

IN THE SUPREME COURT OF FLORIDA

*Orig + 7*  
**FILED**

SID J. WHITE

DEC 17 1997

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

TEAYOIR SCANTLING,  
Appellant,

v.

CASE NO. 90,968

STATE OF FLORIDA,  
Appellee.

---

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

PAULA S. SAUNDERS  
ASSISTANT PUBLIC DEFENDER  
LEON COUNTY COURTHOUSE  
SUITE 401  
301 SOUTH MONROE STREET  
TALLAHASSEE, FLORIDA 32301  
(850) 488-2458

ATTORNEY FOR APPELLANT  
FLA. BAR NO.

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS

TABLE OF CITATIONS

ii

PRELIMINARY STATEMENT

1

ARGUMENT

2

ISSUES ENTITLED

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

2

CONCLUSION

8

CERTIFICATE OF SERVICE

9

TABLE OF AUTHORITIES

PAGE(S)

CASES

Benvard v. Wainwright, 322 So. 2d 473 (Fla. 1975) . . . . . 4  
Bruce v. State, 679 so. 2d 45 (Fla. 4th DCA 1996) . . . . . 3  
Brumit v. Wainwright, 290 So. 2d 39 (Fla. 1973) . . . . . 4

STATUTES

Section 921.16(1), Florida Statutes . . . . . 2-4  
Section 947.141(14, 5), Florida Statutes . . . . . 5

IN THE SUPREME COURT OF FLORIDA

TEAYOIR SCANTLING,

Petitioner,

v.

CASE NO. 90.968

STATE OF FLORIDA,

Respondent.

---

**PETITIONER'S REPLY BRIEF ON THE MERITS**

I PRELIMINARY STATEMENT

This brief is submitted in reply to Respondent's Answer Brief on the Merits. The answer brief will be referred to herein as "AB" followed by the appropriate page number in parenthesis. All other references will be set forth as designated in Petitioner's Brief on the Merits.

## II 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.

Respondent initially argues that under Section 921.16(1), Florida Statutes, the trial court was both authorized and required to run petitioner's sentence for possession of cocaine consecutive to the sentence imposed for violation of his control release. Respondent's reliance on Section 921.16, Fla. Stat., is unpersuasive. That statute essentially gives trial judges discretion whether to impose concurrent or consecutive sentences. Under the statute, there is a presumption that sentences for two or more offenses charged in the same information or indictment be served concurrently unless the court directs that the sentences be served consecutively; sentences for offenses not charged in the same information or indictment are presumed to be consecutive unless the court directs that they be served concurrently.

The sentencing court below was not silent as the sentencing disposition but did, in fact, impose consecutive sentences for two offenses not charged in the same information. The problem, however, is that the first of those consecutive sentences was uncertain. While Section 921.16 authorizes the imposition of

consecutive sentences, it does not resolve the problem presented here where a sentence is ordered to run consecutive to an undetermined or uncertain sentence for a violation of control release from an unrelated prior conviction.

Respondent contends that under Section 921.16, "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" (AB 5) and refers to Bruce v. State, 679 So. 2d 45 (Fla. 4th DCA 1996). Bruce does not stand for this proposition.

In Bruce, the defendant entered a plea agreement whereby he would be sentenced to seven years imprisonment for the present charges which **was** to run concurrent with the remainder of the sentence for violation of his conditional release in an unrelated case. The trial court, concluding that it had no authority to order that the sentences run concurrent, only recommended that they run concurrent in the sentencing order. The Department of Corrections treated the sentences as consecutive, and Bruce filed a motion for post-conviction relief below seeking to have the sentencing imposed in the latter case run concurrent with his control release sentence. On appeal from the denial of his motion for post-conviction relief, the court held that contrary to the assumption of the sentencing judge, the legislature vested trial

courts with discretion to impose either concurrent or consecutive sentences in independent cases, citing Section 921.16(1), Fla. Stat. The court noted that where the trial court fails to specify whether sentences imposed for offenses not charged in the same information or indictment be served concurrently, Section 921.16(1) dictates that such sentences be served consecutively but imposition of consecutive sentences is not mandatory. Since Bruce entered his plea upon the express condition that his sentence be served concurrent with his control release sentence to be imposed in the prior case, the sentence was reversed and the case remanded with instructions to run the present sentence concurrently with the sentence imposed by the Department of Corrections for violation of control release.

Even Benyard v. Wainwright, 322 So. 2d 473 (Fla. 1975), upon which respondent relies, recognizes that trial courts have discretion to run sentences concurrently or consecutively. ~~Benyard~~ and Brumit v. Wainwright, 290 So. 2d 39 (Fla. 1973), both hold that the first sentence imposed must be served first and that the Parole 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. Respondent's reliance on Benyard and Brumit, however, is misplaced. Even though a sentence for a

subsequent offense must follow a prior sentence which is reinstated upon a parole revocation, that assumes that parole will be revoked and the prior sentence reinstated. However, where the Parole Commission has discretion whether to revoke control release status and reinstate the prior sentence or impose other conditions of release, it cannot be assumed that control release will be revoked such that the subsequent sentence can only be served consecutive to the prior sentence.

Contrary to respondent's argument, petitioner has not suggested that he should or could be resentenced for the attempted armed robbery upon violation of his control release. The Parole Commission cannot modify or change petitioner's seven year sentence, but it does have discretion whether to return petitioner to prison to serve the remaining portion of the sentence imposed, reinstate the original order granting the release, order petitioner's placement 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. Because the disposition upon violation of control release is discretionary, and it is uncertain whether the original sentence will be reinstated, a sentence for a subsequent offense cannot be ordered to run consecutive to the sentence for the prior



offense unless control release has already been revoked and the original sentence reinstated. To hold otherwise would lead to piecemeal sentences whereby a defendant could begin serving a new sentence, which would be interrupted when control release is revoked and resumed upon completion of the remaining portion of the original sentence.

The problem here is really a matter of timing. If the trial court determines that consecutive sentences are appropriate, it should stay sentencing for the subsequent offense pending the Parole Commission's action on the violation of control release. Had the Parole Commission revoked petitioner's control release and reinstated the remaining portion of his previous sentence before his sentencing for the subsequent offense, the trial court could have ordered the subsequent sentence to run consecutively because there would have been a date certain for the consecutive sentence to begin. Since the Parole Commission had not acted prior to petitioner's sentencing, it was uncertain what action the Commission would take and whether the prior sentence would in fact be reinstated. Consequently, petitioner's sentence was ordered to run subsequent to an uncertain future sentence, Although the length of the sentence to be served upon a revocation of control release was certain, the actual disposition for the violation of

control release was still undetermined at the time of petitioner's sentencing.

In conclusion, petitioner does not dispute that a trial court has discretion to run sentences concurrently or consecutively; he does maintain, however, that his sentence for possession of cocaine could not be ordered to run consecutive to his sentence for violation of control release until such time as his control release was revoked and he was ordered to serve the remaining portion of his previously imposed seven year sentence. Until such time, the disposition for the control release violation was uncertain and, under the authorities cited in petitioner's brief on the merits, it was error to order his new sentence to run consecutive to an undetermined sentence.

III CONCLUSION

Based upon the foregoing argument, as well as that in petitioner's Brief on the Merits, petitioner requests that this Court quash the decision of the district court and remand with directions that the trial court strike that portion of its sentencing order which requires that the sentence be served consecutive to any future sentence.

Respectfully submitted,

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

Paula S. Saunders

PAULA S. SAUNDERS  
Assistant Public Defender  
Florida Bar No. 308846  
Leon Co. Courthouse, #401  
301 South Monroe Street  
Tallahassee, Florida 32301  
(850) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Edward Hill, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 16<sup>th</sup> day of December, 1997.

Paula S. Saunders

PAULA S. SAUNDERS