IN THE SUPREME COURT OF FLORIDA

CASE NO. 04-1461

STATE OF FLORIDA,

Appellant,

vs.

SEAN E. CREGAN,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA
(Criminal Division)

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MERITS BRIEF OF APPELLANT

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

Melanie A. Dale
Assistant Attorney General
Florida Bar No. 0168556
1515 N. Flagler Drive
9th Floor
West Palm Beach, Fl. 33401
Phone: 561-837-5000
Fax: 561-837-5099

Counsel for Appellee

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PRELIMINARY STATEMENT

The Petitioner was the Prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On July 7, 2004, the Fourth District Court of Appeals reversed and remanded the case for an evidentiary hearing, or record attachments conclusively showing no entitlement to relief. The District Court held that the trial court did not exercise it's discretion when it denied the Defendant's motion for jail credit, rather the trial court denied credit as a matter of law, without affording the defendant an evidentiary hearing on the issue of whether the drug program qualified him for credit for time served (Appendix 1). The District Court certified conflict with Toney v. State, 817 So. 2d 924 (Fla. 2d DCA 2002) and Molina v. State, 867 So. 2d 645 (Fla. 3d DCA 2004). Id.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals improperly reversed and remanded this case for an evidentiary hearing, or for record attachments conclusively showing no entitlement to relief. The Defendant is not entitled to credit for the time he served in rehabilitation because as a matter of law the Turning Point Bridge rehabilitation program is not the functional equivalent of jail.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEALS IMPROPERLY REVERSED AND REMANDED THIS CASE WHERE THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT WAS NOT ENTITLED TO CREDIT FOR TIME SERVED IN A DRUG TREATMENT FACILITY WHILE ON COMMUNITY CONTROL.

On July 7, 2004, the Fourth District Court of Appeals improperly reversed and remanded this case for an evidentiary hearing, or for record attachments conclusively showing no entitlement to relief (Appendix 1). The District Court held that the trial court did not exercise it's discretion when it denied the motion for jail credit, rather the trial court denied credit as a matter of law, without affording the defendant an evidentiary hearing on the issue of whether the drug program qualified him for credit for time served (Appendix 1). The District Court certified conflict with Toney v. State as well as with Molina v. State, because the Third District Court of Appeals adopted Toney.

The Defendant is not entitled to credit for the time he served in rehabilitation because as a matter of law the Turning Point Bridge rehabilitation program is not the functional equivalent of jail. Pennington v. State, 398 So.2d 815, 817 (Fla.1981)(finding that [h]alfway houses, rehabilitative centers, and state hospitals are not jails. Their purpose is structured

rehabilitation and treatment, not incarceration). As a matter of law, the trial court below properly denied the motion for credit for time served at the rehabilitation facility.

In Pennington,398 So. 2d at 817, this Court made the following finding:

> We are aware that some courts have determined that credit for rehabilitation center confinement must be given. See, e. g., Lock v. State, 609 P.2d 539 (Alaska 1980); People v. Rodgers, 79 Cal.App.3d 26, 144 Cal.Rptr. 602 (1978); People v. Stange, 91 Mich.App. 596, 283 N.W.2d 806 (1979). Those jurisdictions, however, have controlling statutes which require that result. Our statute, section 921.161(1), states: "(T)he court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence" (emphasis ours). We decline to extend the statute's plain language to require that credit be given in other circumstances.

In this case, the Fourth District Court of Appeals found that the decision to award credit for the time served at the Turning Point Bridge program is discretionary, yet the court cites to no precedent to support this reasoning. Rather, the finding is contrary to this Court reasoning in Pennington, that as a matter of law, time spent in rehabilitation is not incarceration.

This Court’s opinion in Pennington is over twenty years old and § 921.161, Florida Statutes, has not been amended to require

that credit be awarded for time served in a rehabilitation facility. The Legislature has chosen not to accept the dissent's[1] invitation to place a different construction on our statute, notwithstanding that it "presumably" is aware of the decision in Pennington. *See*, Dowell v. Gracewood Fruit Co. 559 So.2d 217, 218 (Fla.,1990)("we cannot simply ignore our prior decisions of which the legislature is presumably aware."). Thus, the Legislature's continued acquiescence twenty years after Pennington is a tacit acknowledgment that it approves the majority's interpretation of § 921.161, Florida Statutes.

This Court must reverse the Fourth District's decision and approve the decision of the Second District in Toney v. State, 817 So. 2d 924 (Fla. 2d DCA 2002), as it is clearly in line with this Court's prior precedent. In Toney v. State, 817 So. 2d 924 (Fla. 2d DCA 2002) the Second District Court of Appeal receded

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[1]The Dissent stated :
"I would quash the decision of the district court of appeal, and would hold in favor of the results reached in Graham v. State, 366 So.2d 498 (Fla.2d DCA), appeal dismissed, 370 So.2d 459 (Fla.1979), and Johnson v. State, 334 So.2d 334 (Fla.2d DCA 1976). While I cannot fault the majority's reasoning based on the authorities cited, I would place a different construction on our statute dealing with the allowance of credit for time served. In this context, I see little if any rational distinction between the denial of liberty through incarceration in jail and the denial of liberty by way of confinement in the structured environment of a training or treatment center. Therefore, I respectfully dissent."

from Hill v. State, 754 So.2d 788 (Fla. 2d DCA 2000), Hall v. State, 784 So.2d 1224 (Fla. 2d DCA 2001), and their progeny, finding that Toney was not entitled to jail credit for time spent in a drug treatment facility as a condition of probation or community control, even though he was in the total custody and control of the state at all times, where he was able to avoid imprisonment either by the court's benevolence or his own choice and the facility was not a coercive deprivation of liberty. The Second District recognized that section 921.161, Florida Statutes (2000), requires that "the court imposing a sentence shall allow a defendant credit for all of the time she or he spent in the county jail before sentence". Although Tal-Mason v. State[2] logically and properly extended the meaning of "county jail" to include court-mandated pretrial confinement in a state mental institution, the Court declined to further stretch the interpretation of the statute.

The Second District previously followed this view in Williams v. State, 780 So.2d 244, 246-47 (Fla. 2d DCA 2001), when it rejected Williams's claim that he was entitled to credit for time spent in a probationary residential treatment program. See also Nowell v. State, 742 So.2d 345 (Fla. 5th DCA 1999) (finding

[2] 515 So. 2d 738 (Fla. 1987)

that the defendant's stay at an inpatient drug treatment program while on probation was neither coercive nor custodial). The Williams case, however, cited Hill, and had left an opening for the defendant to prove that he was in "the total custody and control of the state at all times." Williams, 780 So.2d at 246 (quoting Tal-Mason, 515 So.2d at 739). The decision in Toney closes that door.

The Second District found that the courts will not be required to determine, through a hearing, the extent of post-conviction time spent in a drug treatment facility to be counted against a subsequently imposed prison term. Nor will the court's or the defendant's initial selection of an appropriate treatment facility be influenced by the quantity of potential jail-type credit the program might provide. Toney, 817 So. 2d at 926. Accordingly, the Second District held that the time a probationer spends in a post-conviction drug treatment facility is not creditable against a subsequent term in jail or prison.

In this case, it is clear that the Fourth District Court of Appeals improperly found that the decision to award credit for time served in a drug rehabilitation program is discretionary. This Court must reverse the decision of the Fourth District Court of Appeals and approve of the Second District’s decision in Toney.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to REVERSE the opinion of the Fourth District Court of Appeals and APPROVE the decision of the Second District Court of Appeals in Toney.

Respectfully Submitted,

CHARLES J. CRIST JR.,
Attorney General

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CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

_____

MELANIE A. DALE
Assistant Attorney General
Florida Bar Number 0168556
Office of the Attorney General
Department of Legal Affairs
1515 Flagler Avenue, Suite 900
West Palm Beach, Florida 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I, Melanie A. Dale, certify that a true and correct copy of the foregoing has been furnished by Courier to:, Bianca Liston, Esq., Clark, Robb, Mason, & Coulombe, 19 West Flagler Street, Suite 920, Biscayne Building, Miami Florida 33130, this ___ day of _____, 2004.

_____
Melanie A. Dale

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

_____
Melanie A. Dale
Assistant Attorney General