IN THE SUPREME COURT OF FLORIDA

CASE NO. FSC 00-1867

ALLEN W. HODGDON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Petitioner, ALLEN W. HODGDON, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol “T.” designates the transcript of the trial court proceedings.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The trial court properly declined to give Appellant credit for jail time served on Counts I and IV on all of the consecutive terms entered on the violation of probation. By giving credit for time served on the overall sentence, the trial court avoided any possible guidelines error.

ARGUMENT

THE TRIAL COURT PROPERLY DECLINED TO GIVE APPELLANT CREDIT FOR JAIL TIME SERVED ON COUNTS I AND IV ON ALL OF THE CONSECUTIVE TERMS ENTERED ON THE VIOLATION OF PROBATION.

Petitioner argues that the Fourth District erred in affirming his sentence entered on violation of probation. He claims that he should have been given credit for time served on each consecutive count of probation that he violated. The State responds that the trial court and Fourth District correctly determined that Petitioner was only entitled to credit on the overall sentence, because this credit avoided any guidelines problem and because it did not prevent the trial court from appropriately punishing Petitioner for the violation.

In Tripp v. State, 622 So. 2d 941, 942 (Fla. 1993), this Court was concerned with sentencing upon revocation of a consecutive term of probation, after the defendant had already completed a term of incarceration on another offense to which he was sentenced at the same time as the offense for which he was on probation (true split sentence). This Court explained that if a defendant is not given credit for time served on the primary offense in sentencing him on the offense for which he violated probation, then the sentence is likely to run afoul of the guidelines. After all, in sentencing on the revocation of probation, the trial court must limit the total sentence to the original guidelines score plus a one-cell increase

for each violation. Rules 3.701(d) (12) and (14), Florida Rules of Criminal Procedure (1989). See also Williams v. State, 594 So. 2d 273, 275 (Fla. 1992).

In Tripp, the defendant was sentenced to four-and-one-half years on the first offense and to three-and-one-half years on the second offense. Upon the defendant having been adjudged guilty for violating probation, had the trial court not credited the defendant with the four-and-one-half years on the revocation, and sentenced the defendant to three-and-one-half years imprisonment on the offense for which he was violated, then the total sentence that the defendant would have served would have been eight years (four-and-on half plus three-and-one-half). This eight year total would have clearly exceeded the five-and-one-half years permitted under the guidelines scoresheet.

In this case, a similar problem would have occurred if the trial court had not credited Petitioner time served on Count II. For illustration, if the original fifteen years to which Petitioner was sentenced on Count I was added to the total of forty years to which he was sentenced on the instant violation, then the total term that he would serve would be fifty-five years, in excess of the top of the permitted guidelines range, forty years. With the credit on Count II, however, any potential guidelines problem has been remedied, because Appellant will only be actually serving a total of twenty-five years on the violation (forty less fifteen

years time served), and this total plus the fifteen years served on Count I amounts to forty years, which is within the permitted range.[1]

This being so, the additional credits on the consecutive terms requested by Petitioner would not have been necessary to avoid a guidelines problem, but would have resulted in an unjustified windfall to Petitioner. Under Petitioner's analysis, he would have received credit for more than twice the sentence that he had originally received and for almost six times the sentence that he actually served! Tripp did not deal with the situation present in the instant case, multiple probation sentences consecutive to an incarcerative sentence. Therefore, Tripp never contemplated, much less suggested, that a defendant should be given credit for time served on multiple charges for which he was given probation, upon a subsequent violation of probation.

Rather, this Court's stated goal in Tripp was to effectuate the spirit and purpose of the guidelines. This court in Tripp did not indicate that credit must be entered even where there is no guidelines problem. Instead, this Court only addressed possible

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[1] Because the crimes were committed prior to October 1, 1989, the Chapter 89-531, which forfeits any gain time on revocation, Petitioner was entitled to credit for gain time plus time actually served, i.e. the full 15 years to which he was sentenced instead of the 7 years he actually served. See State v. Green, 547 So. 2d 925, 927 (Fla. 1989).

sentencing abuses whereby a court could impose a maximum guidelines sentence in the original sentence, and then do the same on the consecutive offense upon a violation of probation. Tripp, 622 So. 2d at 942.

In Cook v. State, 645 So. 2d 436, 438 n. 5 (Fla. 1994)[2], this Court offered that the windfall that resulted in that case could have been avoided if the trial court had structured the sentence differently. In Cook, the court had entered a four-and-one-half year imprisonment term on 1990 offenses, to be followed by a three-and-one-half year probationary term on probation violations on 1989 offenses, under the same scoresheet. Upon violating this probation, the trial court sought to sentence the defendant to three-and-one-half years. While this Court ruled that the four-and-one-half years served on the 1990 offenses had to be applied to the case, it said that the resulting wash could have been avoided had the trial court thought to have sentenced the defendant to three-and-one-half years over the four-and-one-half years (eight years).

Obviously, this Court's main focus, again, was remedying any potential guidelines problems. Yet it was also concerned with the trial court's ability to impose a permissible sentence within its discretion, so as to avoid an unjust result. In fact, it appears

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[2] This case was decided six months after Bailey v. State, 634 So. 2d 171 (Fla. 1st DCA 1994), relied on by Appellant.

that this Court in Cook was suggesting that the trial court should have imposed consecutive sentences, like in this case, to avoid the windfall, since the defendant had been convicted of five third degree felonies, each limited by a five year statutory maximum. After all, the eight year sentence proposed by the court could have been achieved only by stacking a consecutive term to a five year term.

Bailey v. State, 634 So. 2d 171 (Fla. 1st DCA 1994), on which Petitioner relies, was wrongly decided. In Bailey, the court went beyond this Court's stated purpose in Tripp, and interpreted the credit for time served as a "bright line" rule that must be applied on all terms of incarceration upon revocation. Rather than simplifying matters, the approach taken in Bailey created a situation by which defendants can avoid imprisonment on violations of probation. The court in Bailey even recognized this problem, referring to the result as "bizarre."

The court in Priester v. State, 711 So. 2d 177, 178-179 (Fla. 3d DCA 1998), cited by Petitioner, also acknowledged this anomaly In Priester, the court obviously felt bound by this court's decision in Tripp when it reversed the case for resentencing so that the defendant could be given "double credit" for time served on remand. In Priester, the defendant was sentenced to concurrent terms of 364 days in jail, to be followed by five years probation, in two cases, each having two counts. When the defendant violated

probation, the court reasoned that in each of the two cases, the defendant should have been given credit for time served on the 364 days on the first count of each case, against the sentences imposed on the violations in the second count of each case.

However, the court announced its dissatisfaction with the end result. It stated:

> It would be our hope that at some point the Florida Supreme Court may see fit to revisit *Cook* and *Tripp*. The theory underlying *Cook* and *Tripp* is that "where a defendant is sentenced to prison to be followed by probation, that defendant's cumulative sentence may not exceed the guidelines range of the original scoresheet. Otherwise, trial judges could structure sentences in such a manner as to circumvent the guidelines." *Cook*, 645 So. 2d at 437-438 (citation omitted). Logically this rule should come into play only where necessary to keep the sentence within the guidelines – but *Cook* itself held that credit for time served had to be granted where that step was not necessary to keep the sentence within the guidelines. See 645 So. 2d at 438 n. 5.
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> In the present case, it appears that the defendant's guidelines exceeded the sentences imposed. By giving defendant credit for 364 days time served on Count I, and credit for the same 364 days on count II, defendant is given a double credit. It would appear to us to be desirable to limit the rule in *Cook* and *Tripp* only to those situations where necessary in order to keep the disposition within the guidelines. At present, however, *Cook* and *Tripp* call for the credit to be granted and we remand for that.

711 So. 2d at 178-179.

Respondent points out that unlike in Priester, this case does not

involve separate cases, just separate counts. Hence, Respondent contends, as it did in the Fourth District, that *Tripp* and *Cook* do not explicitly apply to the circumstances of this case. At least in Priester, the defendant had the argument that he served time in prison on each of the cases, albeit, the same period of time.

Regardless, Respondent advances the reasoning in Priester. If a trial court is not faced with a guidelines problem, then the rationale of Tripp is not implicated. Therefore, a defendant is not entitled to additional credit, and should not be privy to a windfall due to a rigid application of a rule designed to assist trial court's in calculating jail-time credit. Respondent, therefore, asks this court to approve the decision by the Fourth District in this case, and to disapprove the ruling in Bailey.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, Respondent respectfully requests this Honorable Court to approve the decision of the Fourth District affirming the trial court's denial of additional jail time credit on each consecutive term.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Paul Petillo, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on July 9, 2001.

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Of Counsel

Counsel for Appellee