IN THE SUPREME COURT OF FLORIDA

APPEAL NO. SC06-139

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

WILLIAM TODD LARIMORE,

PETITIONER

vs.

STATE OF FLORIDA,

RESPONDENT.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other

ARGUMENT

ISSUE SEXUALLY VIOLENT PREDATOR PROCEEDINGS CANNOT BE BROUGHT AGAINST PETITIONER BECAUSE HE WAS NOT IN LAWFUL CUSTODY ON THE DATE THE STATE FILED THE PETITION AND THE RYCE ACT DOES NOT APPLY TO PETITIONER.

1. A Conflict Exists Between The Decisions In Gordon v. Regier And Larimore v. State (Larimore III)

Respondent argues that Gordon v. Regier, 839 So.2d 715 (Fla. 2d DCA 2003) and this case, Larimore v. State, 917 So.2d 354 (Fla. 1st DCA 2005) (Larimore III) are not in conflict because the decisions involve materially different facts. (Answer Brief at 4-6). Petitioner disagrees.

A day after Gordon was released from DOC custody a warrant involving a Ryce Act proceeding was issued and he was arrested the next day. Gordon, 839 So.2d at 717. Gordon "…was not in custody at the time he was seized…" Id. at 716. The first district found "It is clear that Larimore was not in lawful custody when the state filed its commitment petition on November 23, 2004." Larimore, 917 So.2d at 376. The court recognized that in State v. Atkinson, 831 So.2d 172 (Fla. 2002), this Court required custody for a Ryce Act prosecution to be lawful. Larimore, 917 So.2d at 355. In essence, Petitioner was not in custody at the time the petition was filed because he was not detained past the expiration of his

sentence for purposes of initiating Ryce Act proceedings. He was simply unlawfully incarcerated. There is no material distinction between Gordon being unlawfully picked up pursuant to a warrant and Larimore's unlawful incarceration by DOC.

The legal analysis of the two lower courts is in direct conflict. Both Gordon, 839 So.2d at 718, fn. 4, and Larimore, 917 So.2d at 355, recognized that Atkinson requires lawful custody in Ryce Act proceedings. Gordon determined that because he was not in custody (having been unlawfully arrested) the Act was not applicable to Gordon and the state attorney and the trial court lacked jurisdiction to proceed. 839 So.2d at 716, 720. In contrast to that holding, the first district chose not to follow Gordon and determined that jurisdiction is not conditioned upon a person being in custody. Larimore, 917 So.2d at 357. The court found there was jurisdiction to adjudicate the commitment petition. Id. at 358. Gordon concluded that the Act did not apply to persons not in custody when a petition is filed and Larimore decided the act does apply to those persons.

2. Detention In A County Jail Pursuant To A Violation Of Probation Warrant And Violation Proceedings Constitute Custody For Purposes Of The Act

The first district determined that Petitioner is subject to the Act because he was in custody after the effective date of the Act pursuant to a violation of probation charge and the court concluded that the custody was lawful. Larimore,

917 So.2d at 356. Respondent recognizes that custody must be lawful pursuant to Atkinson, (A.B. at 6) but argues that the county jail detention does not constitute custody for purposes of the Act. Petitioner does not disagree with Respondent's analysis, but that is not the issue. Petitioner was not in lawful custody on the effective date of the Act because his prison sentence had expired and he was on probation. Larimore, 917 So.2d at 355. That probation was revoked on February 29, 2000, he was sentenced to five years in prison, but he was not given credit for time served on the first prison sentence. Id. On February 29, 2000, irrespective of the incorrect application of credit for time served, Petitioner was sentenced to total confinement. On those facts, Petitioner herein does not contest the general applicability of the Act to him. A similar position was taken in the proceeding below. (Petition, at 12-13)

3. The Decision Below Reached The Wrong Result

A. Probation Does Not Satisfy The Custody Requirement

Respondent's argument is wholly irrelevant to the issue before this Court. The issue presented is whether a petition could be filed while he was being held in unlawful physical custody. This Court need not decide if a prior period of probation equates to being in custody for purposes of application of the Act.

Respondent's suggestion that probation equates to "in custody" is not well taken. Respondent goes to great lengths to attempt to explain how the terms

"custody" and "probation" mean the same thing. (A.B. at 8-14) Yet, Respondent overlooks one critical fact: neither the original Act in Florida Statutes section 916.45 (Supp. 1988) nor the amendments in Florida Statutes section 394.925 refer to probation. Had the legislature intended to include probationers within the term "in custody" the statute would so provide. Respondent has misconstrued the meaning of the statutory change that occurred in section 394.925. Originally, section 916.45 (Supp. 1998) provided that the act applied to persons in custody who were convicted of predicate offenses and persons convicted of those offenses in the future. The amendment to section 394.925 changed the statute to limit applicability to persons convicted in the future who are also sentenced to total confinement. The inclusion of the phrase "and sentenced to total confinement in the future," changes the statutory meaning to ensure that the act will not apply to someone placed on probation and it excludes nonincarcerative sentences.

Respondent recognizes the concept that plain and unambiguous statutory language is to be accorded its plain meaning (A.B. at 11, citing State v. Mitchell, 848 So.2d 1209 (Fla. 1st DCA 2003); aff., 911 So.2d 1211 (Fla. 2006)). However, the analysis ignores that principle by failing to accord the term "in custody" its common meaning and by attempting to redefine the term to include being on supervision in the community. In this Court's review of the lower court's Mitchell decision, there was a concurrence with the first district's "straightforward

analysis." Mitchell, 911 So.2d at 1211. Petitioner suggests an equally straightforward analysis of sections 916.45 (Supp. 1988) and 394.925 leads to the inescapable conclusion that the Act does not apply to persons in a probation status who are not serving an incarcerative sentence.

State v. Siddal, 772 So.2d 555 (Fla. 3d DCA 2000) reached that exact conclusion. Siddal was on probation at the time the state filed a Ryce Act petition. Id. at 556. The third district analyzed the "in custody" requirement of section 916.45 (Supp. 1988) and accorded the term the customary meaning of a state of being detained or held under guard. Id. That conclusion is logical and conforms to the requirement that plain language should be accorded its plain meaning. Siddal's common sense definition of "in custody" is reaffirmed by Gordon, 839 So.2d at 719. As that court pointed out, the Act did not contemplate proceedings against a person who was living in society or proceedings against those persons who were on supervision but not in custody. Id. at 719-720. Respondent's argument overlooks the material distinction between being "in custody" and being "on supervision." Nothing in this statute remotely suggests that the legislature contemplated including "supervision" within the concept of "in custody."

Respondent suggests that State v. Bolyea, 520 So.2d 562 (Fla. 1988) should be extended to apply to Ryce Act proceedings to determine that "in custody" equates to "on probation." Bolyea was on probation and in custody, i.e., in jail,

serving 364 days as part of a probation sentence. He sought sentencing relief pursuant to rule 3.850, Fla. R. Cr. Pro. Id. Analogizing rule 3.850 to habeas corpus, this Court found that Bolyea could seek sentencing relief after he had been released from jail because the rule was an appropriate mechanism to challenge a sentence due to long-standing policy that habeas relief is to be freely grantable of right to those unlawfully deprived of their liberty in any degree. Id. at 563-564. That rationale is inapplicable to the situation herein where it is being suggested that Petitioner can be forever deprived of his liberty by redefining "in custody" to mean "on probation." Respondent is asking this Court to remove statutory protections (that the Act does not apply to probationers) and restrict liberty interests, based on precedent and rationale that supported the protection of liberty interests. Siddal, 772 So.2d at 556, properly rejected Respondent's argument and correctly determined that very different issues are involved.

B. A Prison Sentence Imposed For A Violation Of Probation Occurring After Enactment Of The Act Constitutes A Sentence To Total Confinement

Petitioner does not contest for purposes of this case the general principle that where there is a qualifying offense and an offender is sentenced to a prison term for violation of probation, the offender has been sentenced to total confinement in the future pursuant to section 394.925. However, that is not the issue herein. While Petitioner may have been subject to the Act because of the VOP sentence,

that sentence was imposed on February 29, 2000 and expired that same day. The Ryce Act petitions were filed on March 25, 2003 and November 23, 2004, long after the period of lawful custody expired.

Respondent's argument overlooks two critical aspects of the total confinement-in custody analysis. First, pursuant to Atkinson, 831 So.2d at 174, custody must be lawful. Respondent previously acknowledged that principle. (A.B. at 6) Petitioner's confinement at the times the petitions were filed was unlawful as determined in Larimore, 917 So.2d at 355 and 356.

Just as important as the lawful custody element is the statutory requirement that the person be physically incarcerated. Section 394.925 requires the sentence to total confinement. Florida Statutes section 394.912(11) defines total confinement as:

> 'Total confinement' means that the person is currently being held in any physically secure facility... A person shall also be deemed to be in total confinement for applicability of provisions under this part if the person is serving an incarcerative sentence … and is being held in any other secure facility for any reason.

Total confinement, in the context of a person sentenced to total confinement, means that the person "…is serving an incarcerative sentence under the custody of the Department of Corrections…" Id. At the time the petitions were filed against Larimore, his sentence had long since expired. Thus, he was not in custody serving a sentence and his incarceration was unlawful.

4. Larimore Is Not Subject To The Ryce Act Because He Was Not In Lawful Custody At The Time The Petitions Were Filed

The foundation of Respondent's argument is the idea that there is no requirement of custody or confinement in order for a person to be subject to the Act and there is no jurisdictional bar to proceeding against Petitioner. The distinction that Respondent fails to draw is between situations where the person is in lawful custody when proceedings are initiated by some state action and those where the person has been released or is not in lawful custody when the state seeks to initiate a Ryce Act prosecution.

The sole authority for the State of Florida to initiate a Ryce Act proceeding is Florida Statutes section 394.914 that provides in relevant part, "…the state attorney, in accordance with s. 394.913, may file a petition with the circuit court…" That section establishes the jurisdiction of the circuit court to adjudicate the matter after a petition has been filed. While subject matter jurisdiction does lie in the circuit court, this case presents the fundamental question of whether the state can proceed against Larimore when the state failed to perfect jurisdiction.

As clearly set forth by the legislature, the Act applies to: 1) persons convicted of qualifying offenses who were currently in custody (as of the effective date of the Act); or 2) to persons convicted of a qualifying offense, sentenced to total confinement, section 394.925, and who are currently being held in a secure

facility or who are serving an incarcerative sentence. Section 394.912(11). Nothing in the applicable statues suggest that a person who was neither in custody nor serving a sentence is subject to the Act.

The crux of Respondent's argument is that Florida Statutes sections 394.913 and 394.9135 specifically provide that the provisions of those sections are not jurisdictional and do not prevent the state from proceeding where there has been a failure to comply with the statutory provisions. The statutory sections do specifically provide that the failure to comply with the provisions is not jurisdictional, but the statutes must be read in context.

In relevant part, section 394.913(1) sets forth the procedures by which the agency, i.e. DOC, must give notice to the multidisciplinary team and the state attorney of a person's pending release so that the multidisciplinary team can begin the assessment and evaluation process. Section 394.913(1) clearly contemplates that the person is in custody. In a similar vein, section 394.9135(1) sets forth the procedures to be followed when a person's "release from total confinement" becomes immediate. When release becomes immediate, there is an expedited 72 hour assessment, section 394.9135(2), and the state attorney is given a period of 48 hours from receipt of the assessment to file a petition. Section 394.9135(3). Importantly, the expedited assessment process is triggered by the pending immediate release from total confinement and the statute requires the custodial

agency to transfer the person to DCF for the assessment. Section 394.9135(1). Thus, the statute authorizes extended detention in cases where the review processes of section 394.913 are not followed. This is the interpretation of Gordon, 839 So.2d at 717-718. Notably, the assessment, evaluation and filing requirements only apply to individuals in total confinement. Sections 394.913(1), 394.9135(1). A plain reading of those statutes demonstrates that nothing in those statutory sections render the procedures applicable to persons not in custody or total confinement. Importantly, sections 394.913 and 394.9135 clearly contemplate that some actions to initiate Ryce Act proceedings occur while the person is in total confinement.

In Larimore, the first district recognized the statutory assessment, evaluation and filing procedures and concluded that those procedures were not mandatory and jurisdiction was not conditioned upon the person being in custody. 917 So.2d at 356-357. In reaching its decision, the court relied in part on Moore v. State, 909 So.2d 500 (Fla. 5th DCA 2005). The facts in Moore are materially distinguishable from those presented herein. While Moore was imprisoned serving a sentence DOC informed DCF that he appeared eligible for commitment as a sexually violent predator. Moore was subsequently mistakenly released and then later taken into custody. Id. at 501-502. The crucial point is that DOC initiated the Ryce Act proceedings against Moore while he was serving a sentence and thereby was

lawfully incarcerated. Larimore also relied on State v. Ducharme, 892 So.2d 1133 (Fla. 5th DCA 2004), rev. dism., 895 So.2d 405 (Fla. 2005). Because of the same important factual distinction, Ducharme does not support the decision below. Ducharme was found to have violated his probation and was sentenced to time served. During the time the sentence was being calculated DOC notified DCF of the imminent release and he was transferred to a facility to begin Ryce Act proceedings. Id. at 1134. Once again, proceedings pursuant to the Act were initiated while the respondent was lawfully incarcerated serving a sentence. Finally, Larimore relied on Judge Cope's concurring opinion in Washington v. State, 866 So.2d 725 (Fla. 3d DCA 2004); rev. den., 895 So.2d 1068 (Fla. 2005). That reliance is equally misplaced because in Washington the petition was filed three days before the sentence expired. Id. at 726. The trial court, in the civil case, had no authority to determine the legality of the sentence in the criminal case. Id. at 725. Herein, the illegality of Petitioner's incarcerations are established facts determined by the first district in Larimore v. State, 823 So.2d 287 (Fla. 1st DCA 2002) (Larimore I) and Larimore v. Fla. Dep't. of Corrections, 910 So.2d 847 (Fla. 1st DCA 2004), rev. den., 905 So.2d 125 (Fla. 2005) (Larimore II). The cases relied upon in Larimore III are materially different because the respondents were being held in lawful custody at the time proceedings were begun.

Respondent also asserts that there is no "in custody" requirement for Ryce Act proceedings. (A.B. at 23) In support of that argument this Court's opinion in Tanquay v. State, 880 So.2d 533 (Fla. 2004) is cited. Respondent's reliance on Tanquay is misplaced. An evaluation occurred during a time period when Tanquay was held beyond the expiration of his sentence. Id. at 535. This Court agreed with the argument that the 1998 version of the Act did not require a petition to be filed prior to the expiration of a sentence and the state did not forfeit its right to proceed by failing to comply with statutory notice provisions. Id. at 537. Respondent has overlooked the fact that this Court interpreted the initial version of the statute, Id. at 534, and found that there was no "in custody" requirement in the statute. Id. at 537. As recognized in Atkinson, 831 So.2d at 172, the statute now has an "in custody" requirement.

Petitioner submits that the correct determination of the issue before this Court is guided by Gordon, 839 So.2d 715. Gordon was released from all custody before any Ryce Act proceedings were initiated. Id. at 717. Relying on section 394.925, the court determined that the Act applied to only those in custody or in total confinement. Id. Because of the custody or confinement requirement and the requirement that custody be lawful the state cannot proceed against Petitioner. Notably, Respondent has conceded that custody must be lawful to satisfy the Act. (A.B. at 6)

There is not a single reference in the Act to provide authority to proceed against those who are not in custody. The established legal fact is that Petitioner's incarceration was unlawful at the points in time at which the state filed petitions. While he was in physical or actual custody, that type of custody cannot be equated to lawful custody for purposes of conferring jurisdiction on the trial court or authority on the state to proceed against him.

An important component of Respondent's argument is the idea that the failure to comply with the statutory requirements to take some action initiating a Ryce Act proceeding while a respondent is in custody relates to a cause of action and not jurisdiction. (A.B. at 20-22, 29) That argument fails to recognize that there is more than one aspect to "jurisdiction." As discussed previously, section 394.914 vests trial court jurisdiction in the circuit court. However, that jurisdiction can be lost. The situation is similar to what occurs where there is a speedy trial violation in a criminal case. Although there is general subject matter jurisdiction over the case, "A court does not have jurisdiction to try a defendant…if he is entitled to a discharge because of a violation of his…right to a speedy trial." Sherrod v. Franza, 427 So.2d 161, 163 (Fla. 1983). Similarly, it has been recognized that prohibition is an appropriate challenge to a trial court's jurisdiction to go forward where there has been a statute of limitations violation. Neal v. State, 697 So.2d 903 (Fla. 2nd DCA 1997). The situation is the same herein. Subject

matter jurisdiction lies in the circuit court, but the court lost jurisdiction to try Petitioner because the state took no action to initiate proceedings against him prior to the expiration of lawful custody.

Finally, Respondent argues that this Court should expand the holding of State v. Goode, 830 So.2d 817 (Fla. 2002) to determine that the pre-release filing of a petition may be considered mandatory however, not jurisdictional. (A.B. at 24-25) That argument overlooks they key, fundamental difference between Goode and Larimore. Jurisdiction to try Larimore was never perfected by the state because no Ryce Act proceedings were initiated at any point while he was in lawful custody. Goode's conclusion that a mandatory time period for a trial could be extended without losing jurisdiction, Id. at 828, has no applicability to the analysis in this case. Extending jurisdiction where it had been previously acquired at the outset is a materially different situation than an attempt to acquire jurisdiction to try Petitioner where no act occurred in a timely manner to initially vest jurisdiction in the trial court. Goode does not stand for the proposition that the failure to vest jurisdiction for trial can be remedied by an untimely filing of a Ryce Act petition.

CONCLUSION

This Court should reverse the decision below with directions to discharge Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to the Office of the Attorney General, representing the State of Florida, this _____ day of July, 2006.

CERTIFICATE OF TYPE-SIZE COMPLIANCE

I HEREBY CERTIFY that this brief is printed in 14 point Times New Roman font, which conforms to type-size and spacing requirements of the Florida Rules of Appellate Procedure.

WARD L. METZGER