IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00 2166

MICHAEL W. MOORE, Secretary,
Department of Corrections,

Petitioner,

-vs-

STEVEN PEARSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

OF PEARSON V. MOORE, 767 So.2d 1235 (Fla. 1st DCA 2000)

REPLY BRIEF OF PETITIONER ON THE MERITS

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AMENDMENT TO CORRECT THE STATEMENT OF FACTS

The Statement of Facts in the department's Initial Brief contained a typographical error which requires correction. On page 1, the last line states that, "All offenses in Case No. 96-29 were committed after October 1, **1985** . . ." It should have been **1995**.

ARGUMENT

WHERE A TRIAL COURT IMPOSES A SENTENCE FOR A TERM OF YEARS TO BE CALCULATED "COTERMINOUS" WITH A SHORTER SENTENCE, DOES THE COTERMINOUS PROVISION VIOLATE THE SEPARATION OF POWERS DOCTRINE UNDER ART. III, § 9, OF THE FLORIDA CONSTITUTION IF IT USURPS THE DUTIES DELEGATED BY THE LEGISLATURE TO THE EXECUTIVE THROUGH THE DEPARTMENT OF CORRECTIONS UNDER SECTION 944.275?

The department herein responds to four of the arguments presented in Pearson's Answer Brief. The first is Respondent's reliance on the recently decided case of Hall v. Moore, 2001 WL 76282 (Fla. 1st DCA 2001) which pertains to jail credit. (A.B. at 17-18) The department agrees with Hall in that it is the sentencing court's duty to award jail credit. It has been settled for years that the award of jail credit is a judicial function. See, Wilson v. State, 603 So.2d 93 (Fla. 1992). Based on particular circumstances in Petitioner Hall's case, the department believed that it had properly effectuated the sentencing court's intent when it applied the jail credit as it did.[1] The department processes sentencing orders from courts throughout the state, and they are not always consistent and clear, especially if the inmate is serving a number of sentences and several amended orders have been received. The department makes every attempt to obtain

[1] Hall's case was a unique circumstance where the sentencing transcript indicated that the court only wanted Hall to have credit for time spent in prison between the date the sentence was originally imposed, and the date the court vacated the sentence and resentenced him, *if* such prison time as was spent serving the sentence that was vacated. The facts revealed that Hall had not served one day on that sentence because it was consecutive to other sentences previously imposed. DOC was not ignoring the sentencing court's order, but was attempting to give effect to the court's intent and its order.

clarification when there is doubt, but in the Hall case, the First District found that the department had applied Hall's jail credit incorrectly. Thus, reliance on Hall is no basis for a general assertion that the department encroaches upon the authority of the judiciary or ignores court orders. The department agrees that an award of jail credit is a function of the court.

Second, Respondent asserts that section 921.16(3) is statutory recognition or "legitimization" of coterminous structuring. (A.B. p. 8) Respondent further argues that the legislature would have repealed section 921.16(3) when it enacted the 85% statute (§ 944.275(4)(b)3. if it did not intend for the two statutes to coexist. (A.B. p. 8) As discussed in the initial brief, section 921.16(3) does not confer authority for coterminous sentencing, and moreover, the very specific mandate of the 85% statute is paramount over the general reference to coterminous in section 921.16(3). (I.B. at 24-25) Further, there was no reason to repeal section 921.16(3) when the 85% statute was enacted, since the 85% statute is only applicable to offenses which occurred after October 1, 1995.

Third, Respondent contends that even if the 85% statute is applicable to Pearson's 13 year term, coterminous service would not conflict because he "effectively served 100%" of the 13 year term since it was coterminous to a 5 year term. (A.B. p. 11) In another part of his brief, Respondent asserts that the sentencing judge did not direct the DOC to "'calculate' [Pearson's] sentence in a certain way", therefore DOC's reliance on its authority to calculate release dates is misplaced. (A.B. p. 6.)

Section 944.275 clearly dictates that for "each prisoner sentenced to a term of years" [as opposed to a life or death sentence], the department shall establish a maximum and tentative release date in a particular manner. (§ 944.275(2)(a); (3)(a), Fla. Stat.) It also dictates the rate at which gaintime shall be awarded. (§ 944.275(4)(a)(b), Fla. Stat.) A coterminous provision requires the department to establish a release date in complete disregard of mandates in section 944.275. Moreover, it requires either withholding gaintime on the "effective" term to allow for 100% service (as Pearson contends), or it requires an excessive award of gaintime in order to expire the term with the shorter term (as DOC contends). Either way, the coterminous provision dictates how the department will calculate the release date and it interferes with awards of gaintime. See, e.g. Shupe v. State, 516 So.2d 73 (Fla. 5th DCA 1987)(trial court is without authority to prevent awards of gain time); Singletary v. Coronado, 673 So.2d 924 (Fla. 2d DCA 1996)(trial court cannot order an award of gaintime).

Finally, the department responds to the emphasis Respondent places on the language in the Pearson opinion which states that the department has interfered with the judiciary by "refusing to execute the sentence exactly as imposed by the sentencing court". Id. at 1237. (A.B at 6-7) This sweeping type of language found throughout Pearson is cause for concern because, coterminous provisions aside, the DOC has been delegated certain functions with regard to the execution of sentences that alter the amount of time served on a sentence. (See, I.B. at p. 28-30) In addition, there

are a number of the other functions delegated to the department pertaining to the custody and care of inmates. See, e.g., Schlosser v. Singletary, 597 So.2d 304 (Fla. 2d DCA 1991)(statute grants the DOC authority to decide which jurisdiction inmate will serve sentence); Riley v. State, 743 So.2d 148 (Fla. 1st DCA 1999)(where defendant was promised boot camp sentence, but was statutorily ineligible for boot camp, it was not possible to carry out the sentence as bargained for); Glenn v. State, 2001 WL 38008 (Fla. 4th DCA 2001)(trial court cannot order DOC to allow defendant to serve his state sentence in federal custody, and if that was part of the plea, the remedy is to fashion a new sentence which effectuates the plea, or to withdraw the plea); Moore v. Lowery,758 So.2d 737 (Fla. 3rd DCA 2000)(trial court was without authority to require the DOC to refrain from cutting inmate's hair even though it was a term of the plea agreement). Relying upon this and other similar case law, the department successfully moves to vacate orders from sentencing courts imposing provisions that interfere with DOC functions. Often, the provision is a part of the plea to which the state attorney agreed.[2]

[2] Pearson states that "DOC cannot rescind the state attorney's office's decision not to appeal" and that "DOC cannot undo a bargain struck by the state attorney". Id. at 1238. Of course DOC has no authority over plea bargains, however, numerous cases, such as those cited above and in the initial brief, hold that if a sentencing provision interferes with a DOC function, withdrawal of the plea is an appropriate remedy for the inmate to seek. See, e.g., Turner v. State, 689 So.2d 1107 (Fla. 2d DCA 1997). Pearson appears to indicate that anything agreed to in a plea must be executed by DOC, even though appellate courts throughout Florida have held otherwise.

The very broad, unequivocal language in Pearson makes no distinction between its application to coterminous provisions and other well settled functions of the DOC. That is, Pearson appears to hold that any provision set forth in a sentencing order must be given effect by DOC if the state attorney did not appeal it. (The department has already seen the Pearson language quoted in inmate petitions and grievances challenging a variety of DOC actions that have nothing to do with the issue in Pearson.)

The department disagrees with Pearson, including its sweeping language. However, if this Court decides to affirm the Pearson holding as it pertains to coterminous sentencing, the department would greatly appreciate and respectfully requests that the Court address the limits of the decision as it pertains to other DOC functions. To do so would undoubtedly settle misperception as to the scope of Pearson and curtail unnecessary future litigation. Specifically, an opinion from this Court that included clear guidelines, or a specific test for the department to follow in resolving conflict between a court order and a legislative mandate would bring clarity to the currently difficult task of interpreting sentencing court orders. In particular, the department is in need of instruction from the Court as to whether there are circumstances where the department should give effect to a court order even if it conflicts with a statute directed to DOC.

CONCLUSION

This Court should quash the decision of the First District in

Pearson and follow the reasoning of the Second and Third Districts in Turner and Nieves v. State, 24 Fla. L. Weekly D591 (Fla. 3d DCA 1999), as well as the cases cited in the initial brief regarding the separation of powers, and conclude that certain sentencing provisions, including coterminous provisions, encroach upon the duties delegated to the department by the Legislature, and therefore, cannot be given effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. Mail to Baya Harrison, III, P.O. Box 1219, Monticello, Florida 32345-1209, on this 16th day of February, 2001.

SHERON WELLS

STATEMENT CERTIFYING TYPE SIZE AND STYLE

I hereby certify that Petitioner's Brief on the merits is certified as being typed in 12 point Courier New, a font that is not proportionally spaced.

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SHERON WELLS