fla. 5th DCA 1995), the court noted that "probation is not normally suspended or tolled retroactively unless the probationer absconds from supervision." Accord Ogden v. State, 605 So.2d 155 (Fla. 5th DCA 1992); Kolovrat v. State, 574 So.2d 294, 297 (Fla. 1991). The filing of an affidavit or warrant for violation of probation does not stay the running of the probationary period. Hall v. State, 641 So.2d 403 (Fla. 1994); Clark v. State, 402 So.2d 43 (Fla. 4th DCA 1981). Probation can only be terminated "by a valid order or revocation or the running of its term, and not by the mere execution of an arrest warrant for violation of probation." Watson v. State, 497 So.2d 1294 (Fla. 1st DCA 1986). Consequently, a defendant continues to serve his probation despite the filing of the affidavit and warrant. "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); Marchessault v. State, 659 So.2d 1315 (Fla. 4th DCA 1995).

This is particularly so in this case where such a lengthy time elapsed between the filing of the affidavit of violation and the revocation of the probation which was not the fault of the defendant. While in prison on the unrelated Broward County case, the defendant sought his return to Monroe County to take care of the probation case, but the state failed to bring him back. (RI: 34) Instead, the detainer merely lodged against the defendant for the entire period of time, creating a more onerous situation for him, preventing him from receiving his complete gain time on the Broward charges and preventing him from participating in certain programs in prison, all despite the defendant's efforts to bring his case back to Monroe County to resolve the probation violation. (RI: 34) Thus, the probation case followed him to prison and affected his period of time there and this period of time should not be tolled out of the total probation time.

is presently pending before this Court on certified direct conflict jurisdiction with Fellman v. State, 673 So.2d 155 (Fla. 5th **DCA** 1996), and Hughes v. State, 667 So.2d 910, 912 (Fla. 4th **DCA** 1996), review denied, 676 So.2d 413 (Fla. 1996), and the defendant urges this Court to overrule Francois and uphold Fellman and Hughes. The Third District's decision must be reversed or quashed and the defendant's sentence reversed and remanded to the trial court for resentencing.

CONCLUSION

Based upon the foregoing, the defendant requests that this Court reverse or quash the decision of the Third District Court of Appeal in this case, reverse the defendant's sentence and remand the case to the trial court with directions to resentence the defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this 21st day of May, 1997.

By: Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY **TERM, A.D. 1996**

LARRY HORTON, **

Appellant, **

vs. ** **CASE NO. 95-3472**

THE STATE OF FLORIDA, ** **LOWER TRIBUNAL NO. 85-165**

Appellee. **

Opinion filed December 4, 1996.

An **Appeal** from **the Circuit Court for** Monroe **County, Ruth J. Becker, Judge.**

Bennett H. Brummer, Public Defender, and Marti Rothenberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and **Linda S. Katz** and **Fredericka Sands, Assistant Attorneys General,** for **appellee.**

Before COPE, **GODERICH and** SHEVIN, **JJ.**

PER **CURIAM.**

We affirm the order **denying** Horton's **motion for** writ **of error** coram nobis, **post-conviction relief, and/or to correct**

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sentence. We are unpersuaded by Horton's argument that he is entitled to credit for time served against his probation sentence, imposed upon revocation of probation, for the period of time that elapsed before the probation violation charge was adjudicated. During that time, Horton was incarcerated on an unrelated conviction. Credit for time spent on probation begins on the date the probation order is entered, and ends on the date the probation violation has occurred, as determined by the court, or, if that date cannot be ascertained, on the date the affidavit of probation violation is filed. Francois v. State, 676 So. 2d 1041, 1042 (Fla. 3d DCA), review granted, No. 88,540 (Fla. 1996). *contra* Fellman v. State, 673 So. 2d 155 (Fla. 5th DCA 1996) (defendant entitled to credit from date of imposition of probation through date *of* probation revocation order); Hughes v. State, 667 So. 2d 910 (Fla. 4th DCA) (same), review denied, 676 So. 2d 413 (Fla. 1996). Thus, Horton is not entitled to credit toward probation for time spent in jail on an unrelated charge, awaiting an adjudication of the probation violation charge. See Weeks v. State, 496 So. 2d 942 (Fla. 2d DCA 1986) (probation tolled while defendant is prisoner in another jurisdiction as defendant was not under probationary supervision during that period).

Remaining points lack merit.

Affirmed.