

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 CLYDE GARLAND WAYNE,)
)
 Respondent.)
 _____)

CASE NO. 71,420

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

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TABLE OF CITATIONS

CASES CITED:

PAGE NO.

Poore v. State
503 So.2d 1282 (Fla. 5th DCA 1987)

1-3,5

OTHER AUTHORITIES:

Rule 3.986, Florida Rule of Criminal Procedure

4

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's statement, except for the following:

While the order placing Wayne on probation has a filing date of June 21, 1985, it was done on May 7, 1985 (R9).

The warrant for violation of the probation was issued September 12, 1986, alleging violations dating from May 5, 1986 (R12), a year after he was sentenced to thirty months in prison. He was released from prison in May, 1986, presumably enjoying the benefit of maximum gain time, but did not keep up with the probation office (R3).

The original guidelines sentence fell in the second cell, twelve to thirty months. With an increase to the next higher cell for violation of probation, his guidelines sentence was three years incarceration, not the two and one-half to three and one-half written on the scoresheet and presumed by the judge (R14). Wayne appealed the one-year departure from the guidelines sentence, because the judge's stated reason was nothing more than a statement of his disagreement with the guidelines sentence.

The majority of the Fifth District Court of Appeal panel decided not to address that issue, but to extend the analysis the same panel had begun in Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987). The majority held that the practice, followed in Wayne's case, of sentencing a person to a prison term, to be followed by a period of probation, does not allow a judge, other than by violating double jeopardy, to sentence the

convicted person again to another prison term for the same offense, merely because he has violated the probation appended to the original prison term. The court ordered Wayne to be discharged from further confinement on the original burglary conviction. Judge Sharp again dissented, as in Poore.

SUMMARY OF THE ARGUMENT

While Respondent would contend that the District Court decision construes the sentencing rule rather than the constitutional provision, and does not accept Petitioner's contention that the court erroneously applied double jeopardy, or that Respondent waived double jeopardy, he must acknowledge that if Poore is under review, this case is its sequel. However, the court should let the decision of the District Court stand.

ARGUMENT

THE COURT SHOULD DECLINE TO ACCEPT
JURISDICTION IN THIS CASE.

When the court held that Wayne's second sentence to a term of imprisonment on the burglary violated constitutional double jeopardy, it was not expressly construing that provision of the federal and state constitutions, in the sense of ascertaining its meaning, but rather was construing the sentence form in Florida Rule of Criminal Procedure 3.986 as violating double jeopardy. Once a person has been sentenced to a prison term on conviction for an offense, he cannot be sentenced again to prison for the same offense, unless the original sentence has been legally set aside. In this case, the sentencing judge twice sent Wayne to prison on the same offense, without the original sentence being legally set aside. This can be avoided in a genuine split sentence, because only one sentence is imposed. If the offender violates the probationary part of his sentence, he can be committed to prison for the portion that was suspended, on condition of good behavior during probation. Under the guidelines system, of course, such a split sentence is limited by the guidelines sentence.

The trial court did not withhold sentencing Respondent to a term of imprisonment (Brief of Petitioner, page 4), but twice sentenced Wayne to prison for the same offense. The statement in the probation order that if the probationer violates any conditions of the probation, the court may revoke his proba-

tion and impose any sentence which it might have imposed before placing him on probation (R9), is subject to the limitation encompassed in "might have imposed" that such imposition pass constitutional muster. The probationer does not and cannot unknowingly waive such constitutional limitation, even in a plea agreement (Brief of Petitioner, pages 4-6).

Respondent must acknowledge that the court below relied on the explanation developed in Poore, and that this case is its sequel. However, the court should decline to accept jurisdiction and let the decision of the District Court stand as a valid application of double jeopardy.

CONCLUSION

BASED UPON the argument made and authority cited herein, Respondent asks this Honorable Court to decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Rober Butterworth, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, in his basket at the Fifth District Court of Appeal; and mailed to 305 S. Tampa Avenue, Orlando, Florida, on this 7th day of December, 1987.

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