IN THE SUPREME COURT OF FLORIDA

TEAYOIR SCANTLING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 90,968

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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FLORIDA BAR NO. 325791

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Teayoir Scantling, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of five volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The lower tribunal correctly determined that an inmate who is on control release has already been sentenced and when he violates his control release any action of the parole commission revoking or modifying his release status is not a sentence.

Absent circumstances not presented by this case, a defendant can only be sentenced once for a single crime. Petitioner was sentenced on the attempted armed robbery when the trial court imposed a seven year sentence. His release four years later via control release did not alter his status as a sentenced convict. Thus when he committed the offense of possession of cocaine, the trial court was authorized to run the new sentence consecutive to the previously imposed seven year sentence. This consecutive sentence is authorized by statute and by case law of this Court. Therefore, this Court should affirm the determination of the lower tribunal.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY IMPOSING A SENTENCE AND DIRECTING THAT IT RUN CONSECUTIVELY TO PETITIONER'S PREVIOUSLY IMPOSED SENTENCE? (Restated)

Petitioner asserts that the lower tribunal's decision incorrectly allowed his new sentence for his 1995 offense of possession of cocaine to run consecutive to his previously imposed seven year sentence for his 1990 offense of attempted armed robbery. Petitioner asserts that the consecutive sentence is impermissible because it results in an sentence running consecutive to a sentence for violation of control release which has not yet been imposed.

Petitioner's argument must be rejected by this Court as it is contrary to long standing statutory provisions and because the interpretation petitioner desires has been specifically rejected by this Court.

It is uncontroverted that the Florida Legislature is the only branch of government authorized to set sentencing policy in the State of Florida. Smith v. State, 537 So.2d 982 (Fla. 1989), Benyard v. Wainwright, 322 So.2d 473, 474 (Fla. 1975). The legislature pursuant to this authority has enacted §921.16 Fla. Stat. which provides in pertinent part:

> 921.16. When sentences to be concurrent and when consecutive
>
> (1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment

> concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

Id §921.16.

In Benvard, this Court determined how conflicts between the statutory mechanism and other court rules were to be resolved when it held:

> Pursuant to this statute, a sentence for a separate offense not charged in the indictment or information is consecutive to a previously imposed sentence when the sentencing court is silent.
>
> [4] We recognize direct conflict exists between Rule of Criminal Procedure 3.722, adopted February 1, 1973, and Section 921.16, Florida Statutes (1973). Our Rule of Criminal Procedure 3.722 directs that sentences are concurrent unless affirmatively designated as consecutive by the sentencing court. In our opinion, the statute must prevail over our rule because the subject is substantive law.

Id. at 475.

Just as the statutory provision controlled over the rule provision, it also controls over other non-statutory sentencing mechanisms and authorizes the sentence imposed on petitioner.

In case number 90-8728CF (R V 460), petitioner was convicted of an attempted armed robbery (R V 463) and sentenced to seven years in prison. (R V 460) After serving about four years, (R V 461) he was released on control release. (R V 460) [1]

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[1] Control Release is a prison population control mechanism designed to relieve prison overcrowding, see §947.146 Fla. Stat.

In 1995, petitioner was arrested for and subsequently convicted of possession of cocaine. (R I 58) Under the terms of §921.16 Fla. Stat. (1995), the sentence for possession of cocaine was as a matter of law to be consecutive to any other sentence unless the judge directed that it be run concurrent. See Bruce v. State, 679 So.2d 45 (Fla. 4th DCA 1996). Petitioner requested a concurrent sentence, however, the trial court refused the request and directed the sentence to be consecutive. (R V 461-464) The lower tribunal affirmed this directive finding that it was conformance with the statutory provisions on release violations and in accord with the legislature's determination of how sentences are to be served. Scantling v. State, 22 Fla. L. Weekly D1491 (Fla. 1st DCA June 21, 1997).

Petitioner argues that because his control release had not been revoked when the sentence was entered that this directive of the legislature must give way before the requirement that sentences cannot be made consecutive to a sentence yet to be imposed.

Petitioner's argument is illogical and unsupported by any statutory provision. Petitioner's first mistake is to equate the decision of what to do about his control release violation with a sentence. A sentence is a punishment imposed for a specific crime. It is controlled by Chapter 921 Fla. Stat. and Fla. R. Crim. P. rules 3.700, 3.701, 3.702, 3.703 and 3.720. A sentence must be imposed by a court. Petitioner was sentenced to seven years incarceration for his attempted armed robbery. Absent

legal modification through an appeal or post conviction motion, he could not be constitutionally sentenced again for that offense.

When a prisoner has his parole or control release revoked his original sentence is not altered and the prisoner is not resentenced. The statutory provision §947.141 makes this clear where it provides how the parole commission may treat a violation. In pertinent part the statute provides:

> By such order, the panel may revoke conditional release, control release, or conditional medical release and thereby return the releasee to prison to serve the sentence imposed, reinstate the original order granting the release, or enter such other order as it considers proper.

§947.141(4), Fla. Stat.

Thus, the commission is limited to dealing with a prisoner's release status and has no authority over the prisoner's sentence. If the release is revoked, the prisoner is merely recommitted to serve out the remainder of his previously imposed sentence. This interpretation of the statutory provision is in accord with the statutory and rule requirement a sentences must be imposed by a court. It is also in accord with Florida's strict separation of powers requirements. Therefore, petitioner's argument that the action of the parole commission on the release violation is a sentencing lacks any legal foundation and must be rejected.

Moreover, this Court has previously rejected petitioner's argument. The issue of how the consecutive sentencing statute was to be applied when a defendant violates his prison release program arose years ago in the context of parole revocations. In

1973, this Court in Brumit v. Wainwright, 290 So.2d 39 (Fla. 1973), settled how such sentences were to run when it held:

> [4] We recognize that our courts have previously approved of parole revocations effective upon the expiration of sentence for an unrelated offense in such cases as Simmons v. State, 217 So.2d 343 (Fla.App.2d 1969) ; Duchein v. Cochran, 127 So.2d 97 (Fla.1961), and Johnson v. State, 185 So.2d 466 (Fla.1966). We have reconsidered the rule of those cases in light of our decisions in Law and Adams, and we today overrule those cases to the extent that they allow parole revocation to be made effective upon the completion of a sentence imposed for an offense while the prisoner was on parole, or to be made effective In futuro upon similar future occurrence or condition. We also overrule all other cases to like effect.
>
> [5] We therefore hold that the revocation of parole was effective as of the date upon which the revocation order was entered (November 15, 1965), and that petitioner, even prior to such formal revocation was, upon his earlier confinement of August 26, 1965, thereupon immediately recommencing the serving of his sentence for armed robbery. The firearms sentence must Follow the termination of the earlier sentence.

Brumit, at 42.

Shortly thereafter in the case of Benyard v. Wainwriaht, 322 So.2d 473 (Fla. 1975), this Court had occasion to address the application of Brumit. This Court reaffirmed the holding in Brumit stating:

> These cases hold that the Commission is prohibited from delaying the effective date of a parole revocation until the completion of the new sentence for the offense causing the revocation. They require that the first sentence imposed must be the first served.

Benvard v. Wainwriaht, 322 So.2d 473, 474 (Fla. 1975).

Pursuant to Brumit and Benvard, when the petitioner was incarcerated in 1995 on his cocaine charge and a detainer issued, he again began serving his old seven year sentence. Therefore,

the imposition of the one year sentence for the cocaine conviction consecutive to the old seven year sentence for attempted armed robbery did not amount to the imposition of a sentence consecutive to a sentence yet to be imposed. Thus, the lower tribunal properly affirmed the sentence imposed on petitioner by the trial court.

Petitioner's reliance on Lyons v. State, 672 So.2d 654 (Fla. 4th DCA 1996) and Currelly v. State, 678 So.2d 453 (Fla. 1st DCA 1996), is misplaced. Lyons and Currellv are little more than citation PCA's in which the courts assumed that a release violation resulted in a new sentence without analyzing the issue, the rules, or, the statutes involved. These cases provide no support for his argument because their basic assumption is flawed.

Additionally, petitioner's argument is not supported by the the holding in the case of Smith v. State, 515 So.2d 363 (Fla. 4th DCA 1987). Smith, was sentenced to nine years in prison to run consecutively with the sentence that he was presently on parole for and any other pending case. The court held that the trial court erred in requiring the sentence to be served consecutively to a sentence which has not yet been imposed on other pending charges. The opinion does not state that it is error to run the new sentence consecutive to the case upon which he was on parole.

Petitioner provides no case law which distinguishes his case from Brumit and he provides no statutory or rule authority for

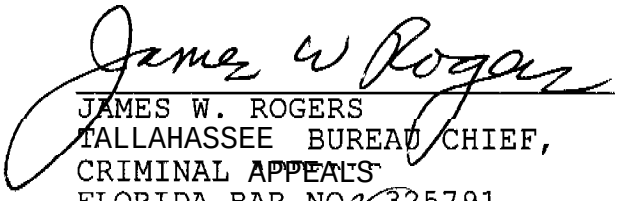
the proposition that 5921.16 Fla. Stat. does not authorize the sentence in this case to be consecutive. Moreover, he provides no authority for the proposition that a revocation of control release by the Parole Commission is a sentence. Therefore, this Court should affirm the decision of the lower tribunal which is supported by case law from this Court and is in accord with the sentencing dictates of the legislature.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal Scantlina v. State reported at 22 Fla. L. Weekly D1491 (Fla. 1st DCA June 21, 1997), should be approved, and the sentence entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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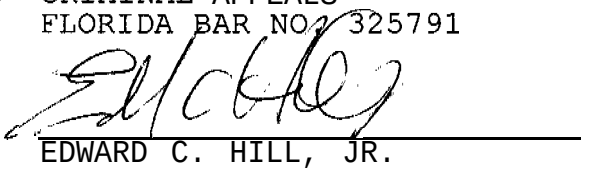

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Paula S. Saunders, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 21st day of November, 1997.

Edward C. Hill, Jr.
Attorney for the State of Florida

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