DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2005

CHARLES BEBOUT,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D03-3777

[June 22, 2005]

PER CURIAM.

We affirm the trial court's finding that appellant had violated his community control, and write to address the propriety of appellant's sentence.

Appellant was originally sentenced to two years of community control, followed by ten years of probation. Fourteen months later, he was charged with violating his community control. The trial court found several violations, and entered an order modifying appellant's sentence to two additional years of community control followed by eight years of sex offender probation.

Appellant moved to correct his sentence under Florida Rule of Criminal Procedure 3.800(b)(2). As grounds, he argued that under section 948.01(4), Florida Statutes (2004), the maximum period of community control that a court could impose is two years, and that he was entitled to credit for the community control he served prior to his arrest on the violation of community control. Over appellant's objection, the trial court converted the two-year community control sentence into two years of "regular probation" with house arrest as a special condition of probation, to be followed by eight years of sex offender probation.

Section 948.01(4), Florida Statutes (2004) provides that the duration of a community control sentence may not exceed two years. A court may not evade the two-year limit by sentencing a defendant to a term of probation in excess of two years, with a special condition of house arrest.

See Villabol v. State, 595 So. 2d 1057, 1058 (Fla. 2d DCA 1992); *Coleman v. State*, 564 So. 2d 1238 (Fla. 5th DCA 1990). Against the sentence imposed in response to his motion to correct sentence, appellant is entitled to credit for the one year, ten months and five days that he spent on community control.

Affirmed in part, reversed in part, and remanded.

STEVENSON and SHAHOOD, JJ., concur.
GROSS, J., concurs specially with opinion.

GROSS, J., concurring specially.

I concur in the majority opinion and write to note that had the trial court revoked probation and resentenced appellant, instead of modifying probation, then appellant would not have been entitled to credit for the time served on community control.

Section 948.01(4), Florida Statutes (2004) provides for a two-year ceiling on a community control sentence. Appellant cites to cases such as *McGehee v. State*, 688 So. 2d 1008 (Fla. 1st DCA 1997), *Cooper v. State*, 672 So. 2d 638 (Fla. 5th DCA 1996), and *Kocher v. State*, 651 So. 2d 1288 (Fla. 3d DCA 1995), which apply section 948.01(4) to hold that even after a revocation of probation, a trial court may not sentence a defendant to more than two years of community control, taking into consideration time served before and after the revocation.

This line of cases was based upon versions of statutes in force in 1995 and earlier. In 1997, the legislature substantially amended section 948.06, Florida Statutes. *See* Ch. 97-299, § 13, at 5381-82, Laws of Fla. The statute now provides that if probation or community control has been revoked, the court may "impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control." § 948.06(2)(b) & (e), Fla. Stat. (2004). Section 948.06(3) directly addresses the situation where a defendant is sentenced after a revocation of community control:

> When the court imposes a subsequent term of supervision following a revocation of probation or community control, it shall not provide credit for time served while on probation or community control toward any subsequent term of probation or community control.

The only limitation on a sentence imposed after a revocation of probation

or community control is that it cannot "exceed the maximum penalty allowable as provided by s. 775.082," when combined with "any amount of time served on preceding terms of probation or community control." § 948.06(3).[1]

If the current version of section 948.06(3) controlled this case, appellant would not be entitled to credit for the time served on community control. He was convicted of violating section 800.04(5)(b), Florida Statutes (2004), a first degree felony carrying a maximum penalty of thirty years imprisonment; his post-violation sentence, when added to the amount of time he spent on community control, does not exceed the statutory maximum.

However, section 948.06(3) does not apply in this case because there was no "revocation of probation or community control." The statute recognizes that after a violation hearing, a court "may revoke, modify, or continue the probation or community control." § 948.06(2)(e), Fla. Stat. (2004). The mandate that the court not provide credit for time served on community control or probation applies only when the court imposes a "subsequent term of supervision following a *revocation* of probation or community control." § 948.06(3) (emphasis added). Here, the trial judge entered an "Order of Modification of Community Control;" there was no order revoking community control and imposing a new sentence.

In sum, the two-year limitation of section 948.01(4) does not apply when community control has been revoked because a defendant violated it. The 1997 additions to the statute have the effect of allowing more than two years of community control when a defendant has violated the terms of the initial sentence.

* * *

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Steven J. Levin, Judge; L.T. Case No. 01-1362CFA.

Carey Haughwout, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellant.

[1]The first sentence of subsection (3) was added in 1997. *See* Ch. 97-78, § 23, at 453, Laws of Fla.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.