ORIGINAL

IN THE SUPREME COURT OF FLORIDA

MARK CHARLES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

DCA CASE NO. 98-871
CASE NO. 95,753

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The Petitioner, MARK CHARLES, was convicted of one count of lewd and lascivious assault upon a child under the age of sixteen in case 89-1569 CF-M, and three counts of lewd and lascivious assault upon a child under the age of sixteen in case 89-1910CF-M, second degree felony violations of Section 800.04 (2), Florida Statutes (1988). (SR 69-72; R 47-56)[1] Charles was sentenced to fifteen years in prison in case 89-1569, to be followed by consecutive probationary periods of fifteen years, in each of the three counts (i.e., 45 years) in case 89-1910. (R 48-56) With credit for time served, Charles completed his prison sentence after six years, and began serving his probationary period on August 26, 1996. (R 34-35; SR 72) On September 5, 1997 an affidavit of violation of probation (VOP) was filed, alleging a new law violation, that the Appellant had exposed his genitals to his seven-year-old granddaughter in Tennessee. (R 1, 76-77)

At his VOP hearing on January 16, 1998 before the Honorable William Parsons, Charles entered a best interests,"no contest" plea to violation of condition

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[1]The record-on-appeal consists of a single volume containing the transcript of record and sentencing (R 1-28; R 29-46), and two supplemental volumes: one containing additional transcript of record, and the transcript of the plea hearing (SR 47-68; SR 69-79), and a second supplemental volume containing the original judgment and sentence in case 89-1569-CF (SR 69-72).

five of his probation, and the court ordered preparation of a pre-sentence investigation (PSI). (R 70, 77-78) The Petitioner claimed that the new law violation resulted from an innocent act, but that he had entered his plea to save his granddaughter from having to testify at trial. (SR 76-77; R 43) At his sentencing hearing before Judge Parsons, Charles explained:

> Your Honor, when my granddaughter walked through that door, it was an innocent act, but when she went to mamma's four months later now, nothing was ever said. Four months later my granddaughter said to mamma, I seen grandpa's wee-wee. From that point on, she didn't call my son, she didn't call my daughter, she called the police. When she called the police, they checked my record, sure enough I'm on probation for a sexual case. Hence, I was on a quick railroad, Your Honor. And that is the truth.

(R 43) Consistent with the report on the charges, the Petitioner claimed that he had been changing his clothes in the basement laundry room, and the seven year old came to the door. (R 41)

Defense counsel complained, at sentencing, that there had been no PSI, and that he didn't "have one scrap of paper" telling him from where the facts averred by the state, were coming. (R 30, 36) His counsel contended that Charles should get credit for the time served on the primary offense in case 89-1569, but the State claimed that the two cases had nothing to do with one another. (SR 72; R 34)

The defense argued two bases for mitigation of sentence for the violation of probation: that Charles "immediately cooperated with the authority, entered into a plea and gave nobody any trouble, and in essence, said he was sorry that this thing had happened, and that his plea to the new law violation was solely for the purpose of keeping his granddaughter out of court. (R 41) Defense counsel requested a low end guidelines sentence of twelve years. (R 42, 44) The State did not have a copy of the new law conviction, but relying upon a conversation that someone had had with "the people up there in Tennessee," maintained that the Petitioner was going back to his old ways and deserved a maximum sentence of twenty two years in prison. (R 42-44)

The court revoked the Appellant's probation and sentenced him to twenty years in prison, fifteen years in count one, and two and one half years each, on counts two and three. (R 44-45)

On appeal, Charles raised the court's refusal to credit time served and credited on the primary offense to the sentence imposed upon revocation of consecutive probation. However, the district court issued a per curiam affirmance citing the cases of ***Howard v. State***, 705 So.2d 947, 948 (Fla. 1st DCA 1998) and ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998)(discretionary review pending in this Court), as controlling authority for the affirmance. ***Charles v.***

State, 24 Fla. L. Weekly D1091 (Fla. 5th DCA April 30, 1999). ***Maddox*** holds that the Criminal Appeal Reform Act as codified in Section 924.051, Florida Statutes (1996) has eliminated the concept of fundamental error at least as it had been previously applied to the sentencing context. **Id** at 619.

A defense motion to stay issuance of mandate pending this court's decision on ***Maddox*** was denied on May 20, 1999.

Relying on ***Jollie v. State***, 405 So.2d 418 (Fla. 1981) (conflict jurisdiction lies where the district court has issued a per curiam affirmance citing, as controlling authority, a case pending discretionary review before the Supreme Court), the Petitioner filed his Notice to Invoke the Discretionary Jurisdiction of this Court on June 1, 1999, and his jurisdictional brief on June 11, 1999.

This Honorable Court issued its order accepting jurisdiction on August 26, 1999. A thirty day extension of time was granted the Petitioner for filing this brief on the merits.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal affirmed the trial court's refusal to credit the fifteen years served on the primary offense, to the sentence imposed upon revocation of the consecutive forty five year probationary sentence in counts one through three of the instant case. *See* ***Tripp v. State***, 622 So.2d 941 (Fla. 1993). Because the underlying offenses were committed before October 1, 1989, the Petitioner is also entitled to credit for accrued gain time as the functional equivalent of time spent in prison. Although it may be argued that this right was not properly preserved for appeal, it should still be cognizable since the error is apparent on the face of the record, and the trial court had notice of the defense request for the credit.

By citing a case as controlling authority for its decision, which is pending review of this Court, and which directly and expressly conflicts with decisions of this Court or other district courts of appeal on the same issue of law, the Fifth District Court has extended that conflict to this case. The Florida Supreme Court is asked to exercise its jurisdiction to grant the credit for time served and credited which is due based upon the face of the record.

ARGUMENT

THE FIFTH DISTRICT COURT'S RELIANCE UPON ***MADDOX***, IN REFUSING TO GRANT CREDIT FOR TIME SERVED ON THE PRIMARY OFFENSE TO THE SENTENCE IMPOSED UPON REVOCATION OF CONSECUTIVE PROBATION IN THE COMPANION OFFENSES, IS IN ERROR AND REQUIRES REVERSAL.

Defense counsel contended that Charles should get credit for the time served on the primary offense in case 89-1569, but the state claimed that the two cases had nothing to do with one another. (SR 72; R 34) His counsel complained, at sentencing, that there had been no PSI, and that he didn't "have one scrap of paper" telling him from where the facts averred by the state, were coming. (R 30, 36)

On July 3, 1990 the Petitioner had been sentenced to fifteen years in prison for a single count of lewd and lascivious assault in the presence of a minor under the age of sixteen, in case 89-1569, and consecutive terms of fifteen years probation in each of three counts of the same offense in case 89-1910. (SR 48-56, 69-72) The Petitioner's sentence on the primary offense was completed, and he was released from prison in 1996. (R 35) On February 24, 1998 the Petitioner was adjudicated guilty of violating his probation, his probation was revoked, and he was sentenced to twenty years in prison on the VOP for the three counts in 89-

1910, based upon a one-cell bump of his guidelines score of 397, or a range of twelve to twenty-two years. Despite documentation that the Petitioner had fifteen years of prison credited by completion of his sentence on count one of the primary offense on the same score sheet, the court erred by refusing to take account of the fifteen years already served, in imposing the twenty year sentence. *See* ***Tripp v. State***, 622 So.2d 941 (Fla. 1993).

In ***Tripp v. State***, the Florida Supreme Court ruled that where a trial court imposed a term of probation on one offense consecutive to sentence of incarceration on another offense, credit for time served on the first offense *had to be awarded* on the sentence imposed after revocation of probation on the second offense. [Emphasis added.] ***Id.*** To hold otherwise would allow trial judges to easily circumvent the sentencing guidelines by imposing a maximum incarcerative sentence for a primary offense, followed by probation on the other count, violation of which would enable imposition of an additional maximum incarcerative period. ***Id.*** at 942. Absent the award of credit for time served on the primary offense, the incarcerative period would defeat the intention of the sentencing guidelines. This holding is applicable to the instant case on appeal, wherein the Petitioner was sentenced pursuant to the guidelines as provided by law. Fla. Stat. Section 921.001 (4)(b)(1) (1997).

In addition, the Petitioner's underlying offenses were all committed in 1988. (R 10-11; SR 47) Where, as here, the crimes were committed prior to October 1, 1989, credit for time served includes jail time actually served and gain time granted pursuant to section 944.275 Florida Statutes (1991). ***Slater v. State***, 639 So.2d 80 (Fla. 2d DCA 1994); ***State v. Green***, 547 So.2d 925 (Fla. 1989). The Petitioner is entitled to be credited with fifteen years served and credited in the primary offense because at that time "accrued gain time was the functional equivalent to time spent in prison." ***State v. Green***, 547 at 926. As a result, the fifteen years served and credited on count one of case #89-1569 must be credited to the twenty year incarcerative sentence imposed upon revocation of probation in the secondary offenses. ***Forbes v. Singletary***, 684 So.2d 173, 175 (Fla. 1996).

The Petitioner recognizes recent authority which holds that the failure to raise this issue at sentencing, or through a timely post-sentencing motion, waives the matter for purposes of appeal. ***Howard v. State***, 705 So.2d 947 (Fla. 1st DCA 1998). However, the Petitioner maintains that where, as here, an unpreserved sentencing error is apparent on the face of the record, to the extent that the unpreserved right would have otherwise inevitably resulted in correction of his sentence, the conclusion that the Petitioner received ineffective assistance of counsel requires remand and correction of the sentence. ***Mizell v. State***, 23 Fla. L.

Weekly D1978 (Fla. 3rd DCA August 31, 1998). ***Mizell*** held that where unpreserved error would otherwise inevitably have resulted in correction of the sentence, the matter is cognizable on appeal since it falls within the "limited, but controlling exception to the rule that ineffectiveness claims may not be raised on direct appeal which applies when 'the facts giving rise to such a claim are apparent on the face of the record.'" ***Id***. There, in order to avoid the legal churning" which would be involved in making the parties do the long way what it could do the short, the court ordered amendment of the sentence upon remand. ***Id***.

The contrary holding of the Fifth District Court of Appeal in ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA), ***review granted***, No. 92,805 (Fla. 1998), relied upon as authority for refusing to grant the credit to which the Petitioner is entitled, held that *no* sentencing error, even entry of an illegal sentence may be heard on appeal without being preserved below. However, the Petitioner requests that this Court factor the unfairness and inefficiency of the result in his case into its pending review of ***Maddox*** to the extent that it governs unpreserved, obvious sentencing error which can be addressed on appeal as fundamental because the sentence is illegal, and to address the point raised in this appeal. See ***Nelson v. State***, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998) (en banc) (holding that illegal sentences constitute fundamental error cognizable for the first

time on appeal); ***Harriel v. State***, 710 So.2d 102, 104 (Fla. 4th DCA 1998) (en banc) (same).

The Petitioner also notes recent authority which holds that the specific sentencing error alleged in his case is cognizable at any time by a Rule 3.800 (a) motion to correct an illegal sentence. ***Staschak v. State***, 23 Fla. L. Weekly D2288 (Fla. 2d DCA October 9, 1998). In the interests of judicial economy, this Honorable Court should exercise its jurisdiction to correct the obvious sentencing error of failing to credit time served and credited on the primary offense sentenced on the same scoresheet, at the same proceeding. In the instant case, although the defense counsel made a valiant effort to represent the Petitioner's interests, raising credit for time served on the primary offense at the time of plea, he was given no notice of the change in the State's position at sentencing, and was furnished with inadequate documentation by the State, essentially being told that 'this is the way it works' by the both the State and the court.

The trial court reversibly erred in refusing to credit time served on the primary offense, in imposing sentence on revocation of probation in the secondary offenses. Even if this Court determines that the error has not been preserved, it is urged that, since the error is apparent on the face of the record, it is cognizable on appeal. In view of the fifteen years of incarceration credited as served by the

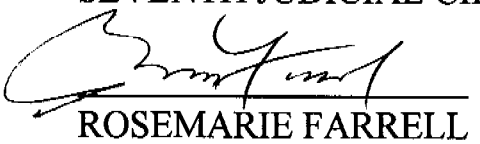
Petitioner regarding the primary offense, the sentence of twenty years in prison for violation of probation on the additional offenses in 89-1910 must be vacated, and the matter remanded for re-sentencing.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the Petitioner requests that this Honorable Court vacate the decision of the Fifth Court of Appeal, and remand for re-sentencing with directions to credit time served and credited on the primary offense pursuant to this Court's previous holdings in ***Tripp*** and ***Green***, to the sentence imposed upon revocation of consecutive probation.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to Mark Charles, this 18th day of October, 1999 .

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman.

ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

MARK CHARLES,

Petitioner,

vs.

DCA CASE NO. 98-871
CASE NO. 95,753

STATE OF FLORIDA,

Respondent,

APPENDIX

So. 2d 831 (Fla. 1997). (BOOTH, JOANOS and WEBSTER, JJ., CONCUR.)

* * *

DWAYNE A. ILES, Appellant, v. GREG DRAKE, et al., Appellee. 1st District. Case No. 98-3312. Opinion filed April 27, 1999. An appeal from the Circuit Court for Taylor County. James Roy Bean, Judge. Counsel: Appellant, pro se. Robert A. Butterworth, Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) DISMISSED. Such dismissal is without prejudice to appellant's right to file a timely notice of appeal upon rendition of a final order in the case below. (WOLF, KAHN and LAWRENCE, JJ., CONCUR.)

* * *

SABINA MARIA VAN TUYN, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 98-1429. L.T. Case No. 86-34279. Opinion filed April 28, 1999. An appeal from the Circuit Court for Dade County, Robert N. Scola, Jr., Judge. Counsel: Frederick C. Sake, for appellant. Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, for appellee.

(Before COPE, GODERICH, and GREEN, JJ.)

(PER CURIAM.) Based upon this court's decision in *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA), *review granted*, 722 So. 2d 193 (Fla. 1998), the appellant's petition for writ of error coram nobis was properly denied.

Affirmed.

* * *

RODERICK D. CLARK, Appellant, vs. METRIC ENGINEERING, INC., Appellee. 3rd District. Case No. 98-1805. L.T. Case No. 96-15144. Opinion filed April 28, 1999. An Appeal from the Circuit Court for Dade County, Alan L. Postman, Judge. Counsel: Cone & Cone; Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, and Joel S. Perwin, for appellant. Daniels, Kashtan & Fornaris, and John E. Oramas, for appellee.

(Before GERSTEN, GODERICH, and GREEN, JJ.)

(PER CURIAM.) Affirmed. *See Clark v. L. & A. Contracting Co.*, 23 Fla. L. Weekly D2692 (Fla. 3d DCA Dec. 9, 1998); *Metropolitan Dade County v. Colina*, 456 So. 2d 1233 (Fla. 3d DCA 1984), *review denied*, 464 So. 2d 554 (Fla. 1985). (GERSTEN and GODERICH, JJ., concur.)

(GREEN, J., specially concurring.) By virtue of this court's denial of the motion for en banc rehearing of *Clark v. L. & A. Contracting Co.*, 23 Fla. L. Weekly D2692 (Fla. 3d DCA Dec. 9, 1998) (Shevin, J., dissenting), I agree that we are compelled to affirm the summary judgment in this cause. However, with all due respect, I believe that *Clark* was not correctly decided for the reasons expressed in Judge Shevin's dissent in that case. *See id.* at D2692.

* * *

JOSE MENDEZ, Appellant, vs. JOSE MIGUEL BATTLE, et al., Appellees. 3rd District. Case No. 98-2240. L.T. Case No. 97-25817. Opinion filed April 28, 1999. An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: John J. Spittler, Jr., for appellant. Robert C. Maland; Jack R. Blumenfeld; Ross & Tilghman and Lauri Waldman Ross, for appellee.

(Before COPE, LEVY, and GODERICH, JJ.)

(PER CURIAM.) In view of the fact that the record does not reflect an abuse of discretion by the trial court, the order appealed from is affirmed.

* * *

STAMBAUGH'S AIR SERVICE, INC., Appellant, vs. AVIATION ENTERPRISES INTERNATIONAL, INC., Appellee. 3rd District. Case No. 98-2875. L.T. Case No. 96-19320. Opinion filed April 28, 1999. An Appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: Seipp, Flick & Kissane and Daniel J. Kissane, for appellant. McDonald & McDonald and Palmer, III, for appellee.

(Before COPE, LEVY, and GODERICH, JJ.)

(PER CURIAM.) The Final Judgment entered by the trial c affirmed in all respects, including the finding that appellee is e to recover reasonable attorney's fees.[1]

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[1]After finding that appellee was entitled to recover reasonable attorney the trial court reserved jurisdiction to determine the amount of those fees a date.

* * *

DAVID BRUNSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th Case No. 98-0387. Opinion filed April 28, 1999. Appeal from the Circu for the Seventeenth Judicial Circuit, Broward County; Robert B. Carney L.T. Case No. 96-7733 CF 10 A. Counsel: Richard L. Jorandby, Public D and Valentin Rodriguez, Jr. of Valentin Rodriguez, P.A., West Palm Special Assistant Public Defender, for appellant. Robert A. Butterworth, General, Tallahassee, and Don M. Rogers, Assistant Attorney General, W Beach, for appellee.

(PER CURIAM.) Affirmed without prejudice to appellant s post-conviction relief on the issue of his sentence as a h violent felony offender. (GUNTHER, FARMER and TA JJ., concur.)

* * *

ANTHONY PARKS, Appellant, v. PROVENCE CONDOMINIUM A TION, INC., Appellee. 4th District. Case Nos. 97-1320 and 97-4287. filed April 28, 1999. Consolidated appeals from the Circuit Court for the Judicial Circuit, Palm Beach County; Kathleen J. Kroll and Walter N. Col Judges; L.T. Case No. 96-1521 AG. Counsel: Anthony Parks, Boca Rato Charles L. Jaffee, Deerfield Beach, for appellee.

ON MOTION FOR REHEARING

(PER CURIAM.) We deny appellant's motion for rehearin No. 97-4287 was previously consolidated with Case No. 97- court order. We, therefore, substitute the following for the issued March 3, 1999 to correct the style of the case and to the per curiam affirmance of Case # 97-4287.

AFFIRMED. (DELL, STEVENSON and HAZOU concur.)

* * *

CHARLES v. STATE. 5th District. #98-871. April 30, 1999. Appe Circuit Court for Putnam County. AFFIRMED. *Howard v. State*, 705 S 948 (Fla. 1st DCA 1998); *see also Maddox v. State*, 708 So. 2d 617 (Fl 1998), *rev. granted*, Table No. 92,805 (Fla. Feb. 17, 1999).

CARSON v. STATE. 5th District. #98-2281. April 30, 1999. Appe Circuit Court for Orange County. AFFIRMED. *See* § 921.0012, 777.04; *Lamont v. State*, 610 So.2d 435 (Fla. 1992); *Maddox v. State*, 617 (Fla. 5th DCA), *rev. granted*, 718 So.2d 169 (Fla. 1998); *Sand* 621 So.2d 723 (Fla. 5th DCA 1993).

CHANDRA v. GODODIA. 5th District. #98-1547. April 30, 1999. A the Circuit Court for Brevard County. AFFIRMED. *See Moritz v.* *prises, Inc.*, 604 So. 2d 807 (Fla. 1992).

SHAKAR v. STATE. 5th District. #98-1456. April 30, 1999. App Circuit Court for Seminole County. AFFIRMED. *See State v. Schopp* 1016 (Fla. 1995).

WARD v. SIKES. 5th District. #97-2566. April 30, 1999. Appeal fror Court for Hernando County. The final judgment is affirmed. *See Square Association, Inc. v. Biancardi*, 507 So. 2d 1366 (Fla. 1987); *of Barry*, 689 So. 2d 1186 (Fla. 4th DCA 1997); *Seaside Community I Corp. v. Edwards*, 573 So. 2d 142, 145 (Fla. 1st DCA 1991); *Ivens C Cie Ltd.*, 555 So. 2d 425 (Fla. 3d DCA 1989), *rev. denied*, 564 So. 2 1990); *Engle Mortgage Co., Inc. v. Dowd*, 355 So. 2d 1210 (Fla. 1st *cert. denied*, 358 So. 2d 130 (Fla. 1978); *GAC Properties, Inc. v. C* So. 2d 466 (Fla. 3d DCA 1971).

AFFIRMED.

* * *

HICKS v. STATE. 4th District. #98-3242. April 28, 1999. Ap Circuit Court for the Nineteenth Judicial Circuit, Indian River FIRMED. *See Bakos v. State*, 698 So.2d 943 (Fla. 4th DCA 1997