

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
vs.) CASE NO. SC01-83
)
MAYNARD WITHERSPOON,))
)
 Respondent.)

)

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

RESPONDENT’S ANSWER BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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 <u>OTHER AUTHORITIES:</u>	
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SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal's decision should be affirmed by this Honorable Court. The Fifth District Court of Appeal's properly followed this Court's mandate in Tripp v. State, 622 So. 2d 941 (Fla. 1993) by granting Respondent credit for time he actually served on Count I against his newly imposed sentence upon a violation of probation on Count II.

ISSUE

THIS HONORABLE COURT SHOULD AFFIRM
THE FIFTH DISTRICT COURT OF APPEAL'S
DECISION IN THE INSTANT CASE WHICH
PROPERLY ALLOWS RESPONDENT CREDIT
FOR TIME SERVED IN COUNT I ON HIS
SENTENCE IMPOSED IN COUNT II.

In the instant case, Respondent was charged with committing the following offenses on *September 6, 1990*: Count I- armed burglary, a first degree felony, in violation of Sections 812.02(2)(b), Florida Statutes and Count II- attempted armed robbery, a second degree felony, in violation of Sections 777.04(1), 777.04(4)(b), and 812.13, Florida Statutes. (R 32-33)

Respondent entered a plea of guilty as charged in both counts. Respondent's sentencing guidelines scoresheet total resulted in a recommended range of 12 to 17 years and a permitted sentence of 9-22 years incarceration. (R 43) The trial court adjudicated Respondent guilty and sentenced Respondent as follows: In Count I to 20 years incarceration with credit for 239 days time served. In Count II, Respondent was placed on 5 years probation to run consecutive to the incarceration imposed in Count I. (R 32-33, 37-38)

Subsequently, Respondent admitted to violating his probation in Count II. The trial court, however, erred by overruling defense counsel's objection and

sentencing Respondent to 15 years incarceration in Count II, without providing Respondent credit for all the time he served on Count I.

In Tripp v. State, 622 So. 2d 941 (Fla. 1993) this Court answered the following question in the *negative*:

IF A TRIAL COURT IMPOSES A TERM OF PROBATION ON ONE OFFENSE CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER A REVOCATION OF PROBATION ON THE SECOND OFFENSE?

This Court further stated in Tripp:

We hold 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.

Thus, the Fifth District Court of Appeal properly followed this Court's mandate in Tripp by granting Respondent credit for time he actually served on Count I against his newly imposed sentence upon a violation of probation on Count II.

Approximately a year after this Court's decision in Tripp, this Court again

held in Cook v. State, 645 So. 2d 436 (Fla. 1994) that the defendant was entitled to credit for time served following its decision in Tripp. This Court refused to limit its holding in Tripp to only cases where the new sentences imposed would exceed the guidelines. In the instant case, the State is again requesting this Court to limit its holding. This Court should again deny the State's request and affirm the Fifth District Court of Appeal's decision.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, Respondent respectfully requests that this Honorable Court to affirm the Fifth District Court of Appeal's decision which reversed the trial court's order denying Respondent credit for time served in Count I against his newly imposed sentence in Count II.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

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, Florida 32118 in his basket at the Fifth District Court of Appeal, and mailed to: Maynard Witherspoon, Inmate # 92422 E1-105L, Washington Correctional Institution, 4455 Sam Mitchell Drive, Chipley, Florida 32428, this 2nd day of April, 2001.

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