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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

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. The answer brief of respondent will be referred to as “RB.” The opinion of the lower tribunal has been reported as Moore v. State, 859 So. 2d 613 (Fla. 1st DCA 2003).

II ARGUMENT

ARGUMENT IN REPLY TO RESPONDENT: 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 has been cheated out of credit for the 13 months and nine days she served in case no. 99-4516, when the judge revoked her probation in case no. 99-4516 and imposed a 36 month sentence.

Respondent does not dispute that this issue was preserved by her objection at sentencing and her timely motion to correct sentencing error. Nor does respondent dispute that the standard of review is de novo (RB at 4).

Respondent does dispute that the well-settled law under the former sentencing guidelines (that under Tripp v. State, 622 So. 2d 941 (Fla. 1993), 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) no longer applies to split sentences imposed under the criminal punishment code.

Respondent does not distinguish or even mention this Court's post-Tripp decision in Cook v. State, 645 So. 2d 436

(Fla. 1994), where 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. 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 respondent's belief that petitioner would also receive a "windfall of credit for time served" (RB at 8).

Respondent pays lip service to this Court's post-Tripp decision in Hodgdon v. State, 789 So. 2d 958 (Fla. 2001), but fails to acknowledge that even though Mr. Hodgdon's sentence was still within the sentencing guidelines range, that distinction did not matter, and he was entitled to the Tripp credit, because his sentences were an "interrelated unit." Hodgdon v. State, 789 So. 2d at 963. Likewise, petitioner's sentences in the two cases must be treated as an "interrelated unit."

Respondent also pays lip service to this Court's post-Tripp decision in State v. Witherspoon, 810 So. 2d 871 (Fla. 2002), where this Court relied on Hodgdon and held that Tripp also applies when the total sentence on more than one count does not exceed the upper end of the sentencing guidelines range (RB at 6-7).

There is no reason why the same should not be true under the present criminal punishment code scoresheet. The lower tribunal 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 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.

Respondent claims that the court in Thomas v. State, 805 So. 2d 850 (Fla. 2nd DCA 2001), which agreed with this position, "is simply wrongly decided" (RB at 9), without telling us why. That court squarely held, in opposition to the instant case, 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.

Respondent makes no mention of Palmer v. State, 804 So. 2d 455 (Fla. 4th DCA 2001), cited in the initial brief at 17, in which the court held that Tripp applies even though the

defendant was sentenced as an habitual offender and not under the former sentencing guidelines.

Respondent makes no mention of Matthews v. State, 854 So. 2d 238 (Fla. 4th DCA 2003), *rev. pending*, case no. SC03-1676, cited in the initial brief at 17-18, in which the court 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.[1]

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, Matthews and Sylvester 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

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[1]The Second District also agrees with the Fourth that one who is sentenced as an habitual offender is entitled to *Tripp* credit. *Sylvester v. State*, 842 So. 2d 977 (Fla. 2nd DCA 2003).

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.

III CONCLUSION

Based upon the arguments presented here, as well as those expressed in the initial brief, 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 February, 2004.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

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

_____
P. DOUGLAS BRINKMEYER