IN THE SUPREME COURT OF FLORIDA

GEANETTA MOORE,

Petitioner,

v. CASE NO. SC03-2136

STATE OF FLORIDA,

Respondent.

________________________/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
WHEN SENTENCING PURSUANT TO THE CRIMINAL PUNISHMENT CODE (§§921.002-921.0027, Fla. Stat. (1999)) FOR A VIOLATION OF A PROBATIONARY TERM ORIGINALLY IMPOSED TO RUN CONSECUTIVELY TO A PRISON TERM IMPOSED FOR A DIFFERENT OFFENSE, <u>Tripp v. State</u>, 622 So. 2d 941 (Fla. 1993), AND ITS PROGENY REQUIRE THE TRIAL COURT TO AWARD CREDIT FOR TIME PREVIOUSLY SERVED ON THE SENTENCE IMPOSED FOR THE DIFFERENT OFFENSE.	
CONCLUSION	20
CERTIFICATE OF SERVICE	21
CERTIFICATE OF FONT SIZE	21

TABLE OF CITATIONS

CASES	PAGES
Cook v. State, 645 So. 2d 436 (Fla. 1994)	6,10,18
Duncan v. State, 686 So. 2d 701 (Fla. 2nd DCA 1996)	17
Hodgdon v. State, 789 So. 2d 958 (Fla. 2001)	Passim
Larimore v. State, 823 So. 2d 287, 288 (Fla. 1st DCA 2002)	15
Matthews v. State, 854 So. 2d 238 (Fla. 4th DCA 2003), *rev. pending*, case no. SC03-1676	17,18
Moore v. State, 28 Fla. L. Weekly D2729 (Fla. 1st DCA Nov. 26, 2003)	1

Palmer v. State, 804 So. 2d 455
(Fla. 4th DCA 2001) 17

State v. Witherspoon, 810 So. 2d 871
(Fla. 2002) Passim

Thomas v. State, 805 So. 2d 850
(Fla. 2nd DCA 2001) 15,17,18

Tripp v. State, 622 So. 2d 941
(Fla. 1993) Passim

OTHER AUTHORITIES

Art. V, §3(b)(3), Fla. Const. 4

Fla. R. App. P. 9.030(a)(2)(A)(v) 4

Fla. R. Crim. P. 3.800(b)(1) 3,8

§§921.002-921.0027, Fla. Stat. (1999) 4,7

§921.0024(2), Fla. Stat. (1999) 15

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:
Petitioner, :
:
v. : CASE NO. SC03-2136
:
STATE OF FLORIDA, :
:
Respondent. :
______________________________ :

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. A one volume record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses.

Attached hereto as appendix A is the opinion of the lower tribunal, which has been reported as Moore v. State, 28 Fla. L. Weekly D2729 (Fla. 1st DCA Nov. 26, 2003).

II STATEMENT OF THE CASE AND FACTS

By amended information filed below under case no. 99-4516, petitioner was charged with grand theft and felony failure to appear (I R 2-3). On November 22, 2000, she entered a plea to the charges, and to another grand theft and felony failure to appear in case no. 99-2202 (I R 6-10). On January 4, 2001, she was sentenced to 24 months in state prison in case no. 99-2202, followed by five years probation in case no. 99-4516 (I R 13-20). The scoresheet for both cases called for a sentence of at least 11.1 months (I R 11-12).

On September 27, 2002, an affidavit of violation of probation was filed, alleging that petitioner had not filed monthly reports, had absconded and had committed two new crimes (I R 39). The violation report form shows that she had been released from prison on February 13, 2002 (I R 42).

On January 16, 2003, she admitted the violations for not filing reports and absconding; she denied the new crimes; and the state elected not to proceed on those (I R 47-53).

Counsel argued that because the original criminal punishment code scoresheet

included both cases, she was entitled to credit against her sentence in case no. 99-4516 for the time she had served in prison on case no. 99-2202, because that was time served on the front end of the total split sentence under the consolidated scoresheet (I R 53-55).

The prosecutor stated that was not correct, because appellant was only before the court on case no. 99-4516, and the judge agreed with the prosecutor (I R 56).

Petitioner’s probation in case no. 99-4516 was revoked (I R 82), and she was sentenced to concurrent terms of 36 months in state prison, with credit for 294 days served in jail pending the VOP, and no credit for the time previously served in prison on case no. 99-2202 (I R 62-63; 71-77). Petitioner requested the prior state prison credit, and the judge noted the objection (I R 62).

On January 27, 2003, petitioner filed a motion to correct sentencing error under Fla. R. Crim. P. 3.800(b)(1), again asking for credit in case no. 99-4516 for the time she had served in prison in case no. 99-2202, on authority of State v. Witherspoon, 810 So. 2d 871 (Fla. 2002), and Tripp v. State, 622 So. 2d 941 (Fla. 1993) (I R 78-79).

On February 7, 2003, the judge entered an order denying the motion and finding that those cases did not apply since petitioner was sentenced under the criminal punishment code rather than the sentencing guidelines (I R 83-84).

On February 11, 2003, petitioner filed a timely notice of appeal (I R 85).

On direct appeal, the lower tribunal agreed with the judge and held that petitioner was not entitled to that credit. Appendix.

The lower tribunal certified the following question to this Court:

> WHEN SENTENCING PURSUANT TO THE CRIMINAL PUNISHMENT CODE (§§921.002-921.0027, Fla. Stat. (1999)) FOR A VIOLATION OF A PROBATIONARY TERM ORIGINALLY IMPOSED TO RUN CONSECUTIVELY TO A PRISON TERM IMPOSED FOR A DIFFERENT OFFENSE, DO Tripp v. State, 622 So. 2d 941 (Fla. 1993), AND ITS PROGENY REQUIRE THE TRIAL COURT TO AWARD CREDIT FOR TIME PREVIOUSLY SERVED ON THE SENTENCE IMPOSED FOR THE DIFFERENT OFFENSE?

Appendix at 4.

Petitioner filed a timely notice of discretionary review, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v), and Art. V, §3(b)(3), Fla. Const.

III SUMMARY OF THE ARGUMENT

The judge erred in denying petitioner credit for the time she had spent in prison on the other case, when he revoked probation in the instant case. The two cases were scored on the same scoresheet originally, and thus petitioner originally received a split sentence of prison time followed by probation. The lower tribunal erred in affirming the judge's decision to deny that credit.

The standard of review is de novo, since this is purely a question of law. The issue was preserved by petitioner's objections at sentencing and her motion to correct sentencing error.

The law was well-settled in Tripp v. State, *supra*, under the former sentencing guidelines, that when a defendant violated probation on the back end of a split sentence, he or she was entitled to credit for time served in prison on the front end of the split sentence.

There is no reason why the same should not be true under the present criminal punishment code scoresheet. The upper limit of the code is now the statutory maximum. But the

principles of the guidelines cases still are valid -- the defendant must be credited with the time he or she served in prison on the front end of a split sentence. The Second District has so held.

The Tripp court's rationale was that to deny credit would be to circumvent the intent of the sentencing guidelines, because the VOP sentence without the credit would in effect be a departure from the guidelines range as calculated on the same scoresheet for both offenses.

This is true even though the sentence imposed on the violation of probation would not have exceeded the upper limit of the sentencing guidelines range. This Court later held in

Cook v. State, 645 So. 2d 436 (Fla. 1994), Hodgdon v. State, 789 So. 2d 958 (Fla. 2001), and State v. Witherspoon, *supra*, that Tripp applied even though the sentence imposed on the violation of probation did not exceed the sentencing guidelines range.

The Fourth District has held that Tripp rule applies even though the defendant was sentenced as an habitual offender and not under the former sentencing guidelines or the present criminal punishment code.

This Court must answer the certified question in the affirmative, reverse the opinion of the lower tribunal, and remand with directions to grant petitioner credit in case no. 99-4516 with the time she served in prison on case no. 99-2202.

IV ARGUMENT

WHEN SENTENCING PURSUANT TO THE CRIMINAL PUNISHMENT CODE (§§921.002-921.0027, Fla. Stat. (1999)) FOR A VIOLATION OF A PROBATIONARY TERM ORIGINALLY IMPOSED TO RUN CONSECUTIVELY TO A PRISON TERM IMPOSED FOR A DIFFERENT OFFENSE, Tripp v. State, 622 So. 2d 941 (Fla. 1993), AND ITS PROGENY REQUIRE THE TRIAL COURT TO AWARD CREDIT FOR TIME PREVIOUSLY SERVED ON THE SENTENCE IMPOSED FOR THE DIFFERENT OFFENSE.

Petitioner originally entered a plea to four charges, grand theft and felony failure to appear in case no. 99-2202, and grand theft and felony failure to appear in case no. 99-4516 (I R 6-10). On January 4, 2001, she was sentenced to 24 months in state prison in case no. 99-2202, followed by five years probation in case no. 99-4516 (I R 13-20). One criminal code scoresheet was used for both cases (I R 11-12).

Petitioner was released from serving her prison sentence in case no. 99-2202 on February 13, 2002, after having served 13 months and nine days (I R 42), and

thereafter violated her probation in case no. 99-4516.

At sentencing on the VOP in case no. 99-4516, counsel argued that because the original criminal punishment code scoresheet was used for both cases, she was entitled to credit for the time she had served in prison on case no. 99-2202, because that was time served on the front end of the total split sentence under the consolidated scoresheet (I R 53-55).

The judge disagreed and accepted the state's position that petitioner was not entitled to that credit because she was only before the court for sentencing in case no. 99-4516 (I R 56).

The judge revoked probation in case no. 99-4516, and imposed concurrent terms of 36 months in state prison, with credit for 294 days served in jail pending the VOP, but with <u>no</u> credit for the time previously served in prison in case no. 99-2202 (I R 62-63; 71-77). Petitioner requested the prior state prison credit, and the judge noted the objection (I R 62).

Thereafter, petitioner filed a timely motion to correct sentencing error under Fla. R. Crim. P. 3.800(b)(1), again asking for credit for the time she had served in

prison in case no. 99-2202, on authority of State v. Witherspoon, and Tripp v. State, *supra* (I R 78-79). The judge entered an order denying the motion and finding that those cases did not apply since petitioner was sentenced under the criminal punishment code, rather than the sentencing guidelines (I R 83-84).[1]

This was reversible error. The lower tribunal likewise created reversible error when it affirmed the judge's decision to deny that credit.

The law was well-settled under the former sentencing guidelines that when a defendant violated probation on the back end of a split sentence, he or she was entitled to credit for time served in prison on the front end of the split sentence.

In Tripp v. State, *supra*, the defendant was sentenced to four years in state prison on a burglary charge, to be followed by four years probation on a grand theft charge. When he violated probation on the grand theft charge, the judge granted credit on that sentence for the time he had spent in prison on the burglary charge. This Court approved of this procedure:

---

[1]Thus, the issue was fully preserved by petitioner's objections at sentencing and her motion to correct sentencing error. The standard of review is de novo, since this is purely a question of law.

> 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.

Tripp, 622 So. 2d at 942; footnote omitted.

The Tripp court's rationale was that to deny credit would be to circumvent the intent of the sentencing guidelines, because the VOP sentence without the credit would in effect be a departure from the guidelines range as calculated on the same scoresheet for both offenses.

In Cook v. State, *supra*, this Court applied the Tripp rationale even though the sentence imposed on a second the violation of probation did not exceed the sentencing guidelines range. Mr. Cook violated his 1989 probation by committing new crimes in 1990 and was sentenced to prison on the new crimes, followed by probation on the 1989 cases.

When he violated that same 1989 probation again, he was sentenced to 3 ½ years in prison, where the sentencing guidelines scoresheet allowed a total sentence of 17 years. He requested credit for the time he had served in prison on the 1990 crimes

for the first violation. This Court held that he was entitled to that credit under Tripp.[2]

Likewise, In Hodgdon v. State, 789 So. 2d 958 (Fla. 2001), the defendant was sentenced on three counts of DUI manslaughter, one count of leaving the scene of an accident involving death, and two counts of DUI with serious bodily injury. He was consecutively sentenced, on various counts, to a total of 15 years in state prison followed by 20 years of probation. When he violated probation, he received a total of 40 years in prison, but the judge did not credit him with the time he had spent in prison on each of the consecutive state prison counts.

This Court noted that the sentence Mr. Hodgdon received was still within the sentencing guidelines range, and so his case was slightly different from that of Mr. Tripp. But that distinction did not matter:

> ANALYSIS
>
> At the outset, it must be noted that **we are not confronted**

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[2]This Court rejected the state's argument that Mr. Cook would receive "an unwarranted windfall." *Cook v. State,* 645 So. 2d at 438, note 5. This Court should likewise reject the lower tribunal's belief that petitioner would also receive "a windfall." Appendix at 4.

here with a sentence that exceeds that permitted under the sentencing guidelines. That factor alone, however, does not preclude the application of *Tripp*.

*   *   *

Moreover, **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**: "[B]oth 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." *Tripp*, 622 So.2d at 942.

CONCLUSION

In sum, **we clarify our holding in *Tripp* to emphasize that a defendant who violates probation on multiple counts imposed consecutive to a prison term is entitled to credit for the time served on the prison term as to the entire sentence imposed on the probation violation**, not against each individual count on which probation was violated. This Court's holding in *Tripp* was intended to prevent the circumvention of the guidelines by treating sentences computed on one scoresheet as an interrelated unit. *Tripp* was never intended to provide a sentencing boon or windfall to defendants upon violations of probation.

Hodgdon v. State, 789 So. 2d at 962, 963; bold emphasis added. Likewise, petitioner's sentences in the two cases must be treated as an "interrelated unit."

Thereafter, in State v. Witherspoon, *supra*, the defendant received a 20 year

state prison sentence on one count, followed by five years probation on another count. When he violated probation on the second count, his sentencing guidelines range was 12 to 27 years, which could be increased to 40 years because of the VOP. He received a 15 year prison sentence for the VOP on the second count, but the judge declined to grant credit for the time he had served in prison on the first count, because the 15 year sentence was within the sentencing guidelines range.

The appellate court followed Tripp and reversed, but because "the award of credit was unnecessary to ensure that the defendant's total prison time [20 years on the front end of the split sentence + 15 years on the VOP] did not exceed the guidelines range [of 12 to 40 years]," the court certified the following cryptic question:

> [W]hether, if the reason which prompted the *Tripp* rule is not present, *Tripp* must apply. [FN1]
>
> FN1. The referenced rule from *Tripp v. State,* 622 So.2d 941, 942 (Fla. 1993), provides:
>
> [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.

Witherspoon v. State, 776 So.2d 984, 985 (Fla. 5th DCA 2001).

State v. Witherspoon, 810 So. 2d at 872.

This Court recast the question as follows:

> When a defendant is originally sentenced consecutively on a single scoresheet, does the holding in *Tripp v. State,* 622 So.2d 941 (Fla. 1993), require the granting of credit for time served in prison **where the defendant's newly imposed sentence upon revocation of probation does not exceed the maximum permitted by the sentencing guidelines**?

State v. Witherspoon, 810 So. 2d at 872; bold emphasis added. This Court relied on Hodgdon, *supra*, and answered the question in the affirmative:

> In *Hodgdon*, this Court specifically stated that **an application of *Tripp* was not precluded where the newly imposed sentences were within the guidelines**. *Id.* at 962. We reasoned 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." *Hodgdon v. State*, 789 So.2d at 963 (*quoting Tripp v. State,* 622 So.2d 941, 942 (Fla. 1993)). Consistent with *Hodgdon*, **we hold that *Tripp* should be applied notwithstanding the fact that the newly imposed sentence is within the guidelines**.

> We therefore approve the decision of the district court of appeal and answer the certified question in the affirmative.

State v. Witherspoon, 810 So. 2d at 873; bold emphasis added.

Thus, the judge below was correct to conclude that Tripp was designed to ensure that a total sentence on more than one count was within the sentencing guidelines range. But the judge and lower tribunal were incorrect to recognize that this Court had held in Hodgdon and State v. Witherspoon demonstrate that Tripp also applies when the total sentence on more than one count does not exceed the upper end of the sentencing guidelines range.[3]

There is no reason why the same should not be true under the present criminal punishment code scoresheet. The judge was wrong to conclude that Tripp no longer applied.

Sentences imposed under the present criminal punishment code, as opposed to the former sentencing guidelines, are still governed by the holdings of Hodgdon and

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[3] *Tripp* applies even though it "may have the effect of erasing the subsequent sentence for the probation violation." *Larimore v. State*, 823 So. 2d 287, 288 (Fla. 1st DCA 2002). Here, it would not erase petitioner's 36 month sentence; it would only give her credit for the prior 13 months and nine days she had served.

State v. Witherspoon. Under the code, there is no "upper range" on the scoresheet. There is a floor, which is the least severe sentence the judge may impose. §921.0024(2), Fla. Stat. (1999). The "upper range" under the code is the statutory maximum for both of petitioner's third degree felony offenses in case no. 99-4516, or a total of 10 years.

The court in Thomas v. State, 805 So. 2d 850 (Fla. 2nd DCA 2001), agreed with this position. There the defendant was sentenced under the criminal punishment code in one case to weekends in jail as a condition of community control and probation. He was placed on straight community control and probation in another case. When he violated probation in both cases, the judge declined to give him credit for the weekends he had served in jail because they had been ordered in only one case.

The appellate court reversed and held that Mr. Thomas was entitled to that credit in both of his cases under Tripp, even though his sentences were imposed under the criminal punishment code rather than the former sentencing guidelines:

> Thomas also claims that the weekend jail credit should have been awarded on both cases. We agree. The trial court determined that the rule in *Tripp v. State,* 622 So.2d 941 (Fla. 1993), did not apply because the probation ordered in case number

> 99-20953 was concurrent with, not consecutive to, the probation in case number 99-17486. **We believe the application of *Tripp* is triggered not by whether a consecutive period of probation is ordered, but by the fact of offenses being scored on the same scoresheet and, thus, factored into the computation of a permissible sentence imposed at the same sentencing proceeding.** We also join the Third District and the Fifth District in the recognition that the *Tripp* rule should come into play only where necessary to keep sentences within the guidelines but that the supreme court has not yet receded from *Tripp* to impose such a limitation. *See Witherspoon v. State,* 776 So.2d 984 (Fla. 5th DCA 2001); *Priester v. State,* 711 So.2d 177 (Fla. 3d DCA 1998). We observe that the legislative broadening of permissible guidelines sentencing ranges has virtually eliminated the circumvention of the guidelines problem with which *Tripp* was concerned. Nevertheless, because *Tripp* appears to require that credit be granted on both cases, we reverse and remand for the trial court to award the additional credit.

Thomas v. State, 805 So. 2d at 851-52; bold emphasis added.

The Fourth District has consistently held that Tripp rule applies even though the defendant was sentenced as an habitual offender and not under the former sentencing guidelines or the present criminal punishment code.[4] In Palmer v. State, 804 So. 2d 455 (Fla. 4th DCA 2001), the court held:

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[4]The Second District held to the contrary in *Duncan v. State*, 686 So. 2d 701 (Fla. 2nd DCA 1996).

> Here, we find that *Tripp* applies to sentences where a portion of the sentence was pursuant to the habitual offender statute. *Tripp* holds that offenses which are originally sentenced together should continue to be treated in relation to each other. *See* 622 So.2d at 942. The habitual offender statute does not change that rationale.

Palmer v. State, 804 So. 2d at 456. In Matthews v. State, 854 So. 2d 238 (Fla. 4th DCA 2003), *rev. pending*, case no. SC03-1676, the Fourth District recently adhered to its position that Tripp applies even to habitual offender sentences, which are not governed by either the former sentencing guidelines or the present criminal punishment code.

Even though petitioner's present 36 month sentence in case no. 99-4516 was imposed under the criminal punishment code and not under the former sentencing guidelines, and even though it does not exceed the maximum of 10 years, she is still entitled under Cook, Hodgdon, State v. Witherspoon, Thomas and Matthews to credit for the time she previously served in prison in case no. 99-2202.

This is demonstrated by taking the holding of State v. Witherspoon and inserting petitioner's "statutory maximum sentence of 10 years" in place of the word "*guidelines*," to-wit: "in *Hodgdon*, this Court specifically stated that an

application of *Tripp* was not precluded where the newly imposed sentences were within the [statutory maximum sentence of 10 years] ~~*guidelines*~~." Likewise, "consistent with *Hodgdon*, we hold that *Tripp* should be applied notwithstanding the fact that the newly imposed sentence is within the [statutory maximum sentence of 10 years] ~~*guidelines*~~."

Thus, since the holdings of Hodgdon and State v. Witherspoon still apply to sentences imposed on a VOP under the criminal punishment code, the proper remedy is to remand with directions that the judge grant credit for the 13 months and nine days petitioner spent in prison on the front end of the total split sentence.

This Court must answer the certified question in the affirmative.

V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court to reverse the decision of the lower tribunal and remand with directions to grant petitioner credit in case no. 99-4516 for the 13 months and nine days she had served in prison in case no. 99-2202.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Alan R. Dakan, Assistant Attorney General, The Capitol, Tallahassee, Florida; and to petitioner, #206530, Gadsden CI, 6044 Greensboro Highway, Quincy, Florida 32351; on this ___ day of December, 2003.

____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New 12 point type.

____
P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

GEANETTA MOORE,

Petitioner,

v. CASE NO. SC03-2136

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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(Publication page references are not available for this document.)

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GEANETTA MOORE a/k/a JEANETTA MOORE,
Appellant,
v.
STATE OF FLORIDA, Appellee.

CASE NO. 1D03-617

District Court of Appeal of Florida, First District.

Opinion filed November 26, 2003.

An appeal from the circuit court for Escambia County. Terry D. Terrell, Judge.

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Charlie Crist, Attorney General; Alan R. Dakan, Assistant Attorney General, Tallahassee, for Appellee.

In this direct criminal appeal, appellant seeks review of sentences imposed following revocation of probation. She argues that, because she was originally sentenced on two counts in one case to concurrent 24-month prison terms to be followed by concurrent 5-year probationary terms on two counts of a second case, the decisions in *Tripp v. State,* 622 So.2d 941 (Fla.1993), and its progeny mandate that she receive credit upon the revocation of her probation in the second case for the time she spent in prison on the sentences imposed in the first case. Because

appellant was sentenced pursuant to the Criminal Punishment Code rather than its predecessor (the sentencing guidelines), we disagree and, accordingly, affirm. We also certify to the supreme court a question which we believe to be of great public importance.

I.

WEBSTER, J.

In November 2000, appellant entered no-contest pleas to charges of grand theft and felony failure to appear in case number 99-2202, and to identical charges in case number 99-4516. In January 2001, the trial court sentenced appellant pursuant to the Criminal Punishment Code (§§ 921.002-921.0027, Fla.Stat. (1999)) to concurrent 24-month prison terms on the two counts in case number 99-2202, to be followed by concurrent 5-year probationary terms on the two counts in case number 99-4516. Appellant served the prison terms imposed in case number 99-2202, and began her probation in case number 99-4516.

In January 2003, appellant admitted that she had violated her probation. Her attorney argued that she was entitled to credit for prison time previously served in case number 99-2202 on any prison sentence imposed in case number 99- 4516 for violation of probation because the original Criminal Punishment Code scoresheet used had included both cases. The trial court agreed with the prosecutor that appellant was not entitled to such credit because she was being sentenced in only case number 99-4516. Accordingly, the trial court revoked appellant's probation in that case, sentencing her to concurrent 36-month prison terms on the two counts. It did not award any credit for the time appellant had previously served in prison on the sentences imposed in case number 99-2202.

Appellant subsequently filed a timely motion pursuant to Florida Rule of Criminal Procedure 3.800(b), again requesting credit on her sentences in case number 99-4516 for the time she had spent in prison on the sentences imposed in case number 99-2202, and relying on *Tripp v. State,* 622 So.2d 941 (Fla.1993), and *State v. Witherspoon,* 810 So.2d 871 (Fla.2002). The trial court denied the motion, concluding that *Tripp* and *Witherspoon* did not apply because appellant had been sentenced pursuant to the Criminal Punishment Code rather than the pre-1998 sentencing guidelines. This appeal follows.

II.

A.

In *Tripp,* the defendant had pleaded guilty pursuant to a plea agreement to charges of burglary and grand theft, which had occurred in November 1988, and had been charged in a single information. *State v. Tripp,* 591 So.2d 1055, 1056 (Fla. 2d DCA 1991). In return, the state had agreed to imposition of a guidelines sentence. *Id.* Pursuant to the sentencing guidelines, the maximum permitted sentence was 4 1/2 years. *Id.* The trial court imposed a 4-year prison sentence for the burglary. *Id.* For the grand theft, the court placed Tripp on probation. *Id.* The probation was to run consecutively to the prison sentence. *Id.* After completing his prison sentence, Tripp began his probationary term. *Id*. A short time later, he violated the terms of that probation. *Id.* Probation was revoked, and Tripp was sentenced to 4 1/2 years in prison. *Id*. He was also given credit against that sentence for the 4 years he had already served for the burglary conviction. *Id.*

On appeal, the Second District Court of Appeal reversed. It concluded that the sentences imposed had not amounted to a split sentence for which jail credit was required but, instead, involved one sentence followed by a separate, consecutive,

sentence of probation. *Id.* Because two separate sentences were involved, the court reasoned that Tripp was not entitled to jail credit on the second, consecutive, sentence for time spent in prison on the first sentence. *Id.* at 1056-57. However, recognizing that its holding would permit trial courts to exceed the maximum permitted sentence contemplated by the sentencing guidelines (*id.* at 1057), the court certified the following question to the supreme court:

> 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?

Id.

The supreme court accepted review, answered the certified question in the negative, and quashed the Second District's decision. *Tripp v. State,* 622 So.2d 941, 942-43 (Fla.1993). It "h[e]ld 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." *Id.* at 942 (footnote omitted). In support of this holding, the court offered the following analysis:

> The purpose of the sentencing guidelines is "to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process" so as to eliminate unwarranted variation in sentencing.... One guidelines scoresheet must be utilized for all offenses pending before the court for sentencing.... A sentence must be imposed for each separate offense, but the total sentence cannot exceed the permitted range of the applicable guidelines scoresheet unless a written reason is given.... Sentences imposed after revocation of probation must be within the recommended guidelines range and a one-cell bump.
>
> When Tripp was originally sentenced, the maximum jail time he could have received within the permitted range of the sentencing guidelines was four and one-half years. Under ordinary circumstances, when he violated his probation, his sentence could not exceed the five-and-one-half-year maximum of the next highest permitted range (limited by the fact that the maximum sentence for a third-degree felony is five years), less credit for time served. The problem arises because Tripp committed two crimes. Unless he is given credit for time served on the one against the sentence imposed for the other upon the probation violation, his total sentence for the two crimes will be eight and one-half years, which is three years beyond the permitted range of a one-cell bump.
>
> [I]t appears that the sentencing method sanctioned by the district court of appeal is inconsistent with the intent of the sentencing guidelines. Under this method, trial judges can easily circumvent the guidelines by imposing the maximum incarcerative sentence for the primary offense and probation on the other counts. Then, upon violation of probation, the judge can impose a sentence which again meets the maximum incarcerative period. Without an award of credit for time served for the primary offense, the incarcerative period will exceed the range contemplated by the guidelines.
>
> The State argues that Tripp was convicted of two separate crimes and received two separate sentences. Thus, Tripp is not entitled to credit for time served on his first conviction after revocation of probation on his second conviction. The State, however, ignores the fact 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.

Id.

B.

Less than two years later, the supreme court extended *Tripp* in *Cook v. State,* 645 So.2d 436 (Fla.1994). In 1989, Cook had been convicted of five counts in three cases, and placed on concurrent 3-year probationary terms for all counts. *Id.* at 436. In 1990, Cook was convicted of four new counts, and found to have violated his probation in the earlier cases. *Id.* For the four new counts, Cook received concurrent 4 1/2 -year guidelines sentences. *Id.* In addition, his probation was revoked on the 1989 convictions and he was again given concurrent 3-year probationary terms, to be served consecutively to the prison terms. *Id.* Following his release from prison, Cook promptly violated the probation imposed in the 1989 cases. *Id.* His probation was revoked, and he was sentenced in the 1989 cases to concurrent 3 1/2 -year prison terms. *Id.* at 436-37. The trial court denied Cook's request that he be given credit on those sentences for the 4 1/2 years he had served for the 1990 convictions, and we affirmed. *Id.* at 437.

The supreme court quashed our decision, "conclud[ing] that Cook should have been credited with the four and a half years he served for the 1990 offenses when he was sentenced ... for violating his probation on the 1989 offenses for a second time." *Id.* at 438. In doing so, the court appeared to focus on the fact that, like Tripp, the sentencing guidelines had required that Cook be sentenced using a single scoresheet. *Id.* at 437. Because of this, according to the court, *Tripp* required that the multiple offenses included on the original scoresheet

> must continue to "be treated in relation to each other, even after a portion of the sentence has been violated." ... Accordingly, 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.

Id. at 437-38 (citing *Tripp,* 622 So.2d at 942). The court reached this conclusion notwithstanding the fact that, unlike the situation in *Tripp,* in *Cook* the total sentence imposed did not exceed the permitted guidelines range--i.e., there was nothing to suggest the trial court had attempted "to circumvent the guidelines."

C.

More recently, the court has reiterated its position in *Cook* that, when guidelines sentences are imposed for multiple offenses using a single scoresheet, those sentences must continue to be treated "as an interrelated unit" when imposing a sentence following a subsequent violation of probation because all of the offenses " 'were factors that were weighed in the original sentencing.' " *Hodgdon v. State,* 789 So.2d 958, 963 (Fla.2001) (citing *Tripp*). Noting that "[a]t the root of [its] decision [in *Tripp*] was a desire to effectuate the intent underlying the sentencing guidelines" (*id.* at 959), the court said:

> Although we were concerned in *Tripp* with the circumvention of the sentencing guidelines, we were equally concerned with ensuring 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. Some six months later, the court reaffirmed *Hodgdon* in *State v. Witherspoon,* 810 So.2d 871 (Fla.2002).

III.

We begin our analysis with recognition of the fact that, "[i]n Florida, the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." *Woods v. State,* 740 So.2d 20, 23 (Fla. 1st DCA 1999) (citations omitted). *See also* § 921.002(1), Fla. Stat. (1999) ("The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature"); *Hall v. State,* 823 So.2d 757, 763 (Fla.2002). Accordingly, to answer the question posed by this appeal we must determine what the legislature intended the result to be pursuant to the Criminal Punishment Code (§§ 921.002-921.0027, Fla.Stat.(1999)). This is consistent with the supreme court's effort in *Tripp* and its progeny "to effectuate the intent underlying the sentencing guidelines." *Hodgdon,* 789 So.2d at 959.

Tripp and its progeny (*Cook, Hodgdon* and *Witherspoon*) all involved sentences imposed pursuant to the sentencing guidelines. The legislature has since abandoned that sentencing scheme in favor of the Criminal Punishment Code. Because the sentences in this case were imposed pursuant to the latter, and our task is to ascertain and give effect to the legislature's intent thereunder, we do not believe that the *Tripp* line of cases constitutes binding precedent. However, the only other appellate decision on point in Florida which we have found appears to reach the contrary conclusion. *See Thomas v. State,* 805 So.2d 850 (Fla. 2d DCA 2001). Accordingly, we note apparent conflict with *Thomas,* and certify to the supreme court the question at the conclusion of this opinion, which we believe to be of great public importance.

Appellant contends that, because all of her offenses were originally scored on the same scoresheet, *Tripp* and its progeny mandate that she be given credit on her sentences in case number 99-4516 for the time she previously served in prison on the sentences imposed in case number 99-2202. The state responds that, because appellant's sentences were imposed pursuant to the Criminal Punishment Code rather than the sentencing guidelines, the *Tripp* line of cases has no bearing. For the reasons that follow, we agree with the state.

It is apparent from a reading of the Criminal Punishment Code that it was intended to return to trial judges most of the discretion regarding sentencing that they had traditionally enjoyed prior to the adoption of the sentencing guidelines. The Code states that "[t]he trial court judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control." § 921.002(1)(g), Fla. Stat. (1999). It further provides:

> The total sentencing points shall be calculated only as a means of determining the lowest permissible sentence. The permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in s. 775.082, for the primary offense and any additional offenses before the court for sentencing. The sentencing court may impose such sentences concurrently or consecutively. However, any sentence to state prison must exceed 1 year. If the lowest permissible sentence under the code exceeds the statutory maximum sentence as provided in s. 775.082, the sentence required by the code must be imposed.

§ 921.0024(2), Fla. Stat. (1999). Unlike the sentencing guidelines, the Code does not provide an upper limit to the possible sentence other than the statutory maximum (unless the lowest permissible sentence

exceeds the statutory maximum), and expressly permits the trial court to impose concurrent or consecutive sentences without restriction. *Hall v. State,* 773 So.2d 99, 101 (Fla. 1st DCA 2000), *approved,* 823 So.2d 757 (Fla.2002); *Pruitt v. State,* 801 So.2d 143, 144 (Fla. 4th DCA 2001). *Compare* Fla. R.Crim. P. 3.701(d)(12) ("A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given"); Fla. R. Crim P. 3.702(d)(19) & 3.703(d)(31) ("The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall be within the guidelines sentence unless a departure is ordered").

Given these differences, we conclude that *Tripp* and its progeny have no bearing on sentences such as appellant's, imposed pursuant to the Criminal Punishment Code. Although appellant's offenses were scored on a single scoresheet, the scoresheet was relevant only to determining the lowest permissible sentence. The trial court remained free to sentence up to the statutory maximum on each offense (including offenses before it on a violation of probation) and to impose those sentences either concurrently or consecutively. The sentences cannot be considered an interrelated unit. Thus, when probation on one offense is ordered to run consecutively to incarceration on another, there is simply no logical reason to award credit for the prison time previously served for the first offense against a newly imposed prison sentence on the second offense following a revocation of probation. To do so would provide a windfall to the defendant, in contravention of the Code's relatively clearly expressed intent. Accordingly, we hold that appellant was not entitled to credit against her sentences in case number 99-4516 for the time she had previously served in prison on the sentences imposed in case number 99-2202.

IV.

We affirm appellant's sentences. However, we also certify to the supreme court the following question, which we believe to be of great public importance:

> WHEN SENTENCING PURSUANT TO THE CRIMINAL PUNISHMENT CODE (§§ 921.002-921.0027, Fla.Stat.(1999)) FOR A VIOLATION OF A PROBATIONARY TERM ORIGINALLY IMPOSED TO RUN CONSECUTIVELY TO A PRISON TERM IMPOSED FOR A DIFFERENT OFFENSE, DO *Tripp v. State,* 622 So.2d 941 (Fla.1993), AND ITS PROGENY REQUIRE THE TRIAL COURT TO AWARD CREDIT FOR TIME PREVIOUSLY SERVED ON THE SENTENCE IMPOSED FOR THE DIFFERENT OFFENSE?

AFFIRMED.

KAHN and VAN NORTWICK, JJ., CONCUR.

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