IN THE SUPREME COURT
STATE OF FLORIDA

DEBORAH ANN ADAMS,

Petitioner,

v. CASE NO. 67,705

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information dated February 19, 1979, with having committed the offenses of forgery and uttering a forgery on October 14, 1978 (R 67-68). She pled guilty to those charges and was placed on probation by Judge Cornelius (R 63). Petitioner violated this probation and was placed on probation a second time and sentenced to a jail term (R 63-64). Upon petitioner's request, Judge Cornelius reduced the sentence to time served (R 64). Petitioner violated probation a second time and came before the Honorable Ted P. Coleman, Circuit Judge, who on December 12, 1983, placed her on community control for 24 months, rather than send her to state prison (R 64,70). On October 25, 1984, petitioner was charged with violating this community control by, among other things, committing new crimes (R 72-73).

After a hearing, Judge Coleman revoked petitioner's community control. The prosecutor, noting that the petitioner had already served the presumptive guidelines sentence (R 62), requested a departure sentence of five (5) years on each count, to run consecutively for a total of ten (10) years and gave his reasons for such request (R 63). Judge Coleman sentenced petitioner to only four (4) years on each count to run consecutively. His reason for departure was:

> Defendant was previously placed on probation and has twice been found to have violated the terms of her probation.

(R 95) (Emphasis supplied).

Petitioner appealed her sentence to the Fifth District

Court of Appeal. The district court of appeal, in a per curiam opinion dated August 29, 1985, affirmed the sentence on the authority of Whitlock v. State, 458 So.2d 888 (Fla. 5th DCA 1984) and Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984). See, Petitioner's Initial Brief on the Merits, Appendix. The decision of this court in Albritton v. State, 476 So.2d 158 (Fla. 1985), was rendered the same day.

In light of this court's decision in Albritton v. State, 476 So.2d 158 (Fla. 1985), petitioner filed her "Expedited Emergency Motion to Recall Mandate" bringing this Albritton decision to the attention of the district court of appeal. (See, Respondent's Brief on Jurisdiction, Appendix Exhibit #1). On September 20, 1985, after considering its decision in light of this court's Albritton decision, the district court of appeal denied petitioner's motion. (Id., Exhibit #2). Petitioner filed her notice of appeal on September 24, 1985. This court accepted jurisdiction.

SUMMARY OF ARGUMENT

The trial court, in departing from the recommended guidelines sentence, gave a clear and convincing reason for departure which is not factored into the guidelines scoresheet--petitionr's prior record of unsuccessful alternatives to committment in a penal facility.

Petitioner has failed to carry her burden of showing abuse of discretion in the length of departure. Regardless of this failure, since reasonable men and women may impose different sentences, the trial court did not abuse its discretion in aggravating petitioner's sentence.

POINT ON APPEAL

THE FACT THAT A DEFENDANT HAS HAD PROBATION REVOKED TWICE PRIOR TO THE VIOLATION FOR WHICH THE DEFENDANT IS BEING SENTENCED IS A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE PERMISSIBLE GUIDELINES SENTENCE.

ARGUMENT

Petitioner seeks reversal of her sentence of eight (8) years in prison, a departure from a permissible guidelines sentence of from any non-state prison sanction to thirty (30) months incarceration, and remand to the Fifth District Court of Appeal for consideration of her sentence in light of this court's decision in Albritton v. State, 476 So.2d 158 (Fla. 1985). The respondent respectfully disagrees. By virtue of petitioner's "Expedited Emergency Motion to Recall Opinion and Mandate", the Fifth District Court of Appeal considered petitioner's request and affirmed her sentence. Petitioner's sentence should be affirmed in all respects. There is no conflict with Albritton.

There is only one reason for departure and so it is clear beyond a reasonable doubt that the sentencing judge would depart for that reason alone. Albritton, supra. Relying on Boldes v. State, 475 So.2d 1356 (Fla. 5th DCA 1985), petitioner suggests that the "sole reason for departure is that the (petitioner) had violated her probation." (Petitioner's Initial Brief on the Merits, p.4). This statement overlooks crucial language in the sentencing court's reason for departure, as well as the holding of the Fifth District Court of Appeal in Riggins v. State, 477 So.2d 663 (Fla. 5th DCA 1985), two of whose panel members

were also on the panel in the instant appeal. Judges Sharp and Dauksch were also on the panel in Boldes, supra.

In Boldes, the trial court's sole reason for departure from the recommended sentence was a single violation of probation conviction. The Fifth District Court of Appeal held that if a violation of probation is the sole reason for departure, the recommended sentence may be increased only one bracket pursuant to Florida Rule of Criminal Procedure 3.701(d)(14).

It should be noted by this honorable court, that the essential basis for the departure sentence in the instant appeal was the fact that petitioner had had her probation revoked and modified at least twice and, more likely three times, for the same offense, prior to the revoking of her community control which is the subject of this appeal. In Riggins, supra, the court held that where reasons additional to the revocation of probation were given, i.e., the fact of a second probation violation for the same offense, the sentencing judge is allowed to depart beyond the one cell allowable under Rule 3.701(d)(14). Thus, it is clear that the decision of the Fifth District Court of Appeal, in the instant appeal, is consistent with its decision in Riggins, in which the length of departure was reviewed, pursuant to Albritton, supra.

Prior revocations of probation or community control are not factors which have already been scored in a recommended sentence and are therefore permissible reasons for departure consistent with the decision of this court in Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The reason for departure given by the

sentencing court, in the instant appeal, is equivalent to prior history of failed alternatives to commitment in a penal facility, found to be a valid reason for departure in Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985) and approved by this court in Hendrix, supra.

Petitioner's case stands in stark contrast to that of a defendant who successfully completes rehabilitative programs and later violates the law. Despite her acceptance of the freedoms that probation and community control allow and her promise to abide by the limits imposed by each program, petitioner ignored her promises to the court. The primary purpose of sentencing is to punish the offender. Fla. R. Crim. P. 3.701(b)(2). This purpose, in this case, was subordinated to rehabilitative efforts, which failed by virtue of petitioner's intentional disregard for the sanctions imposed. The sentencing guidelines were not intended to usurp judicial discretion. Fla. R. Crim. P. 3.701(b)(6). The sentence handed down by the judge in this appeal pointedly recognizes that short periods of incarceration followed by probation have failed to curb the petitioner's lawless behavior and protect the innocents in our society as they exercise their constitutional rights to liberty and the pursuit of happiness without criminal intervention. There is no reason why the trial court, below, should have to wait for more victims before making the petitioner do the time for her crimes.

In Albritton v. State, 476 So.2d 158 (Fla. 1985), this supreme court rejected the proposition that a cap be placed upon the length of departure and held that abuse of discretion is a

standard of review of the length of departure. Petitioner merely alleges, without demonstrating how, in light of clear and convincing reasons for departure, her sentence in an abuse of discretion. The burden of proving abuse of discretion is on the party alleging it, and an appellate court cannot disturb a lower court's exercise of discretion, unless an abuse of discretion is clearly shown. Blue v. Blue, 66 So.2d 228 (Fla. 1953). Petitioner has made no such showing in this case. The record adequately demonstrates that efforts to rehabilitate the petitioner were unsuccessful and useless. Now, it is the time to protect the crime victims in their right to the pursuit of happiness and freedom from criminal intervention. The prosecutor recommended the maximum sentence provided by law and the judge imposed only eight (8) years. Since reasonable men and women might impose different sentences in this case, it cannot be said that the trial court abused its discretion. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court will affirm the opinion of the District Court of Appeal, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by mail to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 17 day of March, 1986.

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