Supreme Court of Florida

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No. SC02-2362

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THOMAS B. GIBSON,
Petitioner,

vs.

FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

[July 8, 2004]

PARIENTE, C.J.

This case concerns the statutory authority of the Department of Corrections (DOC) to forfeit gain time on an expired sentence and add that time to a sentence being served on a different offense. We review Gibson v. Florida Department of Corrections, 828 So. 2d 422 (Fla. 1st DCA 2002), in which the First District certified the following question of great public importance:

> Does the forfeiture penalty enunciated in Eldridge v. Moore, 760 So.2d 888 (Fla.2000), apply where a defendant receives a sentence of incarceration for one offense followed by a sentence of probation for another offense, where both crimes were scored on a single scoresheet

> and the trial court awards prison credit pursuant to Tripp v. State, 622 So.2d 941 (Fla.1993), upon violation of probation for the second offense?

Id. at 423.[1]

I. FACTS AND PROCEDURAL HISTORY

In three different cases arising from crimes committed on different dates in 1993, Gibson was convicted of committing numerous counts of forgery and uttering a forged instrument or forged bills, all third-degree felonies. All the offenses were included in a single guidelines scoresheet because the cases were pending for sentencing at the same time.[2] The trial court sentenced Gibson to consecutive terms of five years in prison in case Nos. 93-216 and 93-297 for a total of ten years' incarceration, followed by consecutive terms of five years on

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1. The First District's certification of a question of great public importance gives us discretionary jurisdiction to review its decision. See art. V, § 3(b)(4), Fla. Const. We have chosen to retain jurisdiction although Gibson's sentence has expired so we may address the certified question and resolve uncertainty reflected in the district court opinion on the applicability of section 944.28(1), Florida Statutes (2003), to sentences like those imposed here. This is an issue affecting numerous sentences imposed upon revocation of community control or probation. Cf. Holly v. Auld, 450 So. 2d 217, 218 n.1 (Fla. 1984) ("It is well settled that mootness does not destroy an appellate court's jurisdiction . . . when the questions raised are of great public importance or are likely to recur.").

2. See Fla. R.Crim. P. 3.701(d)(1) ("One guideline scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing.").

probation on the counts of uttering a forged instrument and five years on probation on the counts of forgery in case No. 93-360 for a total of ten years probation. Thus, the sanctions in case Nos. 93-216 and 93-297 contained no probationary component and, as originally imposed, the sanctions in case No. 93-360 contained no incarceration.

Gibson completed his cumulative ten-year sentence in case Nos. 93-216 and 93-297 through a combination of time actually served and accrued gain time. Computations by the DOC show that Gibson fulfilled his ten-year sentence (consisting of 3650 days) by serving 1660 days in prison and 21 days in county jail, for a total of 1681 days (approximately 4.6 years) actually served, and by accruing 1969 days (approximately 5.4 years) of unforfeited gain time.[3]

Upon his release from prison in April 1998, Gibson commenced the terms of probation in case No. 93-360. He subsequently violated the conditions of probation. The trial court revoked probation and sentenced Gibson to consecutive terms of four and three years in prison for a total of seven years' incarceration. On

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3.

21 days	Original county jail credit
1660 days	Time served in prison
1200 days	Basic gain time
979 days	Additional gain time
-210 days	Gain time forfeited for disciplinary reasons
3650 days	Ten years (10 x 365 days)

Gibson's motion, and pursuant to our decision in Tripp, the trial court granted credit for time served of 1681 days from the completed sentences in case Nos. 93-216 and 93-297 against the overall seven-year sentence in case No. 93-360.

After Gibson began serving his sentence for violation of probation in case No. 93-360, the DOC declared a forfeiture of the 1969 days of previously unforfeited gain time from the sentences in case Nos. 93-216 and 93-297, and applied the forfeiture to the sentences imposed upon revocation of probation in case No. 93-360. The DOC informed Gibson that he had to serve the 1969 days of previously unforfeited gain time from the prior sentences in addition to the cumulative seven-year sentence imposed for the violation of probation on the offenses in case No. 93-360. The combination of credit for the 1681 days served on the expired sentences and the DOC's forfeiture of the 1969 days of gain time from those sentences actually increased Gibson's seven-year sentence by 288 days.

Gibson challenged the DOC's authority to forfeit the gain time by filing a petition for a writ of mandamus, which the trial court denied. The First District agreed with the trial court and denied his petition for common-law certiorari, concluding that the forfeiture of gain time from the expired sentences in case Nos. 93-216 and 93-297 applied to Gibson's sentences in case No. 93-360. The First District explained that it was guided by this Court's holding in Tripp that "credit for

time served on the first offense must be awarded on the sentence imposed after revocation of probation on the second," and its previous interpretation of Tripp "to mean that separate crimes and sentences may constitute a split sentence where both crimes were scored on a single scoresheet." Gibson, 828 So. 2d at 423 (relying on Larimore v. State, 823 So. 2d 287 (Fla. 1st DCA 2002)).

In a specially concurring opinion, Judge Lewis agreed with the majority view that the forfeiture of gain time from the sentences in case Nos. 93-216 and 93-297 could be applied to the sentence upon revocation of probation in case No. 93-360 "because the offenses were [originally] scored on a single scoresheet and considered together in forming his scoresheet sentence." Id. at 424-25 (Lewis, J., specially concurring). Judge Benton dissented. In his view, the gain-time forfeiture unlawfully revived the expired sentences in case Nos. 93-216 and 93-297 and made them components of an unauthorized "general sentence." Id. at 426-28 (Benton, J., dissenting).

II. ANALYSIS

This case involves an issue of statutory interpretation tempered by the constitutional prohibition on double jeopardy. We thus begin with the actual language of the statutes that the DOC relies upon for its assertion of authority to declare a forfeiture penalty of gain time from a sentence that was already fully

served and apply it to another sentence imposed upon revocation of probation. We then address how the DOC's authority is limited by the constitutional bar on punishing an offender twice for the same offense.

A. Statutory Authority

Section 944.28(1), Florida Statutes (1993), provides:

> If a prisoner is convicted of escape, or if the clemency, conditional release as described in chapter 947, probation or community control as described in chapter 948, provisional release as described in s. 944.277, parole, or control release as described in s. 947.146 granted to the prisoner is revoked, the department may, without notice or hearing, declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior to such escape or his or her release under such clemency, conditional release, probation, community control, provisional release, control release, or parole.

(Emphasis supplied.)[4] Section 944.28(1) is one of two provisions that authorized forfeiture of gain time upon revocation of probation at the time of the offenses in this case. The other, section 948.06(6), Florida Statutes (1993), provided:

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4. In 1989, revocation of probation or community control was added to the list of circumstances contained in section 944.28(1) that authorize the DOC to forfeit an offender's gain time. See ch. 89-531, § 6, at 2717, Laws of Fla.; Dowdy v. Singletary, 704 So. 2d 1052, 1053-54 (Fla. 1998). The 1989 legislation superseded State v. Green, 547 So. 2d 925 (Fla. 1989), in which this Court held that under a previous version of section 944.28(1), credit both for time actually served and for gain time must be granted against a sentence imposed upon revocation of the probationary portion of a split sentence. See id. at 927. The present version is essentially unchanged from the 1993 version applicable to Gibson.

> Any provision of law to the contrary notwithstanding, whenever probation, community control, or control release, including the probationary [or] community control portion of a split sentence, is violated and the probation or community control is revoked, the offender, by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of his release on probation, community control, or control release.

(Emphasis supplied.) This subsection provides general authority to forfeit gain time and specifically refers to split sentences.[5]

The issue in this case is whether the DOC may apply the forfeiture penalty of section 944.28(1) across offenses to the guidelines sentence imposed upon violation of probation for a crime that was originally included in the same guidelines scoresheet as the offense on which the gain time was accrued. Section 944.28(1) does not specify whether the forfeiture penalty applies to split sentences. Its analog, section 948.06(6) (now section 948.06(7), Florida Statutes (2003)), specifies that the forfeiture penalty applies to the revocation of probation or community control imposed as part of a split sentence.[6] Similarly, section 921.0017, Florida Statutes (2003), which applies to offenses committed on or after

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5. Section 948.06(6) was enacted in chapter 89-531, section 13, at 2720, Laws of Florida.

6. Effective May 30, 1997, forfeiture of gain time is mandatory under this provision, which was redesignated section 948.06(7). See ch. 97-239, § 5, at 4403, Laws of Fla.; ch. 97-299, § 13, at 5381-82, Laws of Fla.

January 1, 1994, specifies that upon revocation of probation when an offender is serving a "split sentence pursuant to section 948.01," the trial court shall only order credit for time served and not for gain time.

Although none of the statutory provisions governing forfeiture of gain time define a split sentence, two provisions in section 948.01, Florida Statutes (2003), relating to the trial courts' sentencing options, do explain the split sentence option. Section 948.01(6) provides, in full:

> Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may, at the time of sentencing, impose a split sentence whereby the defendant is to be placed on probation or, with respect to any such felony, into community control upon completion of any specified period of such sentence which may include a term of years or less. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant and direct that the defendant be placed upon probation or into community control after serving such period as may be imposed by the court. The period of probation or community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.

Section 948.01(11) provides, in pertinent part:

> The court may also impose a split sentence whereby the defendant is sentenced to a term of probation which may be followed by a period of incarceration or, with respect to a felony, into community control, as follows:
>
> (a) If the offender meets the terms and conditions of probation or community control, any term of incarceration may be modified by court order to eliminate the term of incarceration.

(b) If the offender does not meet the terms and conditions of probation or community control, the court may revoke, modify, or continue the probation or community control as provided in s. 948.06. If the probation or community control is revoked, the court may impose any sentence that it could have imposed at the time the offender was placed on probation or community control.

Section 948.01(6) defines what this Court has described as a "true split sentence." See Poore v. State, 531 So. 2d 161, 164 (Fla. 1988). In Poore, we listed the five sentencing options then available to the trial court in imposing a sentence for a criminal offense:

> [A] judge has five basic sentencing alternatives in Florida: (1) a period of confinement; (2) a "true split sentence" consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion; (3) a "probationary split sentence" consisting of a period of confinement, none of which is suspended, followed by a period of probation; (4) a Villery sentence, consisting of a period of probation preceded by a period of confinement imposed as a special condition; and (5) straight probation.

Id. at 164. We further explained in Eldridge that

> [a] true split sentence is a prison term of a number of years with part of that prison term suspended, contingent upon completion on probation of the suspended term of years. When a defendant violates a true split sentence, the most severe sentence the trial court may impose on resentencing is to "unsuspend" the previously suspended prison term. That is, that the defendant is reincarcerated and must actually serve the previously suspended term of years in prison. . . . In [the probationary split] sentence, if the defendant violates probation, the trial court may impose any sentence it might have originally imposed.

Eldridge, 760 So. 2d at 889 n.1; see also § 948.06(1). In State v. Powell, 703 So. 2d 444, 446 (Fla. 1997), we recognized that section 948.01(11), enacted after Poore, authorizes a sentence not described in that case—a period of probation followed by a period of incarceration, which we labeled a "reverse split sentence."

B. The Tripp Line of Cases

Tripp, the case principally relied upon by the DOC and the First District as justifying the imposition of a forfeiture penalty in this case, concerned credit for time served on a completed sentence when a defendant is sentenced on a different offense to a term of incarceration upon revocation of probation. In Tripp, the Court rejected the contention that because convictions for two separate crimes result in two separate sentences, the offender is not entitled to credit for time served. See 622 So. 2d at 942. We determined that where a term of incarceration on one offense is followed by a term of probation on another, credit for time served on the first offense must be awarded on the guidelines sentence imposed after revocation of probation on the second offense. See id.

Although we did not identify the combined sanctions in Tripp as a true or probationary split sentence, we emphasized that the offenses were "factors that were weighed in the original sentencing." Id. We stated that our decision served two purposes: first, to ensure that offenses originally sentenced as a unit "continue

to be treated in relation to each other, even after a portion of the sentence has been violated," and second, to prevent offenders from receiving a sentence upon revocation of probation that, combined with the sentence originally received, exceeds the maximum guidelines sentence. Id.

In a decision issued shortly after Tripp, Horner v. State, 617 So. 2d 311 (Fla. 1993), we stated that the provision now found in section 948.01(6) defines "split sentencing with regard to the sentencing that the trial court is imposing for all cases against the defendant." Id. at 313. Horner involved a "multiple-case sentence," id. at 312, in which the defendant was sentenced in three separate cases. We concluded that because the trial court adjudicated "three cases in one hearing and imposed a single split sentence," a term of probation on one offense that created a gap between the incarceration and probation imposed on another offense did not violate the statutory requirement that probation immediately follow incarceration in a split sentence. Id. at 313.

In subsequent decisions based on Tripp, we continued to emphasize that several sentences imposed in a single sentencing based on a single scoresheet were to be treated as a single unit upon revocation of probation or community control. In Hodgdon v. State, 789 So. 2d 958 (Fla. 2001), we repeated the imperative that "offenses treated together at sentencing via a single scoresheet continue to be

treated as a single unit for purposes of sentencing upon a violation of probation." Id. at 962 n.5 (emphasis supplied). The issue in Hodgdon was whether the defendant was entitled to have Tripp credit applied individually to the sentence for each offense on which he violated probation. This Court held that Tripp's requirement of credit for time previously served applies to the overall sentence imposed upon violation of probation rather than against each individual count on which probation is revoked. See id. at 963.

The driving force in Hodgdon, as in Tripp, was fairness. To have applied credit against the sentence on each individual count rather than against the overall sentence would have circumvented the guidelines by providing "a sentencing boon or windfall to defendants upon violations of probation." Id. In Hodgdon, per-count credit would also have resulted in the defendant serving no time in prison—a result surely contrary to the trial court's intent. See id. at 962.

In our most recent application of Tripp, this Court reaffirmed that because of the continuing interrelationship of sentences originally imposed together, "Tripp should be applied notwithstanding the fact that the newly imposed sentence is within the guidelines." State v. Witherspoon, 810 So. 2d 871, 873 (Fla. 2002). Thus, we held in a single-scoresheet scenario that an offender was entitled to Tripp credit even though the sentence imposed upon violation of probation would not

exceed the maximum overall guidelines sentence when combined with the time previously served on a different offense. Id. at 873.

C. Tripp Meets Eldridge

In Eldridge, we construed the statutory provision applicable here in a case that involved true split sentences of prison and probation imposed for a number of offenses. See 760 So. 2d at 889. We held that upon revocation of community control or probation imposed as part of a true or probationary split sentence for a single offense, both the trial court and the DOC have the authority to forfeit gain time. See id. at 892. We had previously explained, in Forbes v. Singletary, 684 So. 2d 173, 174 (Fla. 1996), that the trial court's authority derives from language in section 948.06(6) providing that upon revocation of the probationary or community control portion of a split sentence, the offender may be deemed to have forfeited all gain time earned up to the date of his release. We held in Eldridge that pursuant to section 944.28(1), the DOC may forfeit the gain time even if the trial court chooses to retain it. See 760 So. 2d at 891.

We recognized in Eldridge that actual time served and gain time are not the same when it comes to awarding credit to a defendant upon revocation of probation. "While the award of gain time reduces an inmate's release date, just as actual time spent incarcerated, it is clearly not synonymous with actual time served.

On the contrary, gain time is time not served." Id. The DOC explained that the authority to award and forfeit gain time (as opposed to the trial court's authority to award credit for time served) is used to "encourage good behavior in prison and on supervision." Id. at 890. We observed that it was the "Legislature that provided for the award of gain time in the first place and it made the retention of that gain time conditional upon the satisfactory completion of the inmate's supervision." Id. at 892. Thus, under Eldridge, when a defendant is sentenced to a prison term upon revocation of probation imposed as part of a split sentence for a single offense, the DOC has the complete authority to forfeit all gain time previously awarded. The effect of this forfeiture is to require the offender to serve out the remainder of the prior incarceration in addition to the sentence imposed upon revocation of probation.

In this case, the First District concluded that the sanctions initially received by Gibson were a probationary split sentence within the meaning of Eldridge. See Gibson, 828 So. 2d at 423. Relying on Tripp, Horner, Hodgdon, and Eldridge, Judge Lewis elaborated on this conclusion in his separate concurrence:

> [E]ven though he was convicted of multiple offenses, Gibson received only one sentence because the offenses were scored on a single scoresheet and considered together in forming his scoresheet sentence.
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> As Gibson received only one sentence for his three cases, his

> initial sentence constituted a probationary split sentence. Thus, pursuant to Eldridge, the Department had the authority to forfeit any accrued gain time . . . .

Id. at 424-25 (Lewis, J., concurring specially).

Judge Lewis's analysis correctly applies our precedent in this area. We conclude that the DOC's application of section 944.28(1) to the single-unit sentence structure first addressed in Tripp is consistent with our prior case law in which we have recognized the continuing relationship among guidelines sentences that were originally imposed in relation to one another. Application of section 944.28(1) to single-unit sentences also serves the Legislature's purpose of penalizing offenders for violation of probation through the forfeiture of gain time.

We conclude that extending the interrelationship of single-unit guidelines sentences to gain-time forfeiture does not violate the requirement in section 775.021(4), Florida Statutes (2003), and Florida Rule of Criminal Procedure 3.701(d)(12) that the offender receive a sentence for each offense. An offender sentenced for multiple offenses receives a separate sentence for each offense, even though the sentences for offenses scored on a single scoresheet are viewed as a single unit out of concern for fairness and uniformity in sentencing. So long as each sentence remains with the statutory and guidelines maximums, the application of the gain-time forfeiture does not turn separate sentences into an unauthorized

general sentence.

Viewed from the perspective of fairness and uniformity, an offender sentenced upon revocation of probation that was imposed as part of a single-unit sentence should not be exempt from the gain-time forfeiture penalty of section 944.28(1) while an offender sentenced upon revocation of probation imposed as part of a split sentence for a single offense is subject to the forfeiture penalty. Allowing the forfeiture penalty to be applied to single-offense split sentences while precluding application of the penalty to single-unit sentences on which the offender received Tripp credit would result in disparate treatment based solely on sentence structure rather than for any purpose served by either Tripp or section 944.28(1).

We recognize that the DOC's application of section 944.28(1) to single-unit sentences will nullify Tripp credit for most if not all sentences imposed for offenses committed before October 1, 1995, which is the effective date of the enactment that requires prisoners to serve a minimum of eighty-five percent of their sentences. See § 944.275(2)(b)(3), Fla. Stat. (2003). However, if we were to hold that section 944.28(1) does not extend to single-unit sentences, the credit for unforfeited gain time applied to sentences imposed upon revocation of probation would give offenders such as Gibson a windfall in comparison to those sentenced to prison upon violating probation imposed as part of a single-offense split sentence. As we

stated in Hodgdon, "Tripp was never intended to provide a sentencing boon or windfall to defendants upon violation of probation." 789 So. 2d at 963. Nevertheless, as we explain below, the forfeiture penalty may not be applied so as to effect an overall increase in the sentence upon revocation of probation, resulting in a "Tripp penalty."

D. Double Jeopardy Concerns

Gibson asserts that forfeiture of gain time from an expired sentence violates the constitutional prohibition on double jeopardy, because in effect the forfeiture of gain time resurrects a sentence that has been fully served. This concern is also implicit in Judge Benton's view that a prison sentence without a probationary component cannot be revived once the sentence has expired. See Gibson, 828 So. 2d at 428 (Benton, J., dissenting).

In the seminal case of Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873), the United States Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution "was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." The Court in Lange held that once a defendant had paid a court-imposed fine of $200 and served five days of a one-year prison term, the trial court could not vacate the judgment and impose a new prison term of one year

commencing immediately and resulting in a sentence of one year and five days. The Court stated that "[t]o do so is to punish him twice for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing." Id. at 175. In Troupe v. Rowe, 283 So. 2d 857, 859 (Fla. 1973), this Court cited Lange in holding that the trial court violated double jeopardy in increasing the punishment upon an offender who had already begun serving a lawful sentence. See also Ashley v. State, 850 So. 2d 1265, 1267 (Fla. 2003) (holding that amendment of twenty-five-year sentence already underway to incorporate a ten-year mandatory minimum term violated double jeopardy).

This Court applied the double jeopardy principles of Lange and Rowe to a multiple-offense sentence scenario in Fasenmyer v. State, 457 So. 2d 1361 (Fla. 1984). There the defendant, originally sentenced on several counts, successfully challenged one of the convictions on appeal, requiring reduction to a lesser included offense and a shorter sentence. See id. at 1363-64. On remand, the trial court ordered that the five-year sentence on count two, which had been concurrent with the sentence on count one that was vacated on appeal, run consecutive to the new sentence imposed on count one. See id. at 1364. The district court affirmed the new sentences, and held that the change in the sentence that had not been disturbed on appeal allowed the court "to achieve its original sentencing plan based

on the aggregate of the convictions." Id.

This Court quashed the district court decision and stated:

> By changing the sentence from concurrent to consecutive in 1982, and not pursuant to any challenge by appellant to the previous sentence or the underlying conviction, the court nullified the service of those five years and violated the Double Jeopardy Clauses of the United States and Florida constitutions.
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> In Troupe v. Rowe, 283 So.2d 857 (Fla.1973), this Court held that once a defendant has been sentenced, double jeopardy attaches and a court may not thereafter on its own motion increase the severity of the sentence. Such prohibition, clearly, should apply even more strongly when the offender has fully satisfied the sentence. It was so held in Ex Parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873) . . . .
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> . . . [W]e hold that where a conviction is not challenged and not disturbed by the appellate court, and has been fully satisfied by its terms by the time the trial court receives the case on remand, a sentence originally ordered to be served concurrently cannot be changed to consecutive service.

Id. at 1365.

Like the sentences imposed in Fasenmyer, a single-unit sentence for multiple offenses imposed under the guidelines is "sentencing based on the aggregate of the convictions." This is the foundation for the holding in Tripp that the sentences must continue to be treated in relation to one another. However, under Fasenmyer, the fact that offenses are sentenced in the aggregate and in relation to one another does not preclude a double jeopardy violation when one of the sentences, which is not challenged and has been completed, is subsequently increased in a continuation

of the aggregate sentencing scheme. The question is whether revocation of gain time from an expired sentence and application of that forfeiture to a sentence for a different offense under section 944.28(1) constitutes an unconstitutional increase in a "fully satisfied" sentence for that offense.

Initially, we note that the requirement of Tripp credit has the inverse effect of a forfeiture of gain time from an expired sentence. Tripp gives credit for time actually served while section 944.28(1) takes away credit for gain time. Where Tripp credit is equal to or less than the amount of gain time forfeited, the two cancel each other out. To determine whether this is constitutionally permissible, we must re-examine the basis for Tripp credit.

The obligation to grant Tripp credit flows from the policy informing the guidelines rather than from any specific constitutional or statutory directive.[7] Tripp credit is designed to prevent trial judges from circumventing the guidelines' purpose

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7. In contrast, upon revocation of single-offense, split-sentence probation, credit for time served prevents an unconstitutional double punishment. See State v. Jones, 327 So. 2d 18, 25 (Fla. 1976) (stating that to deny credit "would result in a possible constitutional violation under the standards set down in North Carolina v. Pearce, 395 U.S. 711 (1969)"), overruled on other grounds, State v. Holmes, 360 So. 2d 380, 382 (Fla. 1978), and receded from on other grounds, Villery v. Florida Parole & Probation Commission, 396 So. 2d 1107, 1110 (Fla. 1980). Credit for time served upon revocation of probation in a single-offense split-sentence scenario is now also required by statute, effective for offenses committed on or after January 1, 1994. See § 921.0017, Fla. Stat. (2003).

of establishing "'a uniform set of standards to guide the sentencing judge in the sentence decision-making process' so as to eliminate unwarranted variation in sentencing." Tripp, 622 So. 2d at 942 (quoting Fla. R. Crim. P. 3.701(b)). Tripp precludes the disparity that would otherwise result from treating a single-unit sentence of incarceration on one offense followed by probation on another offense differently from a single-offense split sentence. Thus, Tripp credit is dictated solely by the policy of maintaining the interrelationship of single-unit sentences.

Because Tripp already involves the use of an expired sentence to reduce a prison term on a separate offense, and there is no constitutional entitlement to this credit, we determine that Tripp credit may itself be reduced or eliminated through the forfeiture of previously unforfeited gain time without causing a double jeopardy violation. However, permitting gain-time forfeiture to reach beyond this "reservoir" of Tripp credit would have the effect of increasing the punishment on the expired sentence by requiring that the offender again serve prison time that was never credited to another sentence. This would subject the offender to an additional punishment for an offense on which the first sentence has not only commenced, as in Lange and Troupe, but has been completed, as in Fasenmyer, thereby violating the constitutional prohibition on double jeopardy.

This situation is distinguishable for purposes of double jeopardy analysis

from gain-time forfeiture upon revocation of probation imposed as part of a single-offense split sentence which, as previously explained, merely requires the offender to resume serving the sentence previously imposed but not fully served for that offense. Cf. Duncan v. Moore, 754 So. 2d 708, 711 (Fla. 2000) ("[R]eturning a Conditional Release violator to prison to continue serving his or her sentence without credit for the prior awarded gain time does not constitute a violation of double jeopardy."). Accordingly, we hold that the gain-time forfeiture penalty for violation of probation authorized by section 944.28(1) may be applied in the multiple-case, split-sentence scenario so long as the number of days of gain time forfeited does not exceed the credit for time actually served that has been granted under Tripp.

III. THIS CASE

Gibson completed his sentences in case Nos. 93-216 and 93-297 with no post-release supervision of any kind and thus was not subject to reimprisonment in those cases. The trial court sentenced Gibson to seven years of incarceration in case No. 93-960. When Gibson applied for Tripp credit, he received 1681 days of credit for time actually served on the previous sentences.

The First District stated that the trial court also credited unforfeited gain time accrued on the initial prison sentences. See Gibson, 828 So. 2d at 423. However,

the record does not indicate exactly how much credit the trial court intended to grant under Tripp. If the trial court had knowingly granted 1969 days of credit for unforfeited gain time as well as 1681 days of credit for the 1681 days actually served, see supra at 5-6, Gibson would have received ten years of credit on a seven-year sentence, which would have negated any punishment for violation of probation. We note that Tripp requires credit for time served and not credit for gain time. See Tripp, 622 So. 2d at 943 n.2 (stating that for crimes committed after October 1, 1989, "the revocation of probation or community control now serves to forfeit any gain time previously earned"). To the extent that Gibson advocates that he should have received credit for both time served and gain time from the expired sentence without being subjected to any forfeiture penalty from the expired sentence, we reject this view.

However, we conclude that the DOC's position that the entire 1969-day forfeiture could be applied to the new sentence is also untenable. This argument does not take into account the fact that the expired sentences contained no conditions of probation or post-release supervision by which the State retained authority to impose additional sanctions. The DOC's position would result in Gibson serving not just the seven-year sentence imposed by the trial court but also the 288 days from a previously expired sentence. Just as Gibson should not have

received credit for unforfeited gain time, which would have negated his prison sentence for violation of probation, the DOC was unauthorized to forfeit more gain time than the Tripp credit awarded by the trial court, thereby increasing Gibson's sentence in violation of double jeopardy principles.

We conclude that the DOC had the authority in this case to forfeit a maximum of 1681 days of gain time, which would have nullified the Tripp credit of 1681 days. In forfeiting all of Gibson's previously earned gain time, the DOC revived a previously served sentence, thereby violating the Double Jeopardy Clauses of the United States and Florida Constitutions. Thus, the 1681 days of Tripp credit for time served constitute the limit of Gibson's gain-time forfeiture exposure under section 944.28(1) to the sentence imposed upon revocation of probation.[8]

IV. CONCLUSION

The certified question in this case asks whether the forfeiture penalty authorized by our interpretation of the statute in Eldridge also applies to the type of sentence imposed in Tripp. We conclude that for a defendant who is eligible to receive Tripp credit from another offense, the statutory forfeiture penalty contained

8. Had Gibson not already been released under this sentence, he would be entitled to the restoration of the 288 days of unlawfully forfeited gain time.

in section 944.28(1) likewise authorizes the DOC to forfeit gain time from a completed guidelines sentence and add that gain time to the guidelines sentence imposed by the trial court upon revocation of probation.[9] However, in order to comply with the constitutional prohibition against double jeopardy, the gain-time penalty cannot increase the length of the sentence imposed by the trial court on the second offense after violation of probation. In other words, the gain-time forfeiture penalty from an expired sentence cannot exceed the credit for time actually served from that same sentence. With that caveat, we answer the certified question in the affirmative and approve the decision below.

It is so ordered.

ANSTEAD, LEWIS, and QUINCE, JJ., concur.
CANTERO, J., concurs in part and dissents in part with an opinion, in which WELLS and BELL, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANTERO, J., concurring in part and dissenting in part.

I concur in Parts I and II A, B, and C of the majority opinion. I dissent from

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9. We note that our holding applies only to sentences imposed under the guidelines. The applicability of Tripp credit to sentences imposed under the Criminal Punishment Code, which replaced the guidelines for offenses omitted after October 1, 1998, is currently before this Court in another case. See Moore v. State, 859 So. 2d 613 (Fla. 1st DCA 2003), review granted, 870 So. 2d 822 (Fla. 2004).

Part II D, however, to the extent it limits the amount of gain time that the Department of Corrections (Department) may forfeit upon revocation of probation. Unlike the majority, I believe the Department of Corrections may constitutionally forfeit all of Gibson's gain time—even that part exceeding his credit for time served.

As the majority recognizes, ever since Tripp v. State, 622 So. 2d 941 (Fla. 1993), we have consistently viewed a sentencing guidelines sentence imposed for several offenses on a single sentencing scoresheet as a single sentence, not one for each offense. Therefore, for our purposes the trial court in Gibson's case did not impose separate sentences of five years' imprisonment (case no. 93-216), five years' imprisonment (case no. 93-297) (consecutive to the first case), and ten years' probation (case no. 93-360). Rather, it imposed one sentence of ten years' imprisonment followed by ten years' probation. As Judge Lewis concluded in his concurring opinion below, under our precedent Gibson's original sentence "constituted a probationary split sentence." Gibson, 828 So. 2d at 425; see Larimore v. State, 823 So. 2d 287, 287 (Fla. 1st DCA 2002) ("Under Tripp . . . separate crimes and sentences may constitute a split sentence where both crimes were scored on a single scoresheet, and considered in forming a scoresheet sentence."). A probationary split sentence is a sentence consisting of "a period of

confinement, none of which is suspended, followed by a period of probation." Poore v. State, 531 So. 2d 161, 164 (Fla. 1988).

In Tripp, we rejected the State's argument that the defendant had received two separate sentences and thus was not entitled to credit for time served upon revocation of probation. Instead, we emphasized that "both offenses were factors that were weighed in the original sentencing through the use of a single scoresheet and must continue to be treated in relation to each other, even after a portion of the sentence has been violated." 622 So. 2d at 942 (emphasis added).

Our cases after Tripp have continued to consider sentences imposed on a single sentencing scoresheet as one sentence. See Hodgdon v. State, 789 So. 2d 958, 963 (Fla. 2001) (noting that "allowing a defendant to receive credit against the entire sentence imposed on a probation violation permits a defendant's sentences to be treated as an interrelated unit as they were when they were originally imposed"); accord State v. Witherspoon, 810 So. 2d 871, 873 (Fla. 2002) (citing Hodgdon and holding that a defendant sentenced on a single scoresheet to prison on one offense followed by probation on another was entitled to Tripp credit upon revocation of probation). Finally, as the majority notes, in Horner v. State, 617 So. 2d 311, 313 (Fla. 1993), we held that the applicable statute "defines split sentencing with regard to the sentencing that the trial court is imposing for all cases against the

defendant." Thus, "when there is one sentencing that includes incarceration and either community control or probation on a variety of counts or cases," the court has imposed a single split sentence. Id.

Based on the foregoing rationale, the majority correctly holds that the gain-time forfeiture statute applies, just as Tripp does. Majority op. at 15. As the majority recognizes, see majority op. at 6-7, Florida Statutes permit the forfeiture of all gain time upon revocation of the probationary part of a split sentence. See § 948.06(6), Fla. Stat. (1993). We explained in Dowdy v. Singletary, 704 So. 2d 1052, 1054 (Fla. 1998), that prisoners released early because of gain time are no longer deemed to have extinguished their sentences if they are released subject to the Department's supervision. Thus, the State has authority "to consider that the releasees' sentences have not completely expired until completion of the supervisory period." 704 So. 2d at 1054.

We applied this understanding of conditional expiration in Eldridge v. Moore, 760 So. 2d 888, 891-92 (Fla. 2000). There, the defendant was sentenced to a true split sentence of imprisonment followed by probation.[10] After being

10. A true split sentence is a term of years with part of the term suspended contingent upon successful completion of probation for the suspended term. See Poore v. State, 531 So. 2d 161 (Fla. 1988). Upon violation of probation, the defendant may be required to serve the suspended term in prison.

released, Eldridge violated his probation and was resentenced to serve the original probationary part of the sentence in prison. The Department then forfeited all of the previously awarded gain time and required Eldridge to serve those days on the original incarcerative portion of his sentence in addition to his new sentence (less the gain time awarded on that sentence). We explained that although Eldridge was released upon expiration of his prison sentence through the combination of actual time served plus gain time, that expiration was only conditional because (1) gain time and actual time served are not synonymous; (2) the grant of gain time is a matter of legislative grace (a tool the Department uses to encourage good behavior); and (3) the Legislature has specifically conditioned the retention of gain time on an inmate's successful completion of supervision. Id.; see § 944.28(1), Fla. Stat. (1993). Because gain time is conditional, upon its forfeiture "the inmate must serve out his or her prior incarceration as a penalty for the revocation of supervision." 760 So. 2d at 892 (emphasis added). We concluded that

> upon resentencing in either a probationary split sentence or a true split sentence, regardless of whether the trial court resentenced the inmate to a lesser sentence, the Department's statutory authority to forfeit "all gain time" upon probation revocation should not be lessened. In other words, the actual length of the new sentence imposed after probation revocation is irrelevant to any forfeiture penalty exacted from the gain time awarded during the prior incarceration.

Id. (citation omitted) (emphasis added). Under Eldridge, then, upon revocation of

probation, all gain time awarded on the incarcerative portion of a split sentence—whether true or probationary—may be forfeited. Upon resentencing, the defendant must actually serve out the original incarcerative term before serving the new sentence.

We confirmed this understanding in Duncan v. Moore, 754 So. 2d 708, 710-11 (Fla. 2000). In that case, the inmate contended that revocation of his conditional release supervision upon his release from prison would constitute a double jeopardy violation because his sentence would be fully served at the time of his release. Noting that Duncan's sentence had "always included a period of supervision," we stated that under the relevant statutes his sentence "does not expire when the incarcerative portion of his sentence ends; it only expires when the entire sentence, including the supervisory period, has been satisfactorily completed." Id. at 711. Thus, the Court concluded there was no double jeopardy violation:

> Therefore, we find that requiring that a Conditional Release eligible inmate finish his or her sentence by satisfactorily completing a period of post-prison supervision equal to the amount of gain time awarded does not violate double jeopardy. Further, returning a Conditional Release violator to prison to continue serving his or her sentence without credit for the prior awarded gain time does not constitute a violation of double jeopardy.

Id.

In light of these cases, forfeiture of all of Gibson's gain time (1969 days), even that part that would exceed his credit for time served (1681 days)—a difference of 288 days—does not violate double jeopardy principles. The incarcerative portion of Gibson's sentence did not completely expire when he completed his sentence with a combination of time served and gain time awarded; it only expired conditioned on his successful completion of probation.

In finding a double jeopardy violation in this case, the majority relies on cases that involve imposition of a new sentence after a sentence already has been imposed. For example, in Troupe v. Rowe, 283 So. 2d 857, 859-60 (Fla. 1973), the trial court sentenced Troupe pursuant to his plea and over the State's objection. After the hearing, when the State subsequently renewed its objection to the sentence, the court sua sponte and "arbitrarily" set aside the plea and the sentence and set the case for trial. Similarly, in Fasenmyer v. State, 457 So. 2d 1361 (Fla. 1984), the defendant had served nine years of concurrent sentences of fifty and five years when an appellate court reversed the conviction for which he received the fifty-year sentence. We correctly reversed the new sentence on the second count of a five-year consecutive term. The sentence clearly constituted a new sentence that violated double jeopardy principles. Finally, in Ashley v. State, 850 So. 2d 1265 (Fla. 2003), the trial court originally sentenced the defendant as a habitual

felony offender. Three days later, the court brought the defendant back to court and resentenced him as a habitual violent felony offender. This Court held that the resentencing violated double jeopardy principles.

In each of these cases the trial court imposed a new sentence that constituted a second punishment for the same offense. The circumstances of this case are completely different. Gibson has not been resentenced to a different prison term. The forfeiture of all his gain time merely imposes the full term of his original sentence, less credit for time served.

The majority is inconsistent in holding both that Gibson's sentence had only conditionally expired (for purposes of credit for time served) and that it had completely expired (for purposes of the forfeiture statute). If, as the majority repeatedly acknowledges, Gibson received one indivisible sentence, then his release on probation under that same sentence did not extinguish his prison sentence, and the Department's forfeiture of all his gain time upon his violation of probation cannot violate double jeopardy principles. I would hold that the Department of Corrections may constitutionally forfeit all of Gibson's gain time—even that part exceeding his credit for time served.

For these reasons, I concur in part and dissent in part.

WELLS and BELL, JJ., concur.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 1D02-0118

(Leon County)

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