

IN THE SUPREME COURT OF FLORIDA

LONNIE E. POORE,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

AUG 18 1987
 CLERK, SUPREME COURT
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 CASE NO. 70,397

9-11
 6(A)
 12-3-87

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
 PUBLIC DEFENDER
 SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner was sentenced on September 9, 1982, as a youthful offender, to spend two and a half years in prison, followed by two years on probation, for grand theft of a motor vehicle. (R 32-33, 9) On August 14, 1985, he entered guilty pleas to each allegation that he violated his probation by changing his residence without permission and by failing to maintain employment while on probation. (R 3, 8, 34-35) His probation was revoked and he was sentenced to spend five years in prison. (R 21-22, 50, 52-54) During Petitioner's timely appeal to the Fifth District Court of Appeal, jurisdiction was relinquished to the trial court and, on January 6, 1986, the five-year sentence was vacated and Petitioner was sentenced to spend four and a half years in prison. (SROA)

On February 5, 1987, the Fifth District Court of Appeal reversed and vacated the August 14, 1985, sentence. Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987). Petitioner's motion for rehearing and/or motion for rehearing en banc or suggestion of mootness was denied on March 17, 1987. Petitioner filed a notice in the Fifth District Court of Appeal to invoke this Honorable Court's discretionary jurisdiction on April 16, 1987. By its order of July 22, 1987, this Honorable Court accepted jurisdiction of this cause.

SUMMARY OF ARGUMENT

Whether Petitioner came to be on probation by being "placed" on probation initially or by serving the probationary portion of a "split sentence," he was entitled, upon violation of probation, to have his case disposed of through sentencing or resentencing, pursuant to the sentencing guidelines upon his election. The District Court's decision that he was subject only to recommitment for the balance of his original "split sentence" contravenes statutory provisions for disposition upon violation of probation; decisions by this Honorable Court and other Florida courts; and the sentencing guidelines.

ARGUMENT

THE DISTRICT COURT'S DECISION CONTRAVENES THE SENTENCING GUIDELINES, STATUTORY PROVISIONS GOVERNING CRIMINAL DISPOSITIONS, AND FLORIDA DECISIONAL LAW; AND WOULD WORK TO DENY EQUAL PROTECTION OF THE LAW TO PERSONS SUBJECTED TO "SPLIT SENTENCES."

Petitioner's sentence, imposed following revocation of the probation portion of his original split sentence as a youthful offender, was reversed and vacated, "not because it is an improper guideline sentence but because it should not have been imposed at all." Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987). (Appendix 2) Judge Cowart wrote for the Court:

. . . When the defendant violates a condition of probation or community control which is part of a split sentence, that violation is not the basis for an original sentencing, as it is when a defendant is originally placed on probation or community control in lieu of confinement. The subsequent violation of probation or community control in a split sentence serves only to eliminate the condition under which [the] defendant was released from confinement under the original sentence and the defendant is not resentenced but is recommitted to the Department of Corrections for service of the remainder of the original sentence.

(Appendix 4) The Court also held that Petitioner had had no right to elect to be resentenced under the sentencing guidelines "because he had no right to be sentenced a second time at all." (Appendix 4) The District Court's decision that only one sentence is ever imposed in the case of a "split sentence" contravenes the sentencing guidelines, statutory provisions for

revocation of probation or community control, and decisions by this Honorable Court.

The Committee Note to Rule 3.701(d) (12) states:

(d) (12) The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guideline sentence, unless the provisions of paragraph (11) are complied with.

If a split sentence is imposed (i. e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law.

(Emphasis supplied.)

The District Court's decision, however, states:

There has been much confusion as to the nature of a true "split sentence" and how it works. In a "split sentence" case, as in all other cases, only one valid sentence is ever imposed. It is for incarceration; it is imposed at the original sentence hearing; and it is for a specific total period or term of incarceration that the defendant will, under any turn of events, ever have to lawfully serve in confinement for the offense for which he is being sentenced. . . . However, if after the defendant has served the initial specified portion of his sentence of confinement and has been released on probation or community control and violates a condition of such probation or community control, the trial court merely finds and adjudicates the fact that the probation or community control has been violated and recommits the defendant to confinement to serve the remainder of the sentence originally imposed.

(Emphasis supplied.) (Appendix 3-4)

The sentencing guidelines provide that the guidelines apply to sentences being imposed upon revocation of probation or community control. Rule 3.701-(d) (14), Fla.R.Crim.P. The effect of the District Court's ruling is authorize a "departure" sentence without requiring that written reasons for the departure be given, as is mandated by Rule 3.701(d) (11). By terming the initial sentencing to be a "split sentence," the District Court would allow a trial judge to impose a prison sentence which far exceeds the recommended sentencing guidelines range and to which a defendant could be actually committed upon violation of his probation or community control, no matter how minor or technical the violation. A "split sentence" would, in effect, be one to which the sentencing guidelines did not apply. As Judge Sharp pointed out in her special concurrence herein, Section 921.001(4) (a) provides that the guidelines shall be applied to all pre-1983 felonies "for which sentencing occurs after such date," if the defendant affirmatively elects to be sentenced under them. Split sentences are not excluded. (Appendix 5)

Sections 948.01(8) and 958.04(2) (c) provide that "split sentences" may be imposed whereby the defendant or youthful offender is to be placed on probation or community control upon the completion of any specified period of incarceration. Sections 948.06(1) and 958.14 both provide that upon violation of probation or community control, the revoking judge may "impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control." Again, the procedure for violations of probation or community control does not distinguish between defendants who are "placed" on probation and those who are given "split sentences." In the case of a "split sentence," the court "stays and withholds" the imposition of the sentence following that which must be initially served, and instead

places the defendant on probation or into community control. The effect is a "split disposition." Petitioner suggests that the failure to provide for the imposition of any sentence which might have originally been imposed, except in the case of "split sentences," is not a legislative oversight because there is no true distinction between being on probation or in community control as the result of being "placed" on probation and being on probation as the result of a "split sentence." Because the statutes clearly treat the two types of probation interchangeably it may be that, contrary to Judge Cowart's assertion, no more than semantics is involved. (Appendix 3)

The decision of the District Court further contravenes decisions by this Honorable Court and other Florida courts which have dealt with disposition of defendants who have violated the probation portion of their "split sentences." In Brooks v. State, 478 So.2d 1052 (Fla. 1985), this Honorable Court held that when a person is sentenced as a youthful offender, upon revocation of his youthful offender community control status, the circuit court may sentence him in accordance with Section 948.06(1). Brooks had been sentenced, as a youthful offender, in 1979, to consecutive split sentences of four years in prison plus two years in a community control program for each of two counts of armed robbery. Likewise, in Hill v. State, 486 So.2d 1372 (Fla. 1st DCA 1986), the District Court upheld a sentence imposed after the revocation of Hill's community control. Hill had been sentenced to a "split sentence" in 1980 as a youthful offender. In Lynch v. State, 491 So.2d 1169 (Fla. 4th DCA 1986), the Fourth District Court of Appeal approved a nine-year sentence imposed after revocation of Lynch's probation which had been part of a youthful offender sentence. The Second District Court held, in Crosby v. State, 487 So.2d 416 (Fla. 2d DCA 1986), that the trial court was free to sentence Crosby in any

manner authorized by Section 948.06(1), after Crosby had violated the community control portion of an original split sentence. See, Crosby v. State ("Crosby I"), 462 So.2d 607 (Fla. 2d DCA 1985).

Judge Sharp pointed out that the District Court's holding in this case also contravenes this Honorable Court's decision in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981):

Further, the disparity between treatment of split sentences and probation or other sentencing alternatives is contrary to the teachings of Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981). The Florida Supreme Court in that case described incarceration as a condition of probation as "also known as the split sentence probation alternative." It treated both kinds of sentences or dispositions the same, limiting the incarceration time to one year. That was later statutorily repealed by sections 921.1[8]7 and 948.01(4) for split sentences, but the balance of Villery remains good law. The court further held that after probation is revoked for either kind of disposition, the court can impose any sentence it originally could have made. The only limitation for split sentences in Villery is that credit must be given for prison time served.

(Appendix 6) (Footnotes omitted.) (Emphasis in original.)

To uphold the District Court's decision in this case would be to authorize the imposition of a sentence which will automatically depart from the sentencing guidelines if probation or community control is violated, without requiring written reasons for the departure, in contravention of Rule 3.701(d)(11) and State v. Jackson, 478 So.2d 1054 (Fla. 1985). To allow this result would be to deny equal protection to persons whose sentences are

designated as "split sentences," and deprive them, on the basis of "semantics," of the benefits of the sentencing guidelines. Art. I §2, Fla. Const.; Amend. XIV, U. S. Const.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by delivery to his basket at the Fifth District Court of Appeal, 300 S. Beach Street, Daytona Beach, Florida 32014, this 17th day of August, 1987.



ATTORNEY