IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALLEN W. HODGDON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 4D00-30
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

On Appeal from the Circuit Court of the
Nineteenth Judicial Circuit of Florida,
In and For St. Lucie County
[Criminal Division].

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CERTIFICATE OF INTERESTED PERSONS

Counsel for defendant/appellant certifies that the following persons and entities have or may have an interest in the outcome of this case.

Robert Butterworth, Attorney General
by Celia Terenzio, Chief, Assistant Attorney General
(Appellate counsel for State/Appellee)

Honorable Dwight L. Geiger, 19th Judicial Circuit
(Presiding Judge)

Richard L. Jorandby, Public Defender, 15th Judicial Circuit
by Paul E. Petillo, Assistant Public Defender
(Appellate counsel for defendant/appellant)

Thomas Mack
(Victim alleged in information)

Allen W. Hodgdon
(Defendant/appellant)

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant and respondent was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida.

The following symbols will be used:

"R" Record on Appeal

"T" Transcript

CERTIFICATE OF FONT

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 petitioner 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

Petitioner was charged by information with three counts of DUI manslaughter (counts I, II, and III), one count of leaving the scene of an accident involving death (count IV), two counts of DUI serious bodily injury (counts V and VI), and three counts of vehicular homicide (counts VII, VIII, and IX) (R 10-12). These offenses occurred on May 24, 1989 (R 10-12).

Petitioner pled no contest to counts I through VI as charged; he pled no contest to three counts of reckless driving as lesser included offenses of counts VII, VIII, and IX (R 13-14).[1]

Petitioner was sentenced to 15 years in prison on count I and 5 years in prison on count IV to run concurrently (R 15-16; 23-24). He was sentenced to 10 years probation on counts II and III to run concurrently to each other and consecutively to his 15 year prison sentence (R 17-20). Petitioner was sentenced to 5 years probation on count V and 5 years probation on count VI to run consecutively to each other and consecutively to the 10 year probationary sentences in counts II and III (R 23-26). Petitioner was sentenced to time served on the reckless driving charges in counts VII, VIII, IX (R 27-33). In sum, petitioner was sentenced to 15 years in prison (15 and 5 concurrent) followed by 20 years probation (10 followed by 5 followed by 5).

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[1] The three vehicular homicide counts were based on the same deaths as the three DUI manslaughter counts. A single death cannot support convictions for both vehicular homicide and DUI manslaughter. State v. Chapman, 625 So.2d 838 (Fla. 1993).

Petitioner served approximately 7 years of his prison sentence before being released and placed on probation (T 5). On July 7, 1999, an affidavit of violation of probation was filed (T 63). Petitioner admitted the violation (R 73-74). A guidelines scoresheet was prepared (R 53, 64). With the one-cell increase, the permitted range was 17 to 40 years (R 53, 64).[2] At sentencing the issue was the appropriate sentence under this court's decision in Tripp v. State, 622 So.2d 941 (Fla. 1993). In Tripp, this court held that "if a trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, credit for time served on the first offense must be awarded on the sentence imposed after revocation of probation on the second offense." Id. at 942.

Defense counsel relied on Bailey v. State, 634 So.2d 171 (Fla. 1st DCA 1994), rev. dismissed, 637 So.2d 233 (Fla.1994), which held that Tripp established a bright line rule and that credit for time served in prison is applied to each consecutive sentence upon revocation (T 22-25). The state relied on a footnote in Cook v. State, 645 So.2d 436 (Fla. 1994), which suggested that credit for

[2] This range is the result of a scoresheet error, and undersigned counsel has filed a motion pursuant to Fla. R. Crim. P. 3.800(a) to correct it. Petitioner's two DUI with serious bodily injury convictions (third degree felonies) are scored 15 points under additional offenses at conviction (R 53, 64). They should have been scored 12 points. See Florida Rules of Crim. Proc. re Sentencing Guidelines, 522 So.2d 374, 381 (Fla.1988). Reduction of petitioner's total points from 226 to 223 reduces petitioner's maximum permitted range (with the one-cell increase for violation of probation) to 12-27 years. This correction does not effect the issue involved in this appeal.

time served in prison is applied only once to consecutive sentences upon revocation (T 32-36). See Cook, 645 So. 2d at 438 n.5.

The trial court refused to follow Bailey and apply credit for time served in prison to each consecutive sentence (T 41). Petitioner was sentenced to 40 years in state prison: 15 years on counts II and III, and 5 years each on counts V and VI, all sentences to run consecutively (T 40-41; R 90-96). Petitioner appealed to the Fourth District Court of Appeal. The Fourth District affirmed but certified conflict with Bailey. Hodgdon v. State, 764 So.2d 872 (Fla. 4th DCA 2000). The court did remand with instructions to correct petitioner's written sentence to reflect 15 years credit for time served.[3] Id. A timely notice to invoke discretionary review was filed in the district court.

[3] Since petitioner's offenses were committed prior to October 1, 1989, the effective date of chapter 89-531, Laws of Florida, "credit for time served" includes jail and prison time actually served and gain time granted pursuant to § 944.275, Fla. Stat. Statutes (1989). Tripp v. State, 622 So.2d at 942 n. 2.

SUMMARY OF THE ARGUMENT

In Tripp v. State, 622 So.2d 941 (Fla. 1993), this court held that if a trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, credit for time served on the first offense must be awarded on the sentence imposed after revocation of probation on the second offense. Case law since Tripp holds that credit for time served in prison is applied to each consecutive sentence entered after revocation. The trial court refused to do so in this case. This court should require that petitioner's credit for time served in prison be applied to each of his consecutive sentences.

POINT ON APPEAL

THE TRIAL COURT ERRED IN REFUSING TO APPLY CREDIT FOR TIME SERVED IN PRISON TO EACH CONSECUTIVE SENTENCE UPON REVOCATION

In Tripp v. State, 622 So.2d 941 (Fla. 1993), this court held that "if a trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, credit for time served on the first offense must be awarded on the sentence imposed after revocation of probation on the second offense." Id. at 942. For example, if a defendant is sentenced to 5 years in prison on count I, followed by probation on count II, he receives 5 years credit for time served in the event probation is revoked.

In Bailey v. State, 634 So.2d 171 (Fla. 1st DCA 1994), rev. dismissed, 637 So.2d 233 (Fla. 1994), the First District was asked how to apply Tripp when the defendant's prison sentence is followed by consecutive terms of probation. The First District treated the holding in Tripp as a "bright line" rule intended "to simplify the application of sentencing guidelines and avoid confusion arising from the varying circumstances that can occur in different cases." Bailey, 634 So.2d at 172. The court held that the sentences imposed on all three counts for Bailey's violation of probation should have included credit for the 4 year prison term he had served because the probationary periods originally imposed on counts 2 and 3 were consecutive to the prison term imposed on count 1.

The court did note that this application of Tripp leads to a bizarre result and it certified the following question as one of great public importance:

> DOES THE HOLDING IN TRIPP REQUIRE THAT CREDIT BE GIVEN FOR TIME SERVED IN PRISON ON EACH CONSECUTIVE SENTENCE IMPOSED UPON REVOCATION OF PROBATION WHEN THE FAILURE TO GIVE SUCH CREDIT ON EACH SENTENCE DOES NOT RESULT IN A SENTENCE BEYOND THAT ALLOWED BY THE SENTENCING GUIDELINES?

Bailey, 634 So.2d at 174. This question was never answered, however, because review was dismissed.

In Cook v. State, 645 So.2d 436 (Fla. 1994), the defendant was placed on probation in 1989 for five offenses. He violated this probation when he was charged with committing four new offenses in 1990. The defendant was sentenced to 4½ years in prison on the 1990 offenses; the trial court revoked probation in the 1989 offenses and sentenced the defendant to a new term of probation to be served upon release from the 4½ year prison term. When Cook violated this new term of probation, the trial court sentenced him to 3½ years in prison, and the trial court refused to award credit for the prison time served on the 1989 offenses. The First District affirmed stating, “To allow Cook 4.5 years credit, for time served on the 1990 offenses, on the concurrent 3.5 year sentences imposed for the 1989 offenses after he twice violated his probation for those offenses, would result in no sanction for the second violation of probation. Surely the sentencing guidelines do not intend such a result.” Cook v. State, 635 So.2d 70, 71 (Fla. 1st DCA 1994). This court reversed and held that the case fell

within the contours of Tripp and that Cook was entitled to 4½ years credit applied to his 3½ year VOP sentence--in essence, to time served. Cook, 645 So.2d at 436-437. In a footnote, this court stated that this anomaly "is a product of how Cook's sentence was structured as opposed to a misapplication of Tripp." Cook, 645 So.2d at 438 n.5. This court stated:

> The sentencing judge clearly intended for Cook to spend an additional three and a half years in prison for the 1989 offenses. We note that the sentencing judge could have structured Cook's sentence such that Cook would have spent three and a half years in prison for the 1989 offenses even after being credited with the four and a half years he served for the 1990 offenses. As we previously recognized, with a two-cell increase, Cook could have been sentenced to a total of 17 years. See supra note 3. After crediting Cook with time served for the 1990 offenses, Cook would still have spent three and a half years in prison for the 1989 offenses if he had been sentenced to eight years. The sentencing judge could have sentenced Cook to eight years for the 1989 offenses--well within the permitted range.

Cook, 645 So.2d at 438 n.5. This was the language upon which the trial court relied in rejecting the controlling precedent of Bailey.[4]

This court should adopt the approach of the First District Court of Appeal in Bailey and treat the holding in Tripp as a "bright line" rule intended "to simplify the application of

[4] In the absence of precedent from the Fourth District Court of Appeal, the circuit court was bound by the decision of another district court of appeal. State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976)(Circuit Court for Palm Beach County is bound by the decision of the First District Court of Appeal in the absence of precedent from the Fourth District Court of Appeal).

sentencing guidelines and avoid confusion arising from the varying circumstances that can occur in different cases."

In Priester v. State, 711 So.2d 178 (Fla. 3d DCA 1998), the Third District reviewed a sentence structure similar to petitioner's. In Priester, the defendant was sentenced to 1 year in jail on one count followed by 5 years probation in another count. The defendant received the same sentence in a separate two count case. The sentences were to be served concurrently. When the defendant violated probation, he was sentenced to 10 years in prison--5 years in each case to be served consecutively. The defendant argued, and the Third District agreed, that under Cook v. State, 645 So.2d 436 (Fla.1994), and Tripp v. State, 622 So.2d 941 (Fla.1993), he was entitled to credit for time served of 1 year applied to both of his consecutive 5 year sentences. Priester, 711 So.2d at 179.

This court should approve Priester and Bailey and hold that Cook and Tripp require that petitioner's credit for time served in prison be applied to each of his consecutive sentences.

CONCLUSION

This court should approve Bailey and reverse petitioner's sentences with instructions to apply credit for time served in prison to each of his sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401, by courier this 10th day of October, 2000.

Attorney for Allen W. Hodgdon