IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC01-83

MAYNARD WITHERSPOON,

Respondent.

_____/

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The facts are set out in the district court's opinion, as follows:

> In 1990, Witherspoon was convicted of armed burglary (first degree felony punishable by a term not exceeding life) and attempted armed robbery (second degree felony). His scoresheet reflected a permitted range of 9 to 22 years. He was sentenced on the burglary count to twenty years in prison and on the attempted robbery count to five years probation. After serving approximately eight years of his twenty-year sentence, he was released from prison and embarked upon his probationary term. After about seven months, he was charged with violating his probation and pleaded guilty. At resentencing on the original robbery charge, Witherspoon was sentenced to fifteen years in prison without credit for the time served on the original burglary charge. Witherspoon appeals claiming that his fifteen year sentence should be reduced by the eight years he served on his original sentence as required by Tripp v. State, 622 So. 2d 941 (Fla. 1993). The State agrees that the rule announced in Tripp appears to support Witherspoon but urges that we certify the issue to the supreme court because the justification for the Tripp rule does not apply in this case.
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> * * *
>
> Witherspoon's original guideline maximum was reflected to be 22 years. At resentencing in this case, an error was found in the original scoresheet and was, without objection, corrected to reflect a maximum of 27 years so that, with the one cell bump-up, 40 years less Witherspoon's original sentence remained available to the trial court. The trial court sentenced Witherspoon to the maximum for a second degree felony--fifteen years--but, because it believed ample guideline authority remained and because it

> believed Tripp did not apply, refused to credit the previous time served against this sentence.

Witherspoon v. State, 26 Fla. L. Weekly D174, D175 (Fla. 5th DCA Jan. 5, 2001).

The district court reversed and remanded for the trial court to award credit for time previously served on count one toward the sentenced imposed upon revocation of probation on count two. Id. However, the court certified a question regarding whether this Court's opinion in Tripp applied to a case such as this, where the award of credit was unnecessary to insure that the defendant's total prison time did not exceed the guidelines range. Witherspoon, 26 Fla. L. Weekly at D174. The State timely filed its notice to invoke this Court's discretionary jurisdiction on January 8, 2001. (See this Court's January 16, 2001 Acknowledgment of New Case).

SUMMARY OF ARGUMENT

In Tripp v. State, 622 So. 2d 941 (Fla. 1993), this Court held that where the 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 toward the sentence imposed after revocation of probation on the second offense. The purpose of Tripp was to insure that the sentence imposed after revocation of probation did not exceed the guidelines maximum. It would be consistent with this purpose to limit the holding in Tripp to those instances where the award of credit is necessary to keep the total prison time within the guidelines range.

ARGUMENT

WITHERSPOON IS NOT ENTITLED TO CREDIT FOR TIME SERVED ON COUNT I TOWARD HIS NEWLY IMPOSED TERM OF INCARCERATION ON COUNT II, WHERE THE AWARD OF CREDIT IS NOT NECESSARY TO INSURE THAT THE AGGREGATE PRISON TIME IS WITHIN THE GUIDELINES RANGE.

This case is before the Court on a certified question of great public importance. Witherspoon v. State, 26 Fla. L. Weekly D174 (Fla. 5th DCA Jan. 5, 2001). This Court has jurisdiction. Art. V, § 3(b)(4), Fla. Const. The issue is whether the trial court must award credit for time served pursuant to Tripp v. State, 622 So. 2d 941 (Fla. 1993) in a case where such credit is unnecessary to insure that the total amount of incarceration is within the guidelines range. The determination of whether to award credit for time served would seem to be a mixed question of fact and law, which gives rise to a two-part standard of review:

> The standard of review of the findings of fact is whether competent, substantial evidence supports the findings. Findings of historical fact should be reviewed only for "clear error", with "due weight to be accorded to inferences drawn from those facts" by the lower tribunal... We review the trial court's application of the law to the facts de novo.

Hines v. State, 737 So. 2d 1182, 1184 (Fla. 1st DCA 1999)(citations omitted).

The district court of appeal did not formulate the precise question to be addressed. The issue may be framed as follows: Where the trial court imposes a prison sentence on one count to be

followed by a probationary sentence on the second count, does Tripp require the trial court to award credit for time served on the first offense toward the sentence imposed upon revocation of the probation on the second offense, where such credit is unnecessary to keep the aggregate prison time within the guidelines range?

Witherspoon pled guilty to the offenses of armed burglary and attempted armed robbery. (R.35). In May of 1991, he was sentenced to twenty years in prison on count one, to be followed by five years of probation on count two. (R.37-43). In July of 1999, he was released from prison and began serving his probation on count two. (R.4-5). His probation officer filed an affidavit and an amended affidavit alleging multiple violations of probation and Witherspoon admitted the violations. (R.46-47,57,67). The case proceeded to sentencing where, with the one-cell bump, Witherspoon's new guidelines maximum was forty years, (R.12). Witherspoon, 26 Fla. L. Weekly at D175; see also Fla. R. Crim. P. 3.701(d)(14) (upon violating probation, a one-cell bump may be factored into the guidelines scoresheet).[1] At his sentencing, the state asserted that Witherspoon was not entitled to credit for time served on count one toward a new sentence of incarceration on count two. (R.9-13,16-18). The defense argued that, under Tripp,

[1] Instead of a one-cell bump, later versions of the guidelines and the new criminal punishment code simply add points to the defendant's scoresheet for violating probation. Fla. R. Crim. P. 3.702(d)(10), 3.703(d)(17), 3.704(d)(16).

Witherspoon was entitled to credit. (R.13-16). The trial court imposed a fifteen-year prison term on count two and denied Witherspoon credit for time served in prison on count one, finding that he was not entitled to such credit. (R.26-30).

In Tripp, this Court held, "[I]f 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." 622 So. 2d at 942. The purpose of this rule is to make sure that sentences imposed following probation revocation comport with guidelines limitations. Id.; Cook v. State, 645 So. 2d 436, 437-438 (Fla. 1994). In Tripp, the award of credit was necessary to keep the sentence within the guidelines range. Tripp, 622 So. 2d at 942.

In Priester v. State, 711 So. 2d 177 (Fla. 3d DCA 1998), the district court suggested that this Court revisit Tripp and limit its holding to those cases where the award of credit is necessary to keep the aggregate prison time within the guidelines:

> 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 for multiple offenses, and ultimately violates that 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 437-38 (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.
>
> 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 purpose.

Priester, 711 So. 2d at 178-179 (footnote omitted). The Fifth District echoed these sentiments in the opinion under review. Witherspoon, 26 Fla. L. Weekly at D175. There, the court stated:

> While we agree with the court in Priester v. State, 711 So. 2d 177 (Fla. 3d DCA 1998), that based on the reasoning of Tripp, the Tripp rule should come into play only when the guideline maximum is exceeded, we also agree with Priester that, when given the opportunity to do so in Cook v. State, 645 So. 2d 436 (Fla. 1994), the supreme court refused to so limit its holding.

Witherspoon, 26 Fla. L. Weekly at D175.

However, Cook should not be construed to require that Tripp be applied to instances where credit is unnecessary to insure a sentence within the guidelines. The issue of whether Tripp applies in such cases was not before the Court in Cook. Rather, the issue

in Cook was "whether Tripp applies to situations in which a defendant is sentenced to incarcerative terms and 'resentenced' to probationary periods using a single scoresheet." Cook, 645 So. 2d at 437. While credit may have been unnecessary to assure compliance with the guidelines in Cook, the issue was not raised, let alone decided, in that case. Accordingly, Cook should not be read require the award of credit where the total period of incarceration is within the guidelines.

Analogous support can be found in State v. Summers, 642 So. 2d 742 (Fla. 1994). There, this Court held "that upon revocation of probation credit must be given for time previously served on probation toward any newly-imposed probationary term for the same offense, when necessary to ensure that the total term of probation does not exceed the statutory maximum for that offense." Id. at 744. The purpose of this holding was to prevent ad infinitum extensions of probation beyond the statutory maximum. Id. Consistent with that purpose, the Court went on to limit its holding: "We note, however, that where the total term of probation will not exceed the statutory maximum for a single offense, the court need not give credit for the time already served on probation." Id. Similarly, it would be consistent with the purpose of Tripp to limit the holding in that case only to those cases where the sentence imposed upon revocation would exceed the guidelines maximum absent an award of credit.

Tripp has been held inapplicable in other instances in which guidelines concerns are not present. See Duncan v. State, 686 So. 2d 701, 702 (Fla. 2d DCA 1996)("The danger sought to be avoided by Tripp--the imposition of prison time in excess of that mandated by the guidelines in circumstances where probation on one or more counts follows prison time on one or more others--simply does not inhere in the context of a habitual offender sentence for which the guidelines do not apply.")(*en banc*); Swyck v. State, 693 So. 2d 618 (Fla. 2d DCA 1997)(defendant was ineligible for credit where his first sentence was imposed before the guidelines took effect and thus was not part of a guidelines calculation), approved on other grounds, 716 So. 2d 767 (Fla. 1998); Slater v. State, 639 So. 2d 80 (Fla. 2d DCA 1994)(Tripp did not apply where offenses were part of two different cases, for which separate scoresheets were used).

In this case, even without an award of credit, Witherspoon's total prison time is within the guidelines range. Thus, the purpose behind the Tripp rule does not apply in this situation. To award credit for time served in such a case renders the one-cell bump ineffectual and unjustly limits the sentencing judge's options in fashioning an appropriate sentence. This Court should hold that its decision in Tripp is limited solely to those instances where the total prison time will exceed the guidelines maximum if credit is not awarded.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Honorable Court quash the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been furnished by inter-office delivery to M.A. Lucas, Esq., Asst. Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this _____ day of March, 2001.

_____
DAVID H. FOXMAN
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this document is 12-point Courier New, a font that is not proportionally spaced.

_____
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