

FILED

SID J. WHITE

DEC 19 1996

IN THE SUPREME COURT OF FLORIDA

CASE NO. ~~85,165~~
89,572

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

LARRY HORTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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JNTRDUCTION

This is the brief of the petitioner/defendant Larry Horton on petition for discretionary review based on express and direct conflict jurisdiction from the decision of the Third District Court of Appeal. Citations are to the Appendix attached hereto which contains the opinion from the Third District.

STATEMENT OF THE CASE AND FACTS

The defendant was convicted and placed on probation in Monroe County. (A: 1) While on probation, the defendant was charged in an unrelated offense in another jurisdiction, Broward County. (A: 2) An affidavit of violation of probation and warrant were filed in Monroe County, but were not served on the defendant and the probation violation charge was not adjudicated. (A: 2) The defendant was convicted of the unrelated Broward County offense and was sentenced to prison. (A: 2) During the period the defendant spent in prison on the Broward County charge, the affidavit of violation of probation and warrant were not served on him; the defendant was not returned to Monroe County for a violation hearing and the probation violation was not adjudicated. (A: 2) After his release from prison, the defendant returned to Monroe County and his probation was revoked. (A: 2) Upon revocation, the defendant was given another sentence of probation, but the judge failed to give the defendant credit for probation time served for the period of time that elapsed after the affidavit of violation and before the probation violation charge was adjudicated, during which he was incarcerated on the Broward charge. (A: 2)

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. (A: 2) The Third District affirmed the defendant's case, stating that 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. (A: 2) The Third District cited its earlier decision in Francois v. State, 676 So.2d 1041 (Fla. 3d DCA 1996), review granted, ___ So.2d ___ (Fla. Oct. 24, 1996) (Case No: 88,5401, and acknowledged that Francois was in conflict with the Fifth District decision in Fellman v. State, 673 So.2d 155 (Fla. 5th DCA 1996), and the Fourth District decision in Hughes v. State, 667 So.2d 910 (Fla. 4th DCA 1996), review denied, 676 So.2d 413 (Fla. 1996). (A: 2) The Third District concluded the defendant was not entitled to credit toward probation for the time between the filing of the probation violation affidavit and the revocation order. (A: 2)

SUMMARY OF ARGUMENT

The decision of the Third District in this 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 Huahes v. State, 667 So.2d 910 (Fla. 4th DCA 1996), review denied, 676 So.2d 413 (Fla. 1996). The issue presented in these cases is whether, when a defendant has probation reimposed after a violation, credit for time served should be given for the time period on probation between entry of the affidavit of violation of probation and the order revoking probation. In Fellman and in Hughes, the Fifth and Fourth District Courts held that in calculating the amount of probation served, the time the defendant was awaiting resolution of the affidavit of violation of probation must be included. In the instant case, the Third District stated that the time the defendant was awaiting resolution of the affidavit was not included and that credit for probation served ended upon the filing of the affidavit of violation. The conflict between the Fourth, Fifth and Third District courts regarding this issue warrants the exercise of this Court's jurisdiction.

ARGUMENT

THIS DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY 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 THE 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 defendant alleged on appeal to the Third District that he was entitled to credit on his reimposed probation for all time spent on his original probation, including the time 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 issue in both the instant case and the Fellman and accompanying cases is whether, when a defendant has probation reimposed after a violation, credit for probation time served should be given for all time on probation prior to the entry of the order of revocation, thus 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. In Fellman, the court stated that the appellant "was on probation until an order of revocation was entered" and therefore, "in calculating the amount of probation served, the time appellant was awaiting resolution of the affidavits of violation must be included."

In its decision in this case, however, 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 granted, ___ So.2d (Fla. Oct. 24, 1996) (No: 88,540), 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 served 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."

Francois is presently pending before this court on certified direct conflict jurisdiction with Fellman and Huahas, both cited as contrary authority in the instant case. It is clear that a conflict exists between the Fourth and Fifth Districts on one hand and the Third District on the other hand regarding the calculation of probation time served when new probation is reimposed upon a defendant. The fact that in the instant case, the defendant was in prison in another jurisdiction during the time period awaiting resolution of his probation revocation does not affect this because the decision of the Third District expressly follows the law as outlined in Francois and notes the conflict with Fellman and Hughes, thereby applying such law to this case.

Indeed, Hughes expressly states that “[p]robation is not normally suspended or tolled retroactively unless the probationer absconds from supervision.” 667 So.2d at 912. Since the defendant here did not abscond from supervision, the Third District’s decision tolling his probation for the time in prison conflicts with Hughes on this issue as well.

Consequently, the conflict in calculating probation credit time served and the associated conflict in whether probation credit should be tolled warrants the exercise of this Court’s discretionary jurisdiction since uniformity must exist regarding the calculation of such probation time served. Express and direct conflict exists and this Court should accept jurisdiction in this case.

CONCLUSION

Based upon the foregoing, petitioner requests that this Court exercise its discretionary jurisdiction and take review of this case.

Respectfully submitted,

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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 10 day of December, 1996.

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

Appellee.

**

TRIBUNAL NO. 85-165

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

A:1

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, of, 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)

1 (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), , 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.