IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC08-144

ROBERT RABEDEAU,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

On February 5, 2001, Rabedeau was charged by information with three counts of false imprisonment of a child under the age of thirteen, a first degree felony, and three counts of lewd or lascivious conduct, a second degree felony, in Brevard County, Florida Circuit Court Case No. 01-30028-CFA. (Vol. I, R. 75-76).

On June 11, 2001, Rabedeau entered into a negotiated plea agreement with the State in which he agreed to plead guilty to three counts of lewd and lascivious conduct with the three false imprisonment charges dropped in exchange for a sentence of three concurrent terms of two years of community control followed by thirteen years probation (Vol. I, R. 96-100). The plea was accepted by the trial court and on October 11, 2001, Rabedeau was sentenced in accordance with the plea. (Vol. I, R. 108-116).

In October 2002, Rabedeau was found to be in violation of his community control. (Vol. I, R. 177-178). On December 20, 2002, Rabedeau was sentenced to three concurrent terms of five years imprisonment followed by nine years probation. (Vol. I, R. 190-197).

After serving the incarcerative portion of his sentence, an affidavit for a violation of probation was filed. (Vol. II, R. 219-223, 226-232). On March 8, 2007, Rabedeau pleaded guilty to the probation violation and was sentenced to ten years for each count with the terms to run consecutively. (Vol. II, R. 263-266).

Prior to the imposition of his sentence, the prosecutor noted that Rabedeau would be entitled to five years credit for the time served in the Department of Corrections. (Vol. I, T. 52-53). The trial court imposed his sentence as follows:

> I'm going to sentence you on each of three counts to a period of ten years Department of Corrections to run consecutively with no probation or community control to follow. So it is going to be a total of thirty years less whatever credit you already have in. . . . As far as any DOC gain time/credit time, well gain time from DOC, that is up to them. That is entirely up to them. Whatever credit you have already served, the total, then you can earn a certain amount of gain time.

(Vol. I, T. 55-56).

Rabedeau filed a motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800(b), alleging that he should have been awarded fifteen years credit or five years credit for each count. (Supp. Vol. R. 288-292). The trial court denied the motion, finding that Rabedeau was awarded credit for the time he previously spent in prison and rejecting his argument that he should be entitled to credit on each of his three consecutive ten year sentences citing Gisi v. State, 948 So.2d 816 (Fla. 2d DCA), rev. granted, 952 So.2d 1189 (Fla. 2007). (Supp. Vol. R. 293-294).

Rabedeau timely appealed his judgment and sentence to the Fifth District Court of Appeal, raising the sole claim that he should be awarded five years credit for time served on each count of his three consecutive ten year sentences. The district court agreed, reversing and remanding for resentencing and certifying conflict with Gisi. See Rabedeau v. State, 971 So.2d 913 (Fla. 5th

DCA 2007). Mandate issued in the district court on January 2, 2008.

On February 28, 2008, Rabedeau was resentenced to ten years imprisonment on count one with five years credit for time served in the Department of Corrections, fifteen years on count two with five years credit for time served in the Department of Corrections, and fifteen years on count three with credit for five years time served in the Department of Corrections, with the terms to run consecutively. Rabedeau has again appealed this sentence in the district court of appeal. See Rabedeau v. State, 5D08-1110 (Fla. 5th DCA 2008).

The State timely filed a notice to invoke this Court's discretionary jurisdiction and this Court accepted jurisdiction of this case on March 11, 2008. The State's motion to stay this case pending disposition of Gisi was denied.

SUMMARY OF ARGUMENT

The district court of appeal erred in determining that Rabedeau was entitled to credit for time served on each of the consecutively imposed ten year sentences following the violation of his probation. The rationale for reaching that conclusion utilized by the district court fails to take into consideration that Rabedeau had violated his probation. The conclusion of the district court strips the trial court of its discretion to structure the appropriate sentence given that violation. This Court should affirm the decision of Gisi v. State, 948 So.2d 816 (Fla. 2d DCA), rev. granted, 952 So.2d 1189 (Fla. 2007), which holds that a defendant is entitled to credit on only one count of previously imposed concurrent sentence that are imposed consecutively following the violation of probation.

ARGUMENT

THE DISTRICT COURT OF APPEAL IMPROPERLY DETERMINTED THAT RABEDEAU SHOULD BE AWARDED CREDIT FOR TIME SERVED ON EACH OF HIS CONSECUTIVELY IMPOSED SENTENCES FOLLOWING THE VIOLATION OF HIS PROBATION.

The district court phrased the issue below as follows:

> Is a defendant, on resentencing, entitled to credit on each newly imposed consecutive sentence for prison time already served on the original concurrent sentences?

Rabedeau v. State, 971 So.2d 913, 914 (Fla. 5th DCA 2007)(emphasis in original). However, the actual issue before this Court is whether a defendant on sentencing for a subsequent violation of probation is entitled to credit for time served on each consecutively imposed sentence when the original sentences on the violation of probation were imposed concurrently. This issue, one yet to be addressed by this Court, should be answered in the negative as a defendant should not be entitled to duplicative credit.

In this case, Rabedeau was originally convicted of three second degree felonies and sentenced to serve three concurrent terms of two years community control followed by three concurrent terms of three years probation. Id. On his initial violation of community control, Rabedeau was sentenced to three concurrent terms of five years imprisonment followed by three concurrent terms of nine years probation. Id. After he completed the prison term, Rabedeau again violated his probation and he was sentenced to three

consecutive ten year sentences with credit for time served of five years on the first count only. Id. The Fifth District Court of Appeal reversed his sentence and remanded for resentencing, determining that because his original sentences on the violation of probation ran concurrently, Rabedeau completed the incarcerative portion of those sentences and thus was entitled to credit on each sentence for each count. Id.

This conclusion is contrary to that of the Second District Court of Appeal, which was followed by the trial court here in determining that Rabedeau was entitled to credit for time served on only the first of his three convictions.[1] See Gisi v. State, 948 So.2d 816 (Fla. 2d DCA), rev. granted, 952 So.2d 1189 (Fla. 2007). The State submits that the district court of appeal erred in determining that Rabedeau was entitled to credit for time served on each of his consecutively imposed sentences following the violation of his probation. As a result, this Court should quash the decision of the Fifth District Court of Appeal in Rabedeau, and affirm the decision of the Second District Court of Appeal in Gisi based upon the following.[2]

While this Court has not addressed the issue of jail credit applied to consecutively imposed sentences that were originally imposed concurrently on a violation of probation, this Court has

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1 The Fifth District Court of Appeal certified conflict with Gisi. See Rabedeau, 971 So.2d at 914, 915.

2 This Court reviews an issue of involving credit for time served de novo. See J.I.S. v. State, 930 So.2d 587, 581 (Fla. 2006).

addressed the issue in the context of credit for time served in jail prior to sentencing. See Daniels v. State, 491 So.2d 543, 545 (Fla. 1986), section 921.161, Fla. Stat. (2000). In Daniels, this Court held that a defendant who does not receive concurrent sentences on multiple charges "is not entitled to have his jail time credit pyramided by being given credit on each sentence for the full time he spends in jail awaiting disposition." Daniels, 491 So.2d at 545 (quotations and citations omitted). Thus, a defendant who is sentenced consecutively on multiple charges is only entitled to credit for time served on the first of the consecutive sentences. See Canete v. Fla. Dep't of Corrections, 967 So.2d 412, 415-416 (Fla. 1st DCA 2007); Barnishin v. State, 927 So.2d 68, 70-71 (Fla. 1st DCA 2006).

> If convicted of multiple offenses, the defendant must be given credit only on the first of consecutive sentences. When consecutive sentences are imposed, "the defendant 'is not entitled to have his jail time credit pyramided by being given credit on each sentence for the full time he spends in jail awaiting disposition.'" Daniels v. State, 491 So.2d 543, 545 (Fla. 1986) (emphasis omitted) (quoting Martin v. State, 452 So.2d 938, 938-39 (Fla. 2d DCA 1984)). See also Bell v. State, 573 So.2d 10, 11 (Fla. 5th DCA 1990). On the other hand, when a defendant is entitled to presentence jail-time credit against concurrent sentences, jail time must be credited against each concurrent sentence. See Daniels, 491 So.2d at 545. When sentences are imposed concurrently, the defendant receives credit on each sentence for time spent in jail before sentencing.

Barnishin, 927 So.2d at 71.

Under that scenario, giving credit on each count would result in an improper award of multiple credit and the trial court is not

required to award the same jail time credit to the remaining consecutive sentences. See Gillespie v. State, 910 So.2d 322, 324 (Fla. 5th DCA 2005). See also Bell v. State, 573 So.2d at 11 ("Jail time credit need not be applied to all consecutive sentences, but must be applied to one."). But see Rabedeau, 971 So.2d at 914-915; Atkinson v. State, 860 So.2d 982, 984 (Fla. 1st DCA 2003); and Jones v. State, 633 So.2d 482, 483 (Fla. 1st DCA 1994).

In rejecting this conclusion, the Fifth District Court of Appeal analogized the facts of this case to the scenario of Rabedeau being originally sentenced to three concurrent terms of five years imprisonment without probation to follow. The district court determined that "upon serving the five years in prison, Rabedeau would clearly be found to have completed his five year prison sentence to each of the three felony offenses, not just as to one offense." Rabedeau, 971 So.2d at 915. The district court utilized this hypothetical to support its conclusion that credit for time served had to be imposed on each count.

Yet, what this rationale ignores is the fact that Rabedeau did not just receive an incarcerative sentence; he was sentenced originally to incarceration followed by probation. This sentence evinces the intent of the original sentencing judge that Rabedeau would be fully rehabilitated by serving time in both prison and on supervision. Thus, a portion of his entire sentence was to be served on probation, a matter of grace bestowed upon him in lieu of

additional time in prison. See Adams v. State, 979 So.2d 921, 925 (Fla. 2008)(quotations and citations omitted)(the grant of probation rests within the broad discretion of the trial judge and is a matter of grace rather than right and just as there is broad discretionary power to grant the privilege of probation, the trial court has equally broad discretion to revoke it). Rabedeau was unable to complete the terms of his probation and thus was subject to a sentence at the discretion of the trial judge up to and including the statutory maximum term.[3] See Moore v. State, 882 So.2d 977, 985 (Fla. 2004)(under the Criminal Punishment Code, a trial judge may impose a sentence up to and including the statutory maximum for each individual offense, including those offenses before the trial judge on a violation of probation or community control). See also section 921.002(1)(g), Fla. Stat. (2000). Moore highlights the discretion afforded to a trial judge under the Criminal Punishment Code in sentencing a defendant who violates his or her probation.[4]

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3 Because this case arose after the enactment of the Criminal Punishment Code, the concerns of Tripp v. State, 622 So.2d 941 (Fla. 1993) are not applicable here. See State v. Matthews, 891 So.2d 479, 488 (Fla. 2004); Moore, 882 So.2d at 985. However, even under Tripp there was never an intent to provide a sentencing boon or windfall to defendants upon violations of probation. See Hodgdon v. State, 789 So.2d 958, 963 (Fla. 2001).

4 This Court faced an analogous situation in Moore where the defendant was sentenced to concurrent prison terms in one case and then concurrent terms of probation in a second case to run consecutively to the prison terms. Moore, 882 So.2d at 979. After serving the incarcerative portion of her sentence, the defendant violated her probation in the second case, and sought credit for time served on her new sentence. Id. Rejecting any entitlement to

The decision below does not consider Rabedeau's sentence in the context of a violation of probation. By ordering that credit for time served must be awarded on all three counts, to the equivalent of fifteen years imprisonment, the trial judge has been stripped of his discretion in fashioning the sentence he deemed appropriate of twenty-five years (thirty years less the five years for the credit for time served) based upon a violation of probation. Now Rabedeau will only serve a fifteen year sentence.[5] As noted in Gisi, to allow this as the Fifth District Court of Appeal did in the instant case, "would thwart society's ability to

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credit stemming from her prison term in the first case to her new prison sentence based upon the violation of probation in the second case, this Court noted:

> . . . When probation on one offense is ordered to run consecutively to incarceration on another, there is simply no logical reason to award credit for the prison time previously served for the first offense against a newly imposed prison sentence on the second offense following a revocation of probation. To so do would provide a windfall to the defendant, in contravention of the [Criminal Punishment] Code's relatively clear express intent.

Moore, 882 So.2d at 979-980 (quoting Moore v. State, 859 So.2d 613, 618 (Fla. 1st DCA 2003)).

5 Rabedeau was subject to a statutory maximum sentence of forty-five years as he was convicted of three second degree felonies. His present sentence of thirty years imprisonment with five years for credit for time served on the first count only is not illegal and thus, does not implicate the concerns of the First District Court of Appeal in Jones, 633 So.2d at 483. There, the defendant was sentenced to concurrent terms of five years imprisonment followed by probation on two counts. Upon violating his probation, the trial court imposed consecutive terms of fifteen years on each count with five years credit on count one only. The court noted that as a result, Jones would be subject to twenty years imprisonment on count two, which exceeded the statutory maximum term for that offense. Jones, 633 So.2d at 483.

have its judges fully impose a punishment that the judges believe to be appropriate" when that defendant has violated probation, a prior privilege bestowed upon him. Gisi, 948 So.2d at 819.

There is further difficulty in determining how Rabedeau's sentence is to be structured. Had Rabedeau been sentenced to five years imprisonment followed by five years probation for each count, under the rationale of Rabedeau, he would serve no prison time at all upon his violation of probation because each five year term of imprisonment would be subject to credit. This result would run afoul of any intent on the part of the trial judge to ensure that Rabedeau serve time in prison for again violating his probation.

Furthermore, this is not a case where Rabedeau is not receiving credit for his prior time in prison. See Singletary v. Slay, 688 So. 2d 319, 320 (Fla. 1997)(upon violation of probation, defendant is entitled to credit for time served after serving the incarcerative portion of original split sentence); State v. Green, 574 So.2d 925, 926 (Fla. 1989)(same). In the sentence imposed by the trial court, Rabedeau certainly received credit for his time served in this case. He just should not receive three times the credit or fifteen years for the actual five years he served. See Gisi. Cf. Hodgdon, 789 So.2d at 963 (there should not be "a sentencing boon or windfall to defendants upon violations of probation.").

Essentially, under the rationale of the district court, Rabedeau is receiving credit for fifteen years and he has only

served five years in prison. With that problem in mind, the Second District Court of Appeal correctly determined in Gisi that jail credit against consecutive sentences is mandatory on only one of the consecutives sentences; anything further is discretionary with the sentencing court. Gisi, 948 So.2d at 819 (citing Keene v. State, 500 So.2d 592, 594 n. 2 (Fla. 2d DCA 1986)). Thus, this Court should likewise hold that on sentencing for a violation of probation, a defendant is not entitled to multiple credit for time served. In other words, Rabedeau should not be awarded fifteen years of credit for the five years he served. See Gisi, 948 So.2d at 819-820 and cf. Gillespie, 910 So.2d at 324 and Bell, 573 So.2d at 11.

Finally, the State points out that Rabedeau has been resentenced following the issuance of mandate by the district court. The trial court abided by the ruling of the district court to resentence Rabedeau and restructured Rabedeau's net twenty-five year sentence by imposing a ten year sentence on count one, and fifteen year sentences on counts two and three with all three counts to run consecutively with five years credit for time served to be awarded on each count. Rabedeau has again appealed this sentence in the district court of appeal. See Rabedeau v. State, 5D08-1110 (Fla. 5th DCA 2008).

A trial court is not barred from accomplishing its original sentencing goals where a defendant successfully seeks to have a sentence overturned. James v. State, 845 So.2d 238, 240 (Fla. 1st

DCA 2003). Thus, here, the trial court could and did properly impose a sentence that accomplished the same goal as that contemplated by the trial judge at the outset. See Trotter v. State, 825 So.2d 362, 368 (Fla. 2002)(on resentencing trial court did not err in utilizing drug trafficker multiplier not originally used in order to reach sentence that trial court originally considered to be appropriate). Moreover, Rabedeau's new sentence does not implicate any due process or vindictiveness concerns as Rabedeau received the same sentence in count one, had not begun serving counts two and three, and he received the same net sentence as originally imposed. See James, 845 So.2d at 240-241; Sullivan v. State, 801 So.2d 185, 186-187 (Fla. 5th DCA 2001). Accordingly, should this Court agree with the district court of appeal below and find that Rabedeau is entitled to credit for time served on each count, his new sentence in accordance with that ruling should stand, rendering Rabedeau's current appeal in the district court moot.

In all, the ruling of Second District Court of Appeal in Gisi should be affirmed and the contrary conclusion reached by the Fifth District Court of Appeal in the instant case should be rejected by this Court.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court quash in the decision of the district court below and affirm Gisi v. State, 948 So.2d 816 (Fla. 2d DCA), rev. granted, 952 So.2d 1189 (Fla. 2007) in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by delivery to Assistant Public Defender Noel A. Pelella, counsel for Rabedeau, 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, this _____ day of June, 2008.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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