IN THE SUPREME COURT FOR THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. SC03-1676
4D01-4197

GARY MATTHEWS,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CASE NO. SC03-1676/4D01-4197

STATE OF FLORIDA v. GARY MATTHEWS

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida, Appellee herein, certifies that the following additional persons and entities have, or may have, an interest in the outcome of this case.

1. Jeanine M. Germanowicz, Esq., Assistant Attorney General
   Celia Terenzio, Assistant Attorney General
   Charles J. Crist, Jr., Attorney General
   (Appellate counsel for the State of Florida, Petitioner)

2. Marcy K. Allen, Esq., Assistant Public Defender
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   (Appellate counsel for the Respondent, Gary Matthews

3. Gary Matthews, Respondent

4. The Honorable Cynthia Angelos, Circuit Judge of the Nineteenth Circuit, in and for St Lucie County

5. Erin Kirkwood, Esq., Assistant State Attorney
   Bruce Colton, State Attorney, 19th Circuit

6. Jeffrey H. Garland, Esq., trial attorney for Respondent

7. The Honorable Barry Stone, Appellate Judge for the Fourth District

8. The Honorable Gary Farmer, Appellate Judge for the Fourth District

9. The Honorable Bobby Gunther, , Appellate Judge for the Fourth District

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court below and the appellee in the appellate court below and will be referred to herein as “Petitioner” or “the State.” Respondent was the defendant in the trial court below, and the appellant in the appellate court below and will be referred to herein as “Respondent” and “Defendant.” Reference to the record on appeal will be by the symbol “R;” reference to the transcripts will be by the symbol “T;” reference to any supplemental record or transcripts will be by the symbols “SR” or “ST;” and reference to Petitioner’s brief in the appellate court will be by the symbol “IAB;” all followed by the appropriate page numbers. For example page one of the supplemental record would appear as (SR 1).

STATEMENT OF THE CASE AND FACTS

The District Court of Appeal, Fourth District, summarized the facts of this somewhat complex case history as follows:

> In 1990, Mathews pled guilty to (count I) battery on a law enforcement officer, (count II) resisting an officer with violence, and (count III) escape. For counts I and II, he was sentenced to serve concurrent terms of five years as a habitual felony offender with credit for time served. For count III, he was ordered to serve five years of probation consecutive to the prison sentence.
>
> In 1994, while serving the probation portion of his sentence for count III, Matthews committed two new crimes. The court revoked Matthews' probation in the 1990 case and sentenced him to serve four and a half years in prison with credit for the 355 days he had served while awaiting sentencing. On that same day, Matthews was also sentenced for the substantive charges of sexual battery and false imprisonment in case number 94-1592. However, this sentence was reversed on appeal to this court and Matthews was re-sentenced in 1997.
>
> Upon re-sentencing on case number 94-1592, Matthews was ordered to serve five years in prison as to count I and, as to count II, one year in prison followed by four years on probation, with 1,099 days credit for time served, plus all unforfeited gain time. n2
>
> n2 Matthews' sentence, as to count II, was subsequently amended, resulting in a sentence of one year and one day followed by three years and 364 days of probation.
>
> In 2001, Matthews violated his probation in the 1994 case and was re-sentenced. Matthews filed a *rule 3.800(b)* motion to correct sentence in case 90-1156

> arguing that he should have received Tripp credit and, because he had completed the 1990 sentence, the credit should be considered relative to the date he commenced serving his 1994 sentence.

Matthews v. State, 854 So. 2d 238 (Fla. 4th DCA 2003).[1]

The appellate court opined that had Tripp credit been applied in the 1990 case, Matthews' sentence in the 1994 case would have started sooner than it did. Applying its decision in Palmer v. State, 804 So. 2d 455 (Fla. 4th DCA 2001), the Fourth District held that the Tripp rationale applied even where the defendant was sentenced as a habitual offender.

Rejecting Petitioner's argument that the issue was moot because the sentence in 90-1156 had long since been completed, the Fourth District held that Respondent was entitled to correct credit for time served in an earlier case when it impacted a subsequent release date. Accordingly, the appellate court reversed the denial of the Florida Rule of Criminal Procedure 3.800 motion and remanded to the trial court for further proceedings consistent with their opinion. However, the court certified conflict with the District Court of Appeal for the Second District, which court held in Duncan v. State,

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[1] Tripp v. State, 622 So. 2d 941 (Fla. 1993)(defendant was sentenced to imprisonment on one count followed by probation on the second count; this Court held that credit must be awarded for time served on the first count against the sentence imposed for violating probation on the second count).

686 So. 2d 701 (Fla. 2d DCA 1996), that Tripp credit was not applicable to habitual felony offender sentences. This petition for review followed.

The State would note that Respondent is no longer in custody, having completed his sentence subsequent to the filing of the Fourth District's opinion. The State submits, however, as it did in its response to Respondent's "Suggestion of Mootness," that this Court should nonetheless entertain this case as this issue is capable of repetition, although Respondent has suggested it should evade review in the instant case, and is one of significant public importance.

SUMMARY OF THE ARGUMENT

Appellant was not entitled to credit toward a sentence long since served. The issue was moot and the District Court of Appeal for the Fourth District should have declined to address it, especially where the motion itself was facially insufficient.

Moreover, Tripp credit for habitual offender sentences should not be credited towards guidelines sentences imposed after revocation of probation. Habitual offender sentences are not governed by the guidelines. Therefore, this Court should reverse the opinion of the Fourth District and affirm the trial court’s denial of Gary Matthew’s Florida Rule of Criminal Procedure 3.800 motion.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO CORRECT SENTENCE IN CONNECTION TO CASE NUMBER 90-1156. (Restated).

Respondent claimed below that he was entitled to Tripp credit toward Count III for time served on Counts I and II in case number 90-1156 pursuant to Tripp v. State, 622 So. 2d 941, 942 (Fla. 1993). According to Respondent's argument, if he had received such credit, his sentence in case 90-1156 would have ended earlier and his sentence in case 94-1592 would have started running earlier. Therefore, Respondent asserts that the period of time "wrongfully served" in case 90-1156 should be credited to time served in case number 94-1592. (AIB 26).

As the State argued and the trial court recognized below, the trial court was without jurisdiction to correct the sentence in case number 90-1156. Respondent finished serving that sentence and commenced serving his sentences for the 1994 offenses on May 29, 1996, according to the Department of Corrections. (R 118-119). Respondent was no longer "in custody" for the 1990 offenses when he filed his Florida Rule of Criminal Procedure 3.800 motion. Therefore, any attack on the sentence in 90-1156 was moot because Respondent had already served his time. Moore v. Moore, 764 So. 2d 676 (Fla.

1st DCA 2000); Archibald v. State, 715 So. 2d 1154 (Fla. 4th DCA 1998); Lee v. State, 230 So. 2d 478 (Fla. 4th DCA 1970).

Even if this issue were not moot, Respondent did not properly raise this claim for relief in his Rule 3.800 motion below. As defense trial counsel below stated, he could not predict the effect, if any, of such an application of Tripp credit on Petitioner's current sentence. (SR 13-14). For example, if Petitioner were to obtain Tripp credit for Counts I and II, then the Department of Corrections could revoke any gain time earned on Counts I and II and greatly reduce or erase any benefit Petitioner got from Tripp credit. Gibson v. Florida Department of Corrections, 828 So. 2d 422 (Fla. 1st DCA 2002), rev. granted, 842 So. 2d 843 (Fla. 2003)(defendant must serve time not previously served as forfeited gain time); § 944.28, Fla. Stat. (1989)(forfeiture of gain time upon revocation of probation).

Therefore, the Rule 3.800 motion to correct that was originally filed in the trial court was properly denied because it was, as the assistant state attorney below recognized, facially insufficient under Rule 3.800(a) - Petitioner did not sufficiently allege or demonstrate the alleged prejudice resulting from the alleged error. (SR 9). After all, a motion to correct an illegal sentence relies on

error which is apparent from the face of the record and can be resolved without resort to an evidentiary hearing. Fla. R. Crim. P. 3.800(a); State v. Callaway, 658 So. 2d 983, 987-988 (Fla. 1995). Here, the alleged error was not readily apparent from the face of the record.

The State would note that although Respondent filed a Rule 3.800(b) motion, the motion was not ripe under subsection (b) of the rule since it was not filed prior to or during the pendency of a direct appeal from the 1990 convictions and sentences. In fact, the motion was filed in connection with a sentence that had long since been served. For this reason, the trial court properly treated the Rule 3.800(b) motion as a Rule 3.800(a) motion and denied it without an evidentiary hearing. (R 308, 311).

Admittedly, during the pendency of the appeal from this Rule 3.800(a) motion, Respondent filed a Rule 3.800(b) motion asserting the same issue. (SR1). As a result, the Fourth District chose to treat this proceeding pursuant to Rule 3.800(b). This was error. Respondent should not be allowed to render a motion, which was facially insufficient under Rule 3.800(a), facially sufficient merely by filing a Rule 3.800(b) motion during the pendency of an appeal from the facially insufficient Rule 3.800(a) motion. That would unfairly allow

Respondent to avoid both of the procedural bars in Rule 3.800(a) and Rule 3.800(b). This Court should not permit it.

With regard to the merits of Respondent's claim, it is true that this Court held, in Tripp, 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. However, Tripp involved guideline sentences and not habitual offender sentences.

Nonetheless, the Fourth District reasoned in this case and in Palmer v. State, 804 So. 2d 455 (Fla. 4th DCA 2001), that Tripp was also applicable to habitual offender sentences. The Fourth District certified conflict in this case because they were in direct conflict with the Second District in Duncan v. State, 686 So. 2d 701 (Fla. 2d DCA 1996), wherein the Second District held that Tripp credit did not apply to habitual offender sentences. Although the Fourth District did not also certify conflict with the Fifth District, the Fifth District seems to have adopted the view of the Second District. McKnight v. State, 773 So. 2d 560 (Fla. 5th DCA 2000). This Court should strike down the Fourth District's opinions and uphold the Second District's opinions because the

Second District's reasoning is more logical than the Fourth District's.

This is because, by statute, the guidelines do not apply to habitual offender sentences. Studnicka v. State, 679 So. 2d 819, 822 (Fla. 1996), rev. denied, 687 So. 2d 1306 (Fla. 1996). Habitual offender sentences are removed from the guidelines and a scoresheet is, therefore, not necessary. Rice v. State, 622 So. 2d 1129 (Fla. 5th DCA 1993), citing Daniels v. State, 591 So. 2d 1103 (Fla. 5th DCA 1992). See also Holley v. State, 527 So. 2d 624, 625 (Fla. 1st DCA 1991) (in sentencing appellant as an habitual offender, court was not required to utilize a sentencing guidelines scoresheet since habitual offender sentencing was by statute exempted from sentencing guidelines procedures). Thus, as the Second District properly recognized, a defendant is not entitled to credit for time served on a guidelines sentence toward a habitual offender sentence.

It must be noted that the self-evident goal of the sentencing guidelines scoring system was to achieve control over the **total** prison term for all guidelines sentences scored on the same scoresheet and imposed at the same sentencing. Compare Tripp, 622 So. 2d at 942 (incarcerative period that exceeds guidelines range is inconsistent with intent of

guidelines). A guidelines sentence was usually far less than the statutory maximum sentence and was not permitted to exceed the top of the guidelines range, absent a departure, or to exceed the statutory maximum. § 921.001, Fla. Stat. (1989); Fla. R. Crim. P. 3.701. In contrast, a habitual offender sentence was intended to be harsher than a guideline sentence and was permitted to exceed the top of the guidelines range and the statutory maximum. §§ 775.084 and 775.0841, Fla. Stat. (1989) (the intent of the repeat and violent felony offender statutes is to incarcerate these offenders for extended terms).

Tripp was intended to address a specific sentencing danger under the guidelines, the danger that trial courts might impose consecutive probation as a mechanism to boost, on a subsequent violation, the **total** incarcerative term beyond the guidelines range. Ray v. State, 782 So. 2d 468 (Fla. 2d DCA 2001). That danger did not exist here because the three 1990 sentences imposed on Counts I, II, and III were never required to **collectively** fall within an overall **guidelines** range since two of them were habitual offender sentences. Using credit for one type of sentence toward the other is like mixing apples and oranges - it cannot be done because they are not the same thing.

Significantly, the guidelines prison sentence, four and a half years in prison, that Respondent received for Count III after violating his five year guidelines probation sentence for Count III did not exceed the **total** guidelines sentence permissible for the **only** sentence that Respondent received under the guidelines - the sentence for Count III. The top of the permissible sentencing range for the only sentence imposed under the guidelines in this case was four and a half years, including the one cell bump that was permitted upon revocation of probation.[2] Fla. R. Crim. P. 3.701(d)(14); Fla. R. Crim. P. 3.988. Therefore, no Tripp credit was needed to make sure that Respondent's sentence did not exceed the total guidelines sentence permissible upon a violation of probation.

As appellate courts have noted, this Court did not intend its holding in Tripp to be applied in every case in which probation is imposed on one offense consecutive to a sentence of incarceration on another offense, without consideration of

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[2] Interestingly, it appears that the top of the Guidelines range would have remained exactly the same - three and a half years before the violation of probation and four and a half years after the violation - whether Respondent had been scored under Florida Rule of Criminal Procedure 3.988(d) using Count I (battery on a law enforcement officer) as the primary offense and Counts II and III as additional offenses or had been scored under Florida Rule of Criminal Procedure 3.988(h) using Count III (escape) as the primary offense and not scoring Counts I and II at all.

the circumstances involved. Slater v. State, 639 So. 2d 80, 81 (Fla. 2d DCA 1994). Given the circumstances herein, Tripp should not apply. Stated another way, time served on two habitual offender sentences need not and should not be credited to a guidelines sentence imposed after revocation of probation.[3]

In fact, giving a defendant credit in a situation like the one herein could mean that the defendant could violate probation with impunity because he would already have served all the time he ever had to on the first two counts. It would

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[3] Although not dispositive, Hodgdon v. State, 789 So. 2d 958 (Fla. 2001)(Court was not confronted with a sentence that exceeded that permitted under the guidelines but noted that this factor alone did not preclude the application of Tripp), it is worth noting that the two concurrent five year habitual offender prison sentences for Counts I and II and the consecutive five year guidelines probation sentence for Count III that Respondent initially received in this case were much less than what he could have received. The trial court could have imposed a ten year habitual offender prison sentence for Counts I and II, third degree felonies, and could have imposed a three and a half year guideline prison sentence for Count III. §§ 775.084 and 921.001, Fla. Stat. (1989). Moreover, had the trial court chosen to sentence Respondent as a habitual offender on all three counts, Respondent could have been sentenced to thirty years in prison for Count III, the second degree felony, and to concurrent ten year terms in prison for Counts I and II, third degree felonies. § 775.084, Fla. Stat. (1989). Even though the trial judge ultimately imposed nine and a half years worth of prison for all three counts following Appellant's violation of probation (the initial five years prison on Counts I and II plus the later four and a half years prison on Count III), this was far less than Petitioner might have received. This is simply another reason why the justification for the Tripp rule does not apply in this case.

make probation essentially worthless in this situation.

In addition, the State would note that, even if Respondent was somehow entitled to Tripp credit for the 1990 offenses, it would be contrary to public policy to allow Respondent to use it as credit toward the 1994 offenses - crimes which had yet to be committed in 1990. Silvester v. State, 794 So. 2d 683 (Fla. 4th DCA 2001). See also, Hodgdon v. State, 789 So. 2d 958 (Fla. 2001)(Tripp was never intended to provide a sentencing boon or windfall to defendants upon violations of probation). For this reason as well as for the others cited herein, this Court must deny Respondent the relief he has received from the Fourth District - applying credit for time served on a 1990 crime toward a 1994 crime.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court REVERSE the decision of the FOURTH DISTRICT and, by so doing, AFFIRM the denial of Respondent's Rule 3.800 motion below.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "PETITIONER'S INITIAL BRIEF ON THE MERITS" has been furnished by courier to: MARCY K. ALLEN, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on November 12, 2003.

_____
Of Counsel

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this document, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, has been prepared with 12 point Courier New type.

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Of Counsel

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INDEX TO APPENDIX

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