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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SUPPLEMENTAL MERITS BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant was the Prosecution and Appellee 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 at Turning Point Bridge as a matter of law.

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, 817 So. 2d 924 (Fla. 2d DCA 2002) and Molina v. State, 867 So. 2d 645 (Fla. 3d DCA 2004). Id.

On February 23, 2005, this Court directed the parties to file supplemental briefs addressing the following question only:

> 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), apply in these circumstances.

Pursuant to F.S. ' 948.06(3), the Appellee is not entitled to credit for the time he served in rehabilitation, while on

community control. F.S. § 948.06(3)states as follows:

> 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. However, the court may not impose a 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[1] to serve.**

(Emphasis added). Consequently, should this Court choose to rely upon F.S. § 948. 06(3), the Appellee is not entitled to credit for time served at Turning Point Bridge, while on community control.

Furthermore, this Court's decision in Young v. State, 697 So. 2d 75(Fla. 1997), also applies to the instant case. In Young, after serving his prison term and a portion of his community control, Young violated community control. Id. at 76. The trial court sentenced him to five and a half years in prison. Id. In sentencing Young, the trial court gave him credit for 724

[1] The term "sentence" in section 948.06 refers to incarceration. Young v. State, 697 So. 2d 75, Fn. 5 (Fla. 1997)

days of prior incarceration but did not give him credit for the time he spent on community control. Id. Young argued that in failing to credit the time he served on community control the trial court imposed a sentence greater than the statutory maximum for the crime for which he was convicted. Id. The Fourth District Court of Appeal affirmed the sentence. Young v. State, 678 So.2d 427 (Fla. 4th DCA 1996). This Court approved the decision of the district court finding that pursuant to F.S. § 948.03, no part of the time a defendant is on probation or on community control shall be considered as any part of the time that he shall be sentenced to serve. Young v. State, 697 So. 2d 75(Fla. 1997)

Similarly, in this case, the Appellee violated the terms of community control and was sentenced to incarceration. The Fourth District Court of Appeal improperly reasoned that the decision to award credit for the time served at the Turning Point Bridge program is discretionary. Hence, as a matter of law, pursuant to F.S. ' 948.06(3) and Young, the trial court properly denied Appellee credit for the time spent at Turning Point Bridge while on community control.

Furthermore, this Court's decision in Fraser v. State, 602 So. 2d 1299, 1300 (Fla. 1992), is inapplicable to the instant case. There, Fraser was successfully completing a sentence of

community control when he was informed that, through no fault of his own, the community control was illegally imposed. This Court was not confronted with a situation in which a defendant has transgressed and is therefore rightly facing an increased punishment, rather Fraser faced a four and a half year prison sentence simply because of the trial court's error. Id. This Court reasoned that it would be unfair and inequitable to penalize Fraser for a clerical mistake for which he was not responsible, hence Fraser was entitled to the time served during community control. Id.

Fraser is inapplicable to the circumstances of this case because here the Appellee was properly placed on community control, violated community control, and was sentenced to incarceration. There is nothing unfair nor inequitable about the Appellee's sentence.

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

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.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Melanie Dale Surber, 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 _____, 2005.

_____
Melanie Dale Surber

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 Dale Surber
Assistant Attorney General