7-1-1976

Sentencing Upon Revocation of Probation in Florida

Lawrence A. Farese

satisfactory and equitable to all the parties—restitution to Viacom at a fair price for any services performed and non-enforcement of any executory portions of the contract.[60]

Restitution would not give rise to unjust enrichment, nor complicate the action, yet it would restore Viacom to its original position, suffering no more than a loss of anticipated profits. Such a resolution may serve to negate the anticompetitive abuses incurred by Tandem and simultaneously maintain the integrity of the antitrust laws.

MARC L. FAUST

Sentencing Upon Revocation of Probation in Florida

The Supreme Court of Florida held that a trial court is free to impose any sentence upon revocation of probation which it might have originally imposed despite the fact that the trial court had originally imposed a lesser sentence. In so doing, the court overruled the overwhelming weight of authority exhibited by the lower appellate courts. The author suggests that the defendant's constitutional protection against being twice placed in jeopardy for the same offense and his right to counsel may have been infringed upon in the process.

The defendant pleaded guilty to possession of heroin, issuing a worthless check, and issuing a forged instrument. The trial judge found the defendant guilty and sentenced him to a term of imprisonment of 1 year in the county jail for each offense, to be followed by 5 years probation. All sentences were to be served concurrently. Thereafter, the trial court amended each of the sentences by reducing the period to be spent in the county jail to the 85 days then served, and by suspending the execution of the remainder of the jail sentences; but the court retained the 5 year probationary period. The defendant subsequently violated his probation by committing

60. *See* Comment, *The Defense of Antitrust Illegality in Contract Actions*, 27 U. CHI. L. REV. 758, 776 (1960).

other felonies.[1] Following a probation revocation hearing, the trial judge revoked the defendant's probation, disregarded the previous sentences, and imposed three concurrent sentences each consisting of 2 years imprisonment in the state penitentiary with credit given for 135 days previously served in the county jail.

The District Court of Appeal, Third District, affirmed the judgment but set aside the new sentences,[2] holding that where a defendant has been placed on probation after completing a specified period of imprisonment pursuant to Florida Statutes section 948.01(4)(1973),[3] revocation of probation operates to subject the de-

1. The defendant committed aggravated assault. In addition, at the time of his arrest, he had in his possession a pistol and cocaine. Jones v. State, 296 So. 2d 519, 521 (Fla. 3d Dist. 1974).

2. Jones v. State, 296 So. 2d 519 (Fla. 3d Dist. 1974).

3. For the purpose of aiding readers in understanding this case note and the cases cited herein, the relevant portions of Florida's probation statutes as they existed in 1973 are presented:

FLA. STAT. § 948.01 (1973) When courts may place defendant on probation—

(3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt and in either case stay and withhold the imposition of sentence upon such defendant, and shall place him upon probation under the supervision and control of the commission for the duration of such probation. And the said commission shall thereupon and thereafter, during the continuance of such probation, have the supervision and control of the defendant.

(4) Whenever punishment by imprisonment in the county jail is prescribed, the court, in its discretion, may at the time of sentencing direct the defendant to be placed on probation upon completion of any specified period of such sentence. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation after serving such period as may be imposed by the court.

FLA. STAT. § 948.06 (1973) Violation of probation; revocation; modification; continuance—

(1) If such charge is not at said time admitted by the probationer and if it is not dismissed, the court, as soon as may be practicable, shall give the probationer an opportunity to be fully heard on his behalf in person or by counsel. After such hearing, the court may revoke, modify, or continue the probation. If such probation is revoked, the court shall adjudge the probationer guilty of the offense charged and proven or admitted, unless he shall have previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation.

Effective July 1, 1974, FLA. STAT. § 948.01(4) was amended to read: "Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed . . . ." Thus, the split sentence alternative is no longer limited to situations where confinement in the county jail is prescribed.

fendant to a penalty of serving no more than that portion of the jail sentence which was stayed and withheld incident to placing him on probation.[4]

Due to the great public interest in this problem, the Third District certified the following question to the Supreme Court of Florida: Where a convicted defendant is sentenced to a term of imprisonment with directions that he be placed on probation upon completion of a specified period of such sentence with the remainder of the jail sentence stayed and withheld, can the court impose upon revocation of probation a new and increased sentence of imprisonment which the court could have originally imposed, or is the time to be served following revocation of probation limited to the unserved portion of the original sentence?

After granting the state's petition for writ of certiorari, the supreme court *held*, reversed and remanded with directions to reinstate the new sentences imposed by the trial court: A defendant placed on probation pursuant to Florida Statutes section 948.01(4) (1973), who subsequently violates that probation, may be sentenced to imprisonment by the trial judge for the same period of years as the court could have originally imposed in accordance with Florida Statutes section 948.06 (1973),[5] without the prerequisite of establishing a term of sentence and withholding a part of that

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Although not essential to the determination of the noted case, the Supreme Court of Florida interpreted FLA. STAT. § 948.01(4) (1973) as authorizing a trial judge to prescribe a period of imprisonment in the county jail followed by probation for those offenses punishable only by imprisonment in the county jail (misdemeanor offenses). State v. Jones, 327 So. 2d 18, 24. The court held that the 1974 amendment to section 948.01(4) expands the trial judge's authority to include felonies as well as misdemeanors in the use of the split sentence alternative (a period of incarceration in connection with a period of probation). *Id.*

Other amendments to Florida's probation statutes since 1973 are not essential to the analysis of this case.

Unless otherwise indicated, subsequent citations to the probation statutes will refer to the 1973 version.

4. Initially the Third District found that the original sentences providing for a term of incarceration *to be followed* by a period of probation were not authorized by section 948.01(4) since no portion of the jail sentence was stayed and withheld for use in the event that violation of probation should occur. The amendment to the sentences, reducing the term of imprisonment to 85 days, however, rendered the sentences appropriate since the effect thereof was to withhold the execution of the remainder of the one year jail sentence initially imposed in each case.

The Third District remanded the cause with directions that the defendant be returned to the county jail for the unserved portion of the original sentences.

5. *See* note 3 *supra*.

term at the initial sentencing proceedings. *State v. Jones*, 327 So. 2d 18 (Fla. 1976).[6]

The supreme court's holding and statutory construction are in direct conflict with a multitude of district court decisions[7] originating in the District Court of Appeal, Third District. In *Williams v. State*,[8] the Third District held that in order to impose a valid term of probation in connection with a period of imprisonment under section 948.01(4), the trial court must withhold execution[9] of a portion of the sentence *imposed* upon the defendant. In *Williams*, a defendant was placed on probation after completing a maximum term of imprisonment, with no part of the sentence withheld. The probation portion of the sentence was held to be null and void.[10]

In *Hutchins v. State*,[11] the Third District, further interpreted the probation statutes by holding that where a defendant had been

6. The supreme court also held that trial courts have general authority to require a specific period of incarceration as a condition of probation for felony and misdemeanor offenses pursuant to FLA. STAT. § 948.03 (1973). 327 So. 2d at 24. It should be noted, however, that this was not at issue in the instant case and that this holding was merely an interpretation of the probation statute, no doubt designed to dispose of four companion cases: State v. Baker, 327 So. 2d 27 (Fla. 1976); State v. Lopez, 327 So. 2d 27 (Fla. 1976); State v. Cummings, 327 So. 2d 28 (Fla. 1976); State v. Green, 327 So. 2d 28 (Fla. 1976). Moreover, the holding is not a novel one. Several district court decisions have so interpreted the statute. *See, e.g.*, Hults v. State, 307 So. 2d 489 (Fla. 2d Dist. 1975); Brown v. State, 302 So. 2d 430 (Fla. 4th Dist. 1974).

In addition, the court held that, upon revocation of probation, a defendant must be given credit for any period of time spent in jail pursuant to a split sentence probation order, in accordance with the principles enunciated in North Carolina v. Pearce, 395 U.S. 711 (1969), whether it had been imposed pursuant to FLA. STAT. § 948.01(4), or as a condition of probation under FLA. STAT. § 948.03. 327 So. 2d at 25. In so holding, the court construed FLA. STAT. § 948.06(2), which provides that "[n]o part of the time that the defendant is on probation shall be considered as any part of the time that he shall be sentenced to serve," to apply only to time spent under probation supervision *without* incarceration.

7. *E.g.*, Woodruff v. State, 309 So. 2d 55 (Fla. 2d Dist. 1975); Lennard v. State, 308 So. 2d 579 (Fla. 4th Dist. 1975); Harrell v. State, 308 So. 2d 51 (Fla. 2d Dist. 1975); Hults v. State, 307 So. 2d 489 (Fla. 2d Dist. 1975); Scoggins v. State, 299 So. 2d 669 (Fla. 3d Dist. 1974); *see* Waters v. State, 290 So. 2d 503 (Fla. 1st Dist.), *cert. denied*, 295 So. 2d 307 (Fla. 1974).

8. 280 So. 2d 518 (Fla. 3d Dist. 1973).

9. The Third District stated that "the trial court must withhold *imposition* of a portion of the sentence imposed upon the defendant." *Id.* at 519 (emphasis added). It is apparent from reading *Williams* and the cases which followed, (see cases cited in note 7 *supra*) that the court used the word *imposition* synonomously with *execution*, and that the court intended to hold that the trial judge must suspend execution of part of an imposed sentence.

10. Although the issue of the legality of the defendant's sentence was not raised as a point on appeal, the *Williams* court considered the sentence to be fundamental error and reviewed the matter sua sponte. The cases cited in note 7 *supra*, all follow the *Williams* rule.

11. 286 So. 2d 244 (Fla. 3d Dist. 1973), *cert. denied*, 293 So. 2d 717 (Fla. 1974).

placed on probation pursuant to section 948.01(4), revocation of probation operated to subject the defendant to serving no more than the remaining portion of the jail sentence which was withheld originally.

> Thus, where a court in sentencing a defendant to imprisonment for a designated period in the county jail provides that after serving a stated portion thereof the defendant should be on probation for some period, the penalty for a violation of probation would call for return of the defendant to the county jail for the unserved balance of the jail sentence, or such part thereof as the court should determine.[12]

The Third District's interpretation of section 948.01(4)[13] which required the trial judge at the initial sentencing proceeding to impose a total sentence immediately followed by the withholding of a part thereof for use in the event probation is revoked, was expressly rejected by the Supreme Court of Florida in the principal case.[14] Thus, the noted decision effectively overruled *Williams*, *Hutchins*, and the plethora of cases which followed.[15]

Under the supreme court's interpretation, a trial judge seeking to employ the split sentence alternative authorized by section 948.01(4) need not prescribe the total sentence and stay and withhold the execution of part of that sentence in order to establish a period of probation.[16] The trial judge now may sentence the defen-

12. *Id.* at 246-47. Several district court decisions have held in accord with this principle. *See, e.g.*, Durham v. State, 304 So. 2d 146 (Fla. 3d Dist. 1974); Scoggins v. State, 299 So. 2d 669 (Fla. 3d Dist. 1974); Cleveland v. State, 287 So. 2d 347 (Fla. 3d Dist. 1973).

13. In the noted decision, the supreme court indicated that the four district courts of appeal have had varied constructions and interpretations of section 948.01(4) and have attempted to distinguish the *Williams* decision. 327 So. 2d at 23. Upon careful analysis, however, it is apparent that all four districts have essentially accepted the Third District's interpretation. *See* authorities in notes 7 and 11 *supra*.

Washington v. State, 284 So. 2d 236 (Fla. 2d Dist. 1973), was cited by the supreme court as holding contrary to *Williams*. The issue of the legality of an increased sentence upon probation revocation was not raised on appeal and the District Court of Appeal, Second District, did not choose to address itself to the issue sua sponte. Since the court did not pass upon the question, the case should not be cited as being inconsistent with *Williams*.

In Lewis v. State, 298 So. 2d 540 (Fla. 4th Dist. 1974), cited by the supreme court in attempting to distinguish *Williams*, imposition of sentence following a plea of guilty was withheld and the defendant was placed on probation pursuant to section 948.01(3). The *Williams-Hutchins* interpretation of section 948.01(4), therefore, was totally inapplicable.

14. 327 So. 2d at 25.

15. *See* cases cited in notes 7 and 12, *supra*.

16. 327 So. 2d at 20. The court indicated that its interpretation of section 948.01(4) was consistent with FLA. R. CRIM. P. 3.790, which provides that pronouncement and imposition

dant to a specified term of imprisonment *to be followed* by a specific period of probation. If probation is subsequently revoked, the trial court may impose any sentence which it might have originally imposed before placing the defendant on probation,[17] with credit given for the time spent in jail.[18]

Although the supreme court's interpretation seems reasonable on its face, the court's analysis of the probation statutes and its criticism of the Third District's construction cannot withstand close scrutiny. The supreme court criticized the Third District's interpretation of section 948.01(4) as being inconsistent with the procedure for straight probation authorized by section 948.01(3) and in direct conflict with the revocation procedure prescribed by section 948.06.[19] Under the straight probation alternative of section 948.01(3), *imposition* of sentence immediately following a finding of guilt or a plea of guilty or of nolo contendere is withheld and the defendant is placed on probation. Upon a subsequent revocation of probation, the trial judge is authorized by section 948.06 to impose any sentence which he might have imposed originally had he not chosen to place the defendant on straight probation. Under the split sentence alternative of section 948.01(4), as interpreted by the Third District, sentence is imposed at the initial sentencing hearing, but the *execution* of part of that sentence may be withheld and the defendant is placed on probation after serving a specified portion of the sentence.[20] If probation is subsequently revoked, the defendant would not be sentenced again but would be returned to jail to serve the remainder of the jail sentence originally imposed, or such lesser period as the court might determine.[21] Thus, Florida Statutes sec-

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of sentence of imprisonment shall not be made upon a defendant who is to be placed on probation until such time as the probation is revoked. 327 So. 2d at 25, n.3. This rule, however, contains the procedural aspects of FLA. STAT. §§ 948.01(1),(2),(3), and 948.06, and does not relate to FLA. STAT. § 948.01(4). *See* Committee Notes and Author's Comment to FLA. R. CRIM. P. 3.790, 34 FLA. STAT. ANN. at 295-98 (1975); Danese, *Judgment and Sentence*, in THE FLORIDA BAR (CONTINUING LEGAL EDUCATION, FLORIDA RULES OF CRIMINAL PROCEDURE) 6.12 (1968).

17. FLA. STAT. § 948.06 (1973).

18. 327 So. 2d at 25. *See* note 6, *supra*.

19. 327 So. 2d at 25.

20. *See* Jones v. State, 296 So. 2d 519 (Fla. 3d Dist. 1974); Williams v. State, 280 So. 2d 518 (Fla. 3d Dist. 1973).

21. FLA. STAT. § 948.06 authorizes a trial court, upon revocation of probation, to "impose any sentence which it might have originally imposed," and does not expressly limit punishment to the unserved portion of the original sentence imposed pursuant to section 948.01(4). In light of the interpretation by the Third District, however, this provision relates only to

tions 948.01(3)(4), and 948.06, as read by the Third District, give the trial judge, in his discretion, the option of either imposing a definite sentence immediately upon a determination of guilt, or withholding imposition of sentence until such time as the defendant violates probation. The probation statutes are easily amenable to such an interpretation and there is no apparent inconsistency or conflict in the statutory provisions under this construction.[22]

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cases where imposition of sentence was withheld and the defendant had been placed on probation pursuant to section 948.01(3). *See* Jones v. State, 296 So. 2d 519 (Fla. 3d Dist. 1973); Hutchins v. State, 826 So. 2d 244 (Fla. 3d Dist. 1973).

Florida's Probation Act, as originally enacted in 1941, authorized a trial court to place a defendant on probation only by withholding imposition of sentence, the procedure now authorized by section 948.01(3). Fla. Laws 1941, ch. 20519 § 20. The authority of the trial court to impose any sentence which could have been imposed originally, therefore, clearly related to revocation of straight probation. Fla. Laws 1941, ch. 20519 § 26. When the split sentence alternative of section 948.01(4) was enacted in 1967, no corresponding revision was made in the revocation procedure of section 948.06. *See* Fla. Laws 1967, ch. 67-204. Whether the power to impose a sentence upon revocation of probation was intended to apply where sentence has already been imposed under section 948.01(4) is a question of statutory construction, and has resulted in the conflicting interpretations illustrated in the instant case.

For an analysis of the probation procedure prior to the enactment of section 948.01(4), see Clark, *Probation in the Criminal Courts*, 14 U. FLA. L. REV. 213 (1961).

22. The practicability of the Third District's construction can be illustrated by an analogy to the federal statutes and case law. In Roberts v. United States, 320 U.S. 264 (1943), the United States Supreme Court was called upon to construe federal probation statutes which were similar to FLA. STAT. §§ 948.01 (1973) *et. seq.* The federal statute involved, 18 U.S.C. § 724 (1940), *as amended*, 18 U.S.C. § 3651 (1970), permitted a trial court to suspend the imposition or execution of a sentence and to place the defendant on probation. Upon revocation of probation, 18 U.S.C. § 725 (1940), *as amended*, 18 U.S.C. § 3653 (1948), authorized the trial court to "impose any sentence which might originally have been imposed."

The Supreme Court construed these statutory provisions as authorizing a trial court to either impose a definite term of imprisonment in advance of probation or to defer the imposition of sentence until such time as the defendant violates probation. The Court went on to hold that where a trial judge exercises his discretion by sentencing an offender in advance of probation, he may not later, upon revocation of probation, set aside that sentence and *increase* the term of imprisonment. *But see In re* White, 18 N.J. 449, 114 A.2d 261 (1955), where the Supreme Court of New Jersey disagreed with the majority in *Roberts* and recognized that a state court is not bound by decisions of the United States Supreme Court in determining the construction and interpretation of a state statute.

In 1948, 18 U.S.C. § 3653 was amended to conform to the *Roberts* decision:
"Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."

It is now well settled in federal courts that where imposition of sentence has been withheld, upon revocation of probation, a trial court may impose any sentence which might have originally been imposed. On the other hand, where execution of a sentence has been suspended, a trial court is without authority to impose a sentence in excess of that originally imposed. *See, e.g.*, Manley v. United States, 432 F.2d 1241 (2d Cir. 1970) (where imposition

The source of the divergent interpretation by the Supreme Court of Florida does not lie in any incongruity in the Third District's construction, but rather in the ambiguous language of section 918.01(4), particularly the words: "the court shall stay and withhold the imposition of the remainder of the sentence imposed upon the defendant. . . ."[23]

The supreme court could find no legislative intent in the above language which would require a trial judge to impose the total sentence upon the defendant, at the initial sentencing proceeding, followed by withholding the execution of a part thereof.[24] Rather, the court interpreted this provision to mean that the time spent in jail pursuant to a split sentence "must be within any maximum jail sentence which *could be* imposed."[25] It seems inconceivable that the state legislature would have enacted such a provision merely to remind trial judges that they may not sentence a defendant beyond the maximum time authorized by law. Moreover, in construing the subsection as requiring the trial court to withhold imposition of the remainder of the sentence which *could be* imposed, the supreme court seemed to ignore the express mandate of the statute that the court shall withhold "the remainder of sentence *imposed upon the defendant*."[26]

Although the supreme court altered the existing case law by construing section 948.01(4) as authorizing a trial court to place a defendant on probation without the necessity of imposing a sentence and withholding part of it, clearly the most significant aspect of the noted decision lies in the holding that upon revocation of probation, a trial court may impose, pursuant to section 948.06, any sentence which might have been imposed originally, whether the

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of sentence was withheld); Williams v. United States, 310 F.2d 696 (7th Cir. 1962) (where execution of sentence was suspended). *See generally* 2 WRIGHT FEDERAL PRACTICE AND PROCEDURE, *Criminal* §§ 529, 530 (1969).

23. FLA. STAT. § 948.01(4) (1973).

24. 327 So. 2d at 25.

25. *Id.* (emphasis added). It is interesting to note that under the supreme court's interpretation of section 948.01(4), the words "could be" are impliedly inserted before the phrase "imposed upon the defendant," while under the Third District's construction, the word "execution" is substituted for "imposition." Thus, the ambiguity of section 948.01(4) is evidenced by the inability of either court to construe or apply the exact statutory language.

26. FLA. STAT. § 948.01(4) (1973) (emphasis added). In its opinion, the supreme court conveniently quoted the phrase, "withhold the imposition of the remainder of sentence" out of context of section 948.01(4), and ignored the language immediately following, "imposed upon the defendant," without any indication that language was omitted. 327 So. 2d at 25.

defendant had been placed on straight probation under section 948.01(3), or pursuant to a split sentence under section 948.01(4).[27] Such an interpretation seems to render an original sentence issued under the authority of section 948.01(4) a meaningless formality, since upon revocation of probation such sentence can be revoked, modified or increased. A trial court no longer has the option, as it did under the Third District's interpretation, of placing a defendant on probation while prescribing a definite and final sentence which it believes is justified for the offense committed.

While it may be asserted that the trial judge is the person most qualified to pronounce sentence for the crime for which a defendant has been convicted,[28] it is arguable that assessment of punishment immediately following conviction is based largely upon conjecture.[29] At that point, a judge can only speculate as to whether a defendant may be rehabilitated while continuing at large under the supervision of probation officials, or whether it is necessary to remove the defendant from society by placing him within the confines of a penitentiary. One function of probation is to supplant such speculative action by judgment based upon experience after observing the probationer's ability to function in society within appropriate limits.[30] Perhaps courts should not countenance the notion that a probationer has a vested interest in the original sentence since this may encourage him to weigh the length of such sentence against any advantages he may find in violating his probation. The possibility of receiving a more stringent sentence upon revocation of probation, on the other hand, may well serve as a deterrent for probation violations. These policy considerations may have pursuaded the Supreme Court of Florida to extend the authority of a trial judge to impose upon a previously sentenced probationer a new and increased sentence upon revocation of his probation.[31] On the other hand, Justice Boyd, in his dissenting opinion stated that:

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27. 327 So. 2d at 25.

28. *See, e.g.*, Durham v. State, 304 So. 2d 146 (Fla. 3d Dist. 1974). *See generally* N. WALKER, SENTENCING IN A RATIONAL SOCIETY 117-18 (1971), *reviewed*, Cross, 1970 CRIM. L. REV. 1.

29. *See* Roberts v. United States, 320 U.S. 264, 273 (1943) (Frankfurter, J., dissenting).

30. *Id.* A trial judge can achieve this object of probation under both the Third District's and the Supreme Court of Florida's interpretation of the state probation statutes merely by withholding imposition of sentence at the initial sentencing hearing, and placing the defendant on straight probation pursuant to section 948.01(3).

31. The supreme court did not discuss any policy considerations in the majority opinion, but confined its decision to statutory interpretation.

> Perhaps true justice could be attained by permitting a court to call back and resentence an erring probationer released from county jail during his specified term of incarceration, but I find no Florida statute which permits such action as is approved by the majority opinion. The deprivation of personal liberty by courts for violating criminal statutes must never exceed the punishment authorized by the Legislature. If more harsh sentences are needed the Legislature, not the courts, should change the law.[32]

In developing its questionable construction of Florida's probation statutes, the supreme court failed to consider the constitutional impact of its decision. The Supreme Court of the United States, in *Mempa v. Rhay*,[33] held that an indigent probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing.[34] The Court held that the right to counsel exists "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected,"[35] and that sentencing was one

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32. 327 So. 2d at 26. Justice Boyd conceded that Florida Statutes section 948.01(4) (1973) was ambiguous and in need of legislative clarification, but he emphasized the well recognized principle of law that ambiguities in criminal statutes are to be resolved in favor of accused persons, *citing* Negron v. State, 306 So. 2d 104 (Fla. 1975), and Snowden v. Brown, 60 Fla. 212, 53 So. 548 (1940).

Justice Boyd was of the opinion that the trial court exceeded its statutory authority by imposing a new and increased sentence from the 1 year sentence previously imposed. The dissent suggested that if the offenses committed during the probationary period were deserving of additional punishments, the trial court could have punished the defendant for them upon separate and independent convictions. 328 So. 2d at 26.

33. 389 U.S. 128 (1967).

34. *Accord*, Machwart v. State, 222 So. 2d 38 (Fla. 2d Dist. 1969); Phillips v. State, 165 So. 2d 246 (Fla. 2d Dist. 1964); *see* Gargan v. State, 217 So. 2d 578 (Fla. 4th Dist. 1969); 44 A.L.R.3d 306 (1972). For an excellent analysis of *Mempa*, see Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 TEX. L. REV. 1 (1968).

In *Mempa*, imposition of sentence was withheld incident to placing the defendants on probation, and the defendants received their initial and final sentences at their probation revocation hearings. In a subsequent case where a definite sentence had already been imposed at trial and revocation of probation operated only to subject the defendant to serving the imposed sentence, the Supreme Court held that a probationer does not have an absolute right to counsel at such a probation revocation hearing but that in some cases due process would require that counsel be provided. Gagnon v. Scarpelli, 411 U.S. 778 (1973). Thus it is clear that the factor which compelled the Court to require counsel at the probation revocation hearing in *Mempa*, was that sentence was to be imposed at the hearing. Although the procedure used in placing the defendant on probation in the instant case was similar to that used in *Gagnon*, the fact that a new and increased sentence was imposed at the defendant's probation revocation hearing makes the holding and reasoning of *Mempa* more apposite than *Gagnon*.

35. 389 U.S. at 134.

such stage. In the noted case, it was apparent from the record that the indigent defendant was not represented by counsel at the hearing in which his probation was revoked and a new sentence was imposed, and that no waiver of the right to counsel had been executed.[36] Although the point was briefed and argued before the Supreme Court of Florida,[37] the court did not address itself to the issue when it remanded the cause with directions to reinstate the sentences imposed at the revocation hearing.[38] It is submitted that in affirming sentences which were imposed upon the defendant without the benefit of appointed counsel, the court condoned the deprivation of the defendant's liberty in violation of his constitutional rights to counsel[39] and to due process of law.[40]

Additionally, the supreme court's decision would seem to have infringed upon the defendant's constitutional protection against being twice placed in jeopardy for the same offense.[41] It is well settled that the double jeopardy clauses of both the United States[42] and Florida[43] Constitutions not only protect an accused from double prosecutions for the same crime, but also protect against multiple punishments for the same offense.[44] Accordingly, it has been consistently held that a trial court is without authority to set aside a judgment and sentence once it has been partially satisfied by a defendant, and impose a new and increased sentence, on the ground that to increase the penalty is to subject a defendant to double punishment for the same offense.[45] The defendant in the principal case served part of the sentences initially imposed,[46] yet the supreme

36. Record at 26-27.

37. *See* Brief for Respondent at 7-9; State v. Jones, 327 So. 2d 18 (Fla. 1976).

38. 327 So. 2d at 25.

39. U.S. CONST. amends. VI, XIV; FLA. CONST. art. I, § 16.

40. U.S. CONST. amends. V, XIV; FLA. CONST. art. I, § 9.

41. Although the issue of double jeopardy was not briefed or argued on appeal, the court, in its discretion, may have reviewed such a fundamental issue sua sponte. FLA. APP. R. 3.7(i), 6.16(a); *see* State v. Williams, 198 So. 2d 21 (Fla. 1967).

42. U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .").

43. FLA. CONST. art. I, § 9 ("No person shall . . . be twice put in jeopardy for the same offense.").

44. North Carolina v. Pearce, 395 U.S. 711 (1969); *Ex Parte* Lange, 85 U.S. (18 Wall) 163 (1874); Note, *Twice in Jeopardy*, 75 YALE L. J. 262, 265-66 (1965).

45. *See, e.g.*, United States v. Benz, 282 U.S. 304 (1931); Deutschmann v. United States, 254 F.2d 487 (9th Cir. 1958); Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973); *Ex Parte* Basso, 41 So. 2d 322 (Fla. 1949); Beckom v. State, 227 So. 2d 232 (Fla. 2d Dist. 1969).

46. 327 So. 2d at 20-21.

court upheld the imposition of new and increased sentences upon revocation of his probation,[47] in apparent contravention of the defendant's constitutional right to be protected against receiving double punishments for the same crimes.[48]

The prospective application of the supreme court's interpretation of the probation statutes enunciated in the *Jones* decision, would seem to permit trial courts, upon probation revocation, to vacate a partially satisfied sentence imposed pursuant to Florida Statutes section 948.01(4), and to impose a new and increased sentence upon a probationer in derogation of the well established principle that a trial court is without authority to increase a sentence once the defendant has begun serving it. It is obvious that the current probation statutes are ambiguous and in need of clarification. It is submitted, however, that the statutes, as construed by the Supreme Court of Florida, are unconstitutional as violative of the double jeopardy clauses of both the United States and Florida Constitutions. It can only be hoped that if the legislature intended a different interpretation, it will see fit to revise or amend the statutes in a manner consistent with constitutional protections as well as the policy of probation. If Florida courts continue to impose new and increased sentences at probation revocation hearings, it is urged that the courts respect the probationers' constitutional right to be represented by counsel at the hearing in which sentence is to be imposed, and provide indigent probationers with court appointed counsel.

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47. 327 So. 2d at 25.

48. The question of a possible double jeopardy violation under similar circumstances was presented to the United States Supreme Court in Roberts v. United States, 320 U.S. 264 (1943), but the case was decided on other grounds. *See* note 22, *supra*. The majority in the circuit court opinion, Roberts v. United States, 131 F.2d 392 (5th Cir. 1943), rejected the double jeopardy argument while the dissenting judge would have held that the double jeopardy right had been violated.

It is clear that no double jeopardy violation occurs where a probationer, who has been placed on straight probation pursuant to FLA. STAT. § 948.01(3) (1973), is sentenced at the probation revocation hearing since the defendant receives only one punishment for the crime for which he was convicted. The order initially placing the defendant on probation is not considered to be a sentence. *See* Brown v. State, 302 So. 2d 430 (Fla. 4th Dist. 1974).