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IN THE SUPREME COURT OF FLORIDA

Case No. 89,572

CLERK SUPREME COURT
By 
Chief Deputy Clerk

Third DCA Case No. 95-1998

LARRY HORTON
Petitioner,

-vs-

THE STATE OF FLORIDA
Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The parties shall be referred to as they stand before this Court. **All** emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

The Respondent accepts Petitioner's version of the case as found on pages one (1) and two (2) of Petitioner's Brief on Jurisdiction **as** an generally accurate representation of the history of this **case**. However, the Respondent **does not agree** that on appeal to the Third District Court of Appeal, the defendant argued he was entitled to credit on his reimposed probation for all time spent on his original probation.

The Respondent submits that on appeal to the Third District the defendant argued that because the defendant **had** not been served with an affidavit of probation violation and/or his original probation violation had not been adjudicated, the defendant **was** entitled to credit on his reimposed probation for all time spent in prison on an unrelated offense.

TED

Whether the decision of the Third District Court of Appeal expressly and directly conflicts with decisions of the Fifth District Court of Appeal in Fellman v. State, 673 So. 2d 155 (Fla. 5th Dca 1996), and the Fourth District Court of Appeal in Huahes v. State, 667 So. 2d 910 (Fla. 4th Dca 1996), on the issue of whether a defendant may receive credit for probation time while serving a prison sentence on an unrelated offense?

SUMMARY OF THE ARGUMENT

The holding of the Third District Court of Appeal in the instant case does not conflict with the decisions of the Fifth District in Fellman v. State, 673 So. 2d 155 (Fla. 5th DCA 1996) and the Fourth District in Huahes v. State, 667 So. 2d 910 (Fla. 4th DCA 1996) because the point of law decided by the Third District in the case on review is not the same as the point of law decided in Fellman and Huahes .

ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE OPINION UNDER REVIEW AND THE CASES ASSERTED BY THE PETITIONER AS CREATING A CONFLICT ON THE ISSUE OF WHETHER A DEFENDANT MAY ACCRUE CREDIT FOR PROBATION WHILE SERVING A PRISON SENTENCE FOR AN UNRELATED OFFENSE.

The Petitioner contends that the holding of the Third District Court of Appeal in the instant case directly and expressly conflicts with the decisions of the Fifth District in Fellman v. State, 673 So. 2d 155 (Fla. 5th DCA 1996), and the Fourth District in Hughes v. State, 667 So. 2d 910 (Fla. 4th DCA 1996), on the issue of whether a defendant who has probation reimposed after a violation, is entitled to credit for all probation time served while awaiting the resolution of the affidavit of violation of probation.

The Respondent submits that the Petitioner's application for discretionary jurisdiction of this Court should be denied because the decision of the Third District, providing *inter alia* that, "credit for time spent on probation begins on the date the probation order is entered, and ends on the date the affidavit of probation is filed, Francois v. State, 676 So. 2d 1041, 1042 (Fla. 3d DCA), review granted, No. 88,540 (Fla. 1966)", is not, for the purposes of determining the presence or absence of conflict necessary for discretionary review, in conflict with Fellman and Huahes. because The decision made by the Third District regarding when credit for probation time begins and ends, does

not constitute the decision of the court. See Niemann v. Niemann, (312 So. 2d 733 Fla. 1975) (Statement of the court regarding judicial authority to effect a division of property did not constitute that court's decision).

The conflict between Fellman and Hughes about **how much** credit a defendant is entitled to turns on whether the tolling of credit for time served on probation begins on the date a probation affidavit is filed or the date a court enters its order revoking probation. Resolution of the conflict between Fellman and Hughes would not change the result of the instant case because the seminal feature of the Third District's opinion is that the defendant **was** not under probationary supervision while incarcerated on an unrelated case.

CONCLUSION

Based on the foregoing argument and authorities, the Respondent submits that the Petitioner's Application for Discretionary Review by this Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was provided by U.S. Mail to **MARTI ROTHENBERG**, Assistant Public Defender, Counsel for Petitioner, 1320 N.W. 14th Street, Miami, Florida, 33125, this 13th day of February 1997.

For James W. Rosen

FREDERICKA SANDS
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