

047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,572
Third District No. 95-3472

FILED
SID J. WHITE
JUN 16 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

LARRY HORTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

F
FREDERICKA SANDS
Assistant Attorney General
Florida Bar No. 0894620
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
Telephone: (305) 377-5441
Facsimile: (954) 377-5655

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

QUESTION PRESENTED 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

 I. A DEFENDANT MAY NOT SERVE PROBATION AND A
 PRISON SENTENCE FOR AN UNRELATED OFFENSE
 CONCURRENTLY.

 A. Following A Revocation of
 Probation Hearing And Upon
 Imposition Of A New Probationary
 Term, A Defendant Is Not Entitled To
 Receive Credit For Time Served In
 Prison For An Unrelated Offense
 Toward The Newly-Imposed
 Probationary Term. 5

CONCLUSION 11

CERTIFICATE OF SERVICE 11

TABLE OF CASES

Clemons v. State,
629 So. 2d 1067 (Fla. 2d DCA), rev.denied, 639 So. 2d 976 (Fla.
1994) 8,9

Francois v. State,
No. 88,540 (Fla. June 12, 1997) 4,8,9

Francois v. State,
(676 So. 2d 3d DCA 1996) 7,8

State v. Hall,
641 So. 2d 403 (Fla. 1994) 8

Horton v. State,
684 So. 2d 257 (Fla. 3d DCA 1996) 4

Robinson v. State,
442 So. 2d 284 (Fla. 2d DCA 1983) 9

State v. Summers,
642 So. 2d 742 (Fla. 1994) 7,8

Weeks v. State,
496 So. 2d 942 (Fla. 2d DCA 1986) 8,9

INTRODUCTION

The Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the Third District Court of Appeal, and the Petitioner, Larry Horton, was the Defendant and the Appellant, respectively. In this brief, the parties will be referred to as the defendant and the state. Citations to the record are abbreviated as follows:

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

(RII) -Vol. II of Clerk's Record on Appeal in Third DCA

(RIII) -Vol. III of Clerk's Record on Appeal in Third DCA

(A) -Appendix attached hereto containing Third DCA opinion

STATEMENT OF THE CASE AND FACTS

The state accepts the defendant's statement of the case and facts as a generally accurate account of the proceedings below. *Any* additional facts which the state seeks to bring to the attention of the Court are contained in the argument portion of the brief.

QUESTION PRESENTED

I.

WHETHER FOLLOWING A REVOCATION OF PROBATION HEARING, PURSUANT TO A TIMELY FILED AFFIDAVIT OF PROBATION VIOLATION, AND UPON IMPOSITION OF A NEW PROBATIONARY TERM, DEFENDANT IS ENTITLED TO RECEIVED CREDIT FOR TIME SERVED IN PRISON FOR AN UNRELATED OFFENSE TOWARD THE NEWLY-IMPOSED PROBATIONARY TERM?

SUMMARY OF THE ARGUMENT

The defendant contends that he should receive credit for all of the time that elapsed between the imposition of probation and entry of the probation revocation order entered by the trial court, regardless of the fact that between imposition of probation and the order of revocation in Monroe County, defendant violated the terms of probation by committing four separate and subsequent acts of lewd and lascivious assault in Broward County for which he was sentenced to state prison. The Third District, in Horton v. State, 684 So.2d 257 (Fla. 3d DCA 1996) (Appendix), rejected the foregoing argument.

The state is cognizant of this Court's recent opinion in Francois v. State, No. 88,540 (Fla. June 12, 1997) and submits that the instant case may be distinguished because: (1) filing of an affidavit alleging violation prior to the end of the probationary period sufficiently sets revocation proceedings in motion so as to allow the state and the court to later conduct violation proceedings, even if those proceedings occurred after the expiration of the term; (2) probation and incarceration cannot be

served concurrently as it is impossible to comply with the terms of probation while in prison; (3) and a probationary period is tolled while a probationer is in prison.

ARGUMENT

I.

A DEFENDANT MAY NOT SERVE PROBATION AND A PRISON SENTENCE FOR AN UNRELATED OFFENSE CONCURRENTLY.

A. Following A Revocation of Probation Hearing And Upon Imposition of a New Probationary Term, A Defendant Is Not Entitled To Received Credit For Time Served In Prison For An Unrelated Offense Toward The Newly-Imposed Probationary Term.

The defendant alleges that the sentence of three months community control, followed by ten years of probation, which was imposed on March 16, 1995, upon revocation of probation, illegally exceeds the fifteen year statutory maximum sentence for the subject second degree felony, The defendant's argument is without merit.

On July 13, 1988, the Defendant was arrested in Broward County for the offenses of sexual battery on a child lewd and lascivious assault. He subsequently pled guilty to four counts of lewd and lascivious assault upon a child and was sentenced to state prison.

The defendant remained in the custody of the Department of Corrections serving his sentence until December 28, 1994. The defendant was returned to Monroe County on December 30, 1994. (RI. 30, 68).

The defendant argues that by the time of his December 1994, arrest on the probation violation warrant, he had completed the balance of the five year probationary term, which he was alleged to have violated. The defendant's position is that the filing of an affidavit or warrant for violation of probation **does** not toll the running of the probationary period. Thus, according to the defendant's argument, for the purpose of calculating the length of time previously spent on probation, his five year probationary term, as imposed in his original 1986 sentence, continued to run and expired while he was incarcerated in Broward County on totally separate charges which he committed and pled guilty to while on probation, **Although** convenient for the defendant, this argument defies both logic and equity.

While this Court held in State v. Summers, 642 So. 2d 742 (Fla. 1994), 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." Summers at 744. The state submits that the phrase, "time previously served on probation" does not include time that the defendant in this case served in prison for an unrelated case.

Probation and incarceration cannot be served concurrently, as it is impossible to comply with the terms of probation while in prison. Clemons v. State, 629 So. 2d 1067, 1068 (Fla. 2d DCA), rev. denied, 639 So. 2d 976 (Fla. 1994). Furthermore, the underlying concept of probation is rehabilitation not punishment. Id. Moreover, it has been expressly held in a factually similar case that a probationary period is tolled while a probationer is in prison. Weeks v. State, 496 So. 2d 942, 943 (Fla. 2d DCA 1986).

This Court has now held in Francois v. State, No. 88,540 (Fla. June 12, 1997), citing State v. Hall, 641 So. 2d 403 (Fla. 1994), that ". . .when a probationary period expires, the court is divested of jurisdiction over the probationer *unless*, prior to that time, the appropriate steps were taken to revoke or modify the probation." (Emphasis supplied). In Francois, this Court found

that the state did not file affidavits of violation of probation before expiration of the probationary period. In the instant case an affidavit and warrant for violation of probation and community control were filed against the defendant on July 15, 1988, and July 25, 1988, respectively. The instant case may be distinguished from Francois because: (1) the filing of an affidavit prior to the end of the probationary period sufficiently set revocation proceedings in motion so as to allow the state and the court to later conduct violation proceedings, even if those proceedings occurred after the expiration of the term, Robinson v. State, 442 So. 2d 284 (Fla. 2d DCA 1983) reversed; and (2) the defendant could not simultaneously serve both probation and a prison sentence. Clemons, 629 So. 2d at 1068; Weeks, 496 So. 2d at 943. The occurrence of both of the foregoing factors, therefore, tolled the defendant's probation while he was in state prison.

From the time the defendant's original sentence was entered on March 27, 1986, until the probationary term was tolled on July 13, 1988, the Defendant served a combination of community control and probation amounting to two years and less than four months. As the probation could not be served concurrently with the prison sentence the time actually served on probation before incarceration

in addition to the newly imposed sentence does not exceed the statutory maximum, and therefore the defendant's sentence is not illegal and resentencing is not appropriate.

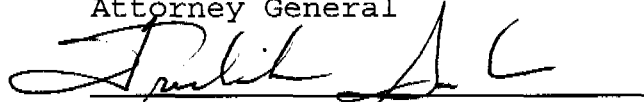
The state respectfully submits that the defendant nor the conflicting opinions cited by him set forth any reasoned basis for the position that where an affidavit alleging a violation of probation has been timely filed, a defendant may receive credit toward the probationary term while serving a prison sentence for an unrelated offense.

CONCLUSION

Accordingly, based upon the foregoing arguments and cited authorities, the state respectfully requests that the decision of the Third District Court of Appeal be affirmed.

Respectfully Submitted,

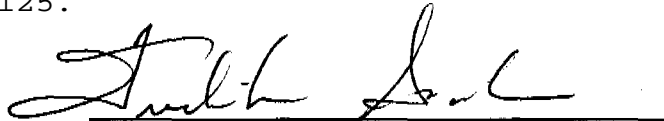
ROBERT A. BUTTERWORTH
Attorney General



FREDERICKA SANDS
Assistant Attorney General
Florida Bar No. 0894620
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
Telephone: (305) 377-5441
Facsimile: (305) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was mailed this 12th day of June 1997, to Marti Rothenberg, Assistant Public Defender, 1320 N.W. 14th **Street**, Miami, Florida 33125.



FREDERICKA SANDS
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,572
Third District No. 95-3472

LARRY HORTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

FREDERICKA SANDS
Assistant Attorney General
Florida Bar No. 0894620
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
Telephone: (305) 377-5441
Facsimile: (305) 377-5655

INDEX TO APPENDIX

APPENDIX

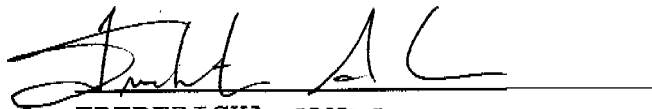
DESCRIPTION

Exhibit 1

Horton v. State, 684 So.2d 257 (Fla. 3rd DCA
1996)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS was mailed this 12th
day of June, 1997 to Marti Rothenberg, Assistant Public Defender,
1320 N.W. 14th Street, Miami, Florida 33125.



FREDERICKA SANDS

Assistant Attorney General

EXHIBIT A

*257 684 So.2d 257

21 Fla. L. Weekly D2558

Larry HORTON, Appellant,
v.
The STATE of Florida, Appellee.

No. 95-3472.

District Court of Appeal of Florida,
Third District.
Dec. 4, 1996.

After the Circuit Court, **Monroe County**, Ruth J. Becker, J., imposed probation sentence upon revocation of probation and denied defendant credit for time spent in jail on unrelated charge, defendant, filed motion for writ of error coram nobis, postconviction relief and/or to correct sentence. The District Court of Appeal held that defendant was not entitled to credit toward probation for time spent in jail on unrelated charge, awaiting adjudication of probation violation charge.

Affirmed.

CRIMINAL LAW

110 -- 982.9(7)

110XXIII Judgment, Sentence, and Final Commitment

1101882 Probation and Suspension of Sentence

110k982.9 Revocation

110k982.9(7) Imposition of unpronounced sentence.

Fla.App. 3 Dist. 1996.

Defendant was not entitled to credit toward sentence upon revocation of probation for time spent in jail on unrelated charge waiting adjudication of probation violation charge.

*258. 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 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, 683 So.2d 483 (ma.1996). Contra *Fellman v. State*, 673 So.2d 155 (Fla. 5th DCA 19%) (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.