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

REPLY BRIEF OF PETITIONER

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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 sentences 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 State maintains 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. The State relies upon those arguments made in the initial brief on the merits, urging this Court to quash the decision of the Fifth District Court of Appeal in Rabedeau v. State, 971 So.2d 913 (Fla. 5th DCA 2007) and affirm the decision of the Second District Court of Appeal in Gisi v. State, 948 So.2d 816 (Fla. 2d DCA), rev. granted, 952 So.2d 1189 (Fla. 2007). The State also responds to Rabedeau's arguments as follows:

Rabedeau argues the State's view is that "a violation of probation retroactively transforms credit earned for fully completed 'concurrent' sentences into a fiction [and] that the years actually spent in prison will be treated by the courts as if they had never been served." Respondent's Br. at 5. In doing so, Rabedeau relies upon Tillman v. State, 693 So.2d 626 (Fla. 2d DCA 1997) and Jones v. State, 633 So.2d 482 (Fla. 1st DCA 1994) which hold that a defendant, who was previously sentenced in different cases to concurrent terms followed by probation and violates probation, and then is sentenced to consecutive terms as a result

of the probation violation, is entitled to credit for time served against each case.[1] In reaching that conclusion, the court focused on the notion that a defendant is "clearly entitled to credit for the time served on the original sentence." Jones, 633 So.2d at 483. See also Tillman, 693 So.2d at 628 n.2 (noting that the award of credit would then exceed the sentence against which it applied and result in the completion of the defendant's sentence).

That rationale is unaffected and holds true in the instant case as Rabedeau has not been denied the five years credit for the time he has served in this case and his violation of probation does not eradicate his entitlement to the credit for the actual time he served. Thus, despite Rabedeau's argument to the contrary, his prior time served in prison is not ignored. Instead, Rabedeau should not, as the district court of appeal has now allowed, be awarded fifteen years credit on the five years he has served based upon the fact that he originally received concurrent sentences prior to his violation of probation.

The State further notes that all three of the cases relied upon Rabedeau predate the enactment of the Criminal Punishment Code. This Court has noted "the interrelationship of sentences under the guidelines is absent from the Criminal Punishment Code, which provides no ceiling other than the statutory maximum penalty

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1 Rabedeau also relies upon Van Thompson v. State, 771 So.2d 593 (Fla. 1st DCA 2000). However, Van Thompson does not even involve a sentencing on a violation of probation but addresses credit for time served on a resentencing following the improper imposition of

and authorizes consecutive sentences." Gibson v. Dep't of Corrections, 885 So.2d 376, 383 (Fla. 2004)(citing Moore v. State, 882 So.2d 977, 980-981 (Fla. 2004)). Accord State v. Holmes, 360 So.2d 380 (Fla. 1978)(a split sentence of a combined period of incarceration and probation must be within statutory maximum). Thus, the Criminal Punishment Code permits the trial judge to sentence a probation violator up to and including the statutory maximum term. With that, the concerns of Jones, which is relied upon in both Van Thompson and Tillman, that without the credit for time served on all that defendant's cases, the defendant would be serving a term in excess of the statutory maximum are not applicable. See Jones, 633 So.2d at 483. Rabedeau's sentence on his violation of probation including the five years credit on count one only is within the statutory maximum and comports with the Criminal Punishment Code.[2]

The State reiterates that 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

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a habitual offender sentence. See Van Thompson, 771 So.2d at 594.

[2] In Jones, the district court relied upon State v. Green, 547 So.2d 925 (Fla. 1989), which had held that defendants were entitled to credit for time served for unforfeited gain time upon sentencing following a violation of probation which was a part of a probationary split sentence. However, as this Court noted in Gibson, Green was superseded by legislation in 1989 when the revocation of probation or community control was added to the circumstances contained in section 944.28(1) that authorized the Department of Corrections to forfeit an offender's gain time. See Gibson, 885 So.2d at 380 n.5 (citing ch. 89-531, § 6, at 2717, Laws of Fla.).

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. 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 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.

For the reasons stated herein and in Petitioner's initial brief on the merits, 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 below should be rejected.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court quash 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 July, 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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