

IN THE SUPREME COURT OF FLORIDA

Case No. 04-1461

Lower Tribunal No. 4D04-1180

STATE OF FLORIDA,

Petitioner,

vs.

SEAN E. CREGAN,

Respondent.

RESPONDENT-S SUPPLEMENTAL BRIEF ON THE MERITS

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INTRODUCTION

On February 23, 2005, this Court entered an Order directing the parties to simultaneously submit supplemental briefs addressing whether and to what extent ' 948.06(3), Florida Statutes, and this Court's decisions in *Young v. State*, 697 So. 2d 75 (Fla. 1997), and *Fraser v. State*, 602 So. 2d 1299 (Fla. 1992), applied to the case *sub judice*.

Throughout this supplemental brief, the Petitioner, STATE OF FLORIDA, will be referred to as APetitioner@ or AState.@ The Respondent, SEAN E. CREGAN, will be referred to as ACregan.@ All references to the record on appeal will be indicated by the symbol A(R).@

Throughout this brief, all emphasis will be added by the writer unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

Cregan adopts the Statement of the Case and the Facts as set out in its Answer Brief filed herein.

ISSUE ADDRESSED IN SUPPLEMENTAL BRIEF

WHETHER AND TO WHAT EXTENT SECTION 948.06(3), FLORIDA STATUTES, AND THIS COURT'S DECISIONS IN *YOUNG V. STATE*, 697 SO. 2D 75 (FLA. 1997) AND *FRASER V. STATE*, 602 SO. 2D 1299 (FLA. 1992) APPLIES TO THE CASE *SUB JUDICE*

SUMMARY OF ARGUMENT

In response to this Court's Order of February 23, 2005, Cregan

contends that '948.06(3), Florida Statutes, *Young v. State*, 697 So. 2d 75 (Fla. 1997), and *Fraser v. State*, 602 So. 2d 1299 (Fla. 1992), are inapplicable to the determination of the issues raised in this appeal. This is so even though the plain language of '948.06(3) provides that no credit for time spent on community control should be given against time served. It is Cregan's contention, however, that the time spent on community control at the Turning Point Bridge was sufficiently restrictive to be the equivalent of incarceration. Based on this position, Florida Statute '921.161(1) should be applied in the determination whether credit should be given for the time spent on community control.

In both *Young v. State*, 697 So. 2d 75 (Fla. 1997), and *Fraser v. State*, 602 So. 2d 1299 (Fla. 1992), the defendant did not raise the allegation that time spent on community control constituted a deprivation of liberty so as to be the equivalent to incarceration. As such, the trial court, as is raised in Respondent's Answer Brief, was obliged to hold an evidentiary hearing to determine whether Cregan's confinement at Turning Point Bridge should be given credit under Florida Statute '921.161(1).

ARGUMENT, POINT ON APPEAL

This Court seeks the parties' position as to the applicability of Florida Statute '948.06(3), and the cases of *Young v. State*, 697 So. 2d 75 (Fla. 1997), and *Fraser v. State*, 602 So. 2d 1299 (Fla. 1992), to the case under review. These authorities are inapplicable to the relief sought by Cregan in the case *sub judice*.

Florida Statute '948.06 governs violations of probation or community

control. Under that section, subsection (3) sets out a procedure for the Court to apply in dealing with certain of these violations. Section (3) states:

When the court imposes a subsequent term of supervision following a revocation of probation or community control, it shall not provide credit for time served while on probation or community control toward any subsequent term of probation or community control which, when combined with any amount of time served on preceding terms of probation or community control for offenses before the Court for sentencing, would exceed the maximum penalty allowable as provided by s. 775.082. No part of the time that the defendant is on probation or in community control shall be considered as any part of the time that he or she shall be sentenced to serve.

While the statute, on its face, applies to violations of community control, section (3) is limited in application to occasions where there is a *subsequent term of supervision following a revocation of probation or community control*. Here, Cregan was not given a subsequent term of supervision. He was ordered incarcerated. As such, subsection (3) does not apply to this case. The phrase "credit for time served" as used in this subsection would therefore apply only to a subsequent, additional sentence of community control and not incarceration.

To the extent that this court's decisions in *Fraser* and *Young* are applied in a situation where a defendant is ordered incarcerated following revocation of community control, those decisions impermissibly extend the term "credit for

time served beyond the plain meaning of the statute.

Hence, it is Cregan's contention that a different statute, § 921.161(1), would govern when the issue of whether time spent on community control was the equivalent to jail. Section 921.161(1) 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. The courts of this state have applied this statute when a defendant, after revocation of community control, claimed that the time spent in community control was a deprivation of his liberty to be the equivalent to jail time. See, *Whitehead v. State*, 677 So. 2d 40 (Fla. 4th DCA 1996); *Anderson v. State*, 449 So. 2d 1311 (Fla. 5th DCA 1984). (In *Fraser v. State*, 602 So. 2d 1299 (Fla. 1992), this court acknowledged that community control is a more coercive deprivation of liberty and a more serious penalty than probation. *State v. Mestas*, 507 So.2d 587, 588 (Fla. 1987) ("Community control, which is a harsh and more severe alternative to ordinary probation, is a departure sentence when the guidelines call for any 'nonstate prison sanction.'")).

Here, Cregan did not seek credit for time served purely on the fact that he spent time on community control. He has, instead, alleged that his time spent in community control at the Turning Point Bridge was sufficiently restrictive to be the equivalent of jail and, as such, under Florida Statute 921.161(1), he should be given credit for the time he served.

Based on the above, then, Cregan contends that the cases of *Young v. State*, 697 So. 2d 75 (Fla. 1997), and *Fraser v. State*, 602 So. 2d 1299 (Fla. 1992), are inapplicable to this case.

CONCLUSION

Respondent respectfully requests that this court resolve the conflict of the districts by affirming the fourth district here, rejecting the contrary position of the second district in *Toney*, and remanding this matter to the trial court for either an evidentiary hearing on the issue of whether his time in the Turning Point Bridge program qualifies him for credit for time served or, at the minimum, requiring record attachments conclusively showing no entitlement to relief on his claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on March 15, 2005, to MELANIE A. DALE SURBER, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401.

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CERTIFICATE OF TYPEFACE COMPLIANCE

The typeface font used in the body of this document is Times New Roman 14, which complies with the Rules of this Court.