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IN THE SUPREME COURT OF FLORIDA

TEAYOIR SCANTLING,

Petitioner,

v. CASE NO. 90,968

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

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I PRELIMINARY STATEMENT

Petitioner, TEAYOIR SCANTLING, was the defendant in the trial court and appellant in the First District court of Appeal. Respondent, the State of Florida, was the prosecution and the appellee, respectively. The parties will be referred to in this brief as they appear before this Court.

The record on appeal consists of one volume of pleadings and four volumes of transcript. The record will be designated by the appropriate volume and page numbers in parenthesis.

II STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information filed January 2, 1996, with one count of possession of cocaine on December 18, 1995 (I, p. 7). Following a jury trial on April 16, 1996 (II, p. 172 - IV, p. 452), he was found guilty as charged (I, p. 58; IV, p. 447).

Petitioner was sentenced on April 26, 1996. Petitioner's mother addressed the court prior to sentencing and related that petitioner had been residing with her, working and assisting with bills, and helping with his two brothers since his release from prison on control release. He had also been reporting to his control release officer (IV, p. 458-459).

Defense counsel noted that petitioner had a retainer on him due to the fact that he was on control release at the time of the instant offense and would "likely be serving an additional sentence for the parole which is solely based upon this case" (IV, p. 460). According to defense counsel, petitioner had been sentenced to seven years in Case No. 90-8728-CF and had served approximately four years of that sentence. Counsel asked the court to impose a sentence to run concurrent with any sentence imposed on the violation of control release (IV, 460-462).

The state rejected the notion that petitioner "deserve[d] any special treatment because he is going to have to go back on the

underlying charge" and asked the court to sentence petitioner to 18 months under the sentencing guidelines (IV, p. 463).[1]

The judgment and sentence in Case No. 90-8728-CF was not introduced into evidence, nor did the state present any evidence of a detainer, revocation proceeding or commitment order on the violation of control release.

The trial court sentenced petitioner to a term of 12 months and one day in state prison and ordered the sentence to be served consecutive to the sentence "he is currently serving in Case No. [90]-8728 CF of this Court" (I, p. 59-63; IV, 464).

On direct appeal, petitioner argued that because the sentence in Case No. 90-8728-CF had not yet been imposed, it was error for the trial court to order that the sentence in the present case run consecutive to an undetermined future sentence in the earlier case. The Criminal Division of the First District Court of Appeal, sitting en *banc*, affirmed petitioner's consecutive sentence but acknowledged conflict with Lvons v. State, 672 So. 2d 654 (Fla. 4th DCA 1996). This appeal follows.

'The undisputed sentencing guidelines range was 10.95 to 18.25 months in prison (I, p. 65; IV, p. 460, 463).

II SUMMARY OF THE ARGUMENT

Petitioner contends the trial court erred in ordering his sentence to run consecutive to any undetermined future sentence imposed in Case No. 90-8728-CF for violation of his control release. The evidence was undisputed that petitioner violated the conditions of his control release when he committed the instant felony offense of possession of cocaine. However, the Parole Commission had not revoked petitioner's control release status at the time of his sentencing for the instant offense, and it was uncertain whether the commission would reinstate the sentence in Case No, 90-8728-CF, reinstate his control release, or enter some other order. Consequently, the sentence for the control release violation was not determined.

IV ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED BY IMPOSING A SENTENCE IN THIS CASE TO RUN CONSECUTIVE TO A SENTENCE THAT HAD NOT YET BEEN IMPOSED.

Petitioner was on controlled release in Case No. 90-8728-CF at the time the instant offense was committed. Although he was admittedly in violation of his control release when he committed the felony offense of possession of cocaine, and there existed a strong possibility that he would be sent back to prison, the Parole Commission had not revoked his control release status at the time of his sentencing for the instant offense. Nonetheless, the trial court ordered that petitioner's sentence in the instant case run consecutive to any sentence imposed on the violation of control release. This was error.

The law is well settled that a court may not impose a sentence to be served consecutively to a sentence that has yet to be imposed in an unrelated case. Marino v. State, 635 So. 2d 1068 (Fla 5th DCA 1994); Schlosser v. State, 554 so. 2d 1183 (Fla. 2d DCA 1989); Smith v. State, 515 So. 2d 363 (Fla. 4th DCA 1987); McCall v. State, 475 so. 2d 1364 (Fla. 2d DCA 1985); Teffeteller v. State, 396 So. 2d 1171 (Fla. 5th DCA 1981). As recognized in Johnson v. State, 538 So. 2d 553 (Fla. 2d DCA 1989), the only limitation on a

consecutive sentence is that it may not run consecutive to a sentence yet to be imposed on another offense, The rationale is that a sentence must commence on a definite date. Percival v. State, 506 So.2d 66, 67 (Fla. 2d DCA 1987). When a sentence is ordered to commence at the expiration of another sentence, the record must reflect the terms of the other sentence. Teffeteller, ***relying on*** Wallace v. State, 41 Fla. 547, 26 So. 713 (Fla. 1899).

In Smith v. State, the defendant **was** sentenced to nine years in prison to run consecutive to the sentence for which he **was** then on parole. The Fourth District Court held it was error to require the sentence to be served consecutively to an expected sentence which had not yet been imposed. In Lyons v. State, the Fourth District applied the same principle to an undetermined future sentence for a violation of control release. There, the court held that it was error to order the sentence in the present case to run "consecutive to any CRD violation and/or any sentence now being served" because the sentence for "CRD violation" had not yet been imposed. 672 So. 2d at 654.

The First District followed the holding of Lyons in Currelly v. State, 678 So. 2d 453 (Fla. 1st DCA 1996), and held it was error to order the defendant's sentence to run consecutive to 'any sentence received for violation of control release in 90-4107-CF,"

noting that the sentence for the violation of control release was an undetermined future sentence. The First District, sitting *en banc*, receded from Currelly in the instant case, reasoning that an inmate on control release has already been sentenced for the earlier offense and does not receive a new sentence.

> [W]e disagree with the apparent assumption in *Currelly* and *Lyons* that a violation of control release will result in a new and undetermined sentence to be imposed in the future. An inmate on control release has already been sentenced for the earlier offense, and pursuant to section 947.141(4), Florida Statutes, an inmate violating control release may be returned to prison for the continued service of that sentence, Because this is not a new sentence, and the inmate is instead imprisoned under a sentence which has previously been determined and imposed, a separate consecutive sentence for another offense committed while on control release is not thereby precluded.

Scantling v. State, 22 Fla. L. Weekly D1491 (Fla. 1st DCA 1997). This holding erroneously assumes that upon a violation of control release, the Parole Commission will automatically revoke the defendant's control release and reinstate the previously imposed sentence.

Section 947.146, Fla. Stat. (Supp. 1996), provides that when the Control Release Authority has reasonable grounds to believe that an offender released on control release has violated the terms and conditions of his release, such offender shall be subject to the provisions of Section 947.141, Fla. Stat. Section 947.141

applies to violations of conditional release, control release and conditional medical release, and provides that when an offender who is on release is arrested on a felony charge, the offender must be detained until an initial appearance for the determination of probable cause. If no probable cause for the arrest is found, the offender may be released; if probable cause is found, that determination also constitutes reasonable grounds to believe that the offender violated the conditions of release, The Parole Commission then decides whether to issue a warrant charging the offender with violation of the conditions of release. Upon issuance of the commission's warrant, the offender must be held in custody pending a revocation hearing. Section 947.141(2), Fla. Stat. If an offender is found in violation of the conditions of release following the revocation hearing, the commission may revoke and return the releasee to prison to serve the sentence imposed, reinstate the original order granting the release, order the placement of a releasee into a local detention facility as a condition of supervision for a period not to exceed 22 months, or enter such other order as it considers proper. Section 947.141(4, 5), Fla. Stat.

The statute makes clear that revocation of control release is discretionary when the offender is found in violation. While the

Parole Commission may revoke conditional release and return the offender to prison to serve the remainder of the sentence imposed, the commission also has the authority to reinstate the original order granting the release, order the offender to serve up to 22 months in a local detention facility as a condition of continued supervision, or enter such other order as it considers proper.

The First District's holding in the instant case overlooks the fact that revocation of control release upon commission of a new offense is discretionary. Since it is uncertain whether the original sentence for the earlier offense will be reinstated, or whether control release will be reinstated or the defendant placed in a local detention facility as a condition of continued supervision on control release, the disposition for violation of control release remains an undetermined future sentence.

Petitioner's control release in Case No. 90-8728-CF had not been revoked when he was sentenced in the instant case. While it was *possible* his original sentence for the earlier offense would be reinstated and petitioner would be returned to prison for the continued service of that sentence, this disposition was neither mandatory under Section 947.141 nor certain. Smith v. State, (error to require sentence to be served consecutive to an expected sentence which had not yet been imposed). Consequently, the trial

court did order the sentence in the present case to run consecutive to an *undetermined future* sentence. The imposition of a consecutive sentence under these circumstances is contrary to the well settled law that a court may not impose a sentence to be served consecutively to a sentence that has yet to be imposed in an unrelated case.

This Court should resolve the inter-district conflict by quashing the decision under review and approving the holdings of the Fourth District in Smith and Lyons.

V CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, petitioner requests that this Court quash the opinion of the district court and strike the portion of his sentencing order which requires that the sentence be served consecutive to any future sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Edward C. Hill, Jr., Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 1st day of November, 1997.

Paula S. Saunders

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