

FILED

SID J. WHITE

FEB 17 1986

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
Petitioner, :
vs. :
MICHAEL ALLEN PENTAUDE, :
Respondent. :

CASE NOS. 68,081 /
68,088 //

BRIEF OF RESPONDENT ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KENNETH L. HOSFORD
Special Assistant Public Defender
210 Office Plaza
Tallahassee, FL 32301
904/878-0308

ATTORNEY FOR RESPONDENT

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| WHETHER, UNDER RULE 3.701(d)(14) A PERSON FOUND GUILTY OF VIOLATION OF PROBATION MAY BE SENTENCED BEYOND THE NEXT HIGHER CELL UPON CONSIDERATION BY THE TRIAL COURT OF CIRCUMSTANCES SURROUNDING THE VIOLATION FOUND BY THE TRIAL COURT TO BE CLEAR AND CONVINCING REASONS FOR DEPARTURE. | |
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and Facts. However, Respondent would add the following additional facts:

Following a plea of guilty to grand theft, Respondent was placed on probation for a period of five (5) years on January 31, 1984 (R-47-49).

On April 5, 1984, an affidavit for violation of probation for violation of conditions (3), (6), (7), (8), (9) and (13), was filed (R-52). Respondent admitted the violations (T-2).

The recommended guideline sentence was any non-state prison sanction, with the next highest cell being twelve (12) to thirty (30) months (R-87). The trial judge imposed a sentence on November 1, 1984 of five (5) years (T-7). The trial judge gave the following statement as his reasons for departing from the guidelines:

"You are sentenced outside sentencing guidelines, if that election appears to be more profitable to you in terms of early release date, for the following reasons which will be transcribed by the court reporter and made a part of your record:

You have violated conditions of your probation and the trust imposed upon you not only by failing to abide by the technical conditions of probation, but apparently having been convicted of an additional crime which shows an utter disregard for the law and for the chances previously given you.

Those reasons the Court deems to be sufficient to aggravate your sentence beyond the sentencing guidelines."

Prior to imposition of sentence, the following colloquy occurred between Respondent's counsel and the trial judge:

"MS. SUTTON: Yes sir. Judge, excuse me, I'm sorry, before you get started there. I've been handed a score sheet by Mr. Thomas and I would request that the score sheet be incorporated in the court file. It reflects a category 6 that reflects 13 points and it indicates that a recommended sentence is any non-state prison sanction and as a probation violation the next highest level of 12 to 30 months.

THE COURT: The sentencing guidelines score sheet will be part of the record.

MS. SUTTON: And one other thing I need to say, Judge, inasmuch as the offense charged occurred before sentencing guidelines went into effect, this defendant has the option of being sentenced under the old system and I would inform the Court as I have in the past that I can't at this point properly advise him as to which to elect because of the court's position on violation of probation and lack of cases and whether if the Court goes outside the guidelines that the person is still eligible for a parole and so I would just request that the Court indicate on the record as it has in the past that he wishes to elect whichever provides the most favorable treatment for him in incarceration.

THE COURT: Any authority that I have to preserve that election will be exercised in favor of the defendant so that he can have that election and I do rule. I'm at a loss as to whether that is valid, but if it is, he can make the election at some later date when he becomes more informed as to the best of his election whether the sentencing guidelines or the old Department of Corrections guidelines.

MS. SUTTON: Okay, just to make sure, the record is clear on Mr. Pentaude's behalf, I would elect sentencing guidelines if the Court sentences him pursuant to sentencing guidelines, but if the Court departs from sentencing guidelines in excess of the twelve to thirty months category, if it turns out that his incarceration would end sooner if he were to elect the previous method with previous parole, I would elect that. If that makes any sense."

(T-5,6)

On November 1, 1984, after imposition of sentence, Respondent attempted to file a pro se motion for mitigation or reduction of sentence, basin said motion, inter alia, on the grounds that he had desired to be sentenced under the new guidelines and that he had not been given sufficient time to discuss this election with his counsel (R-63).

III. ARGUMENT

WHETHER, UNDER RULE 3.701(d)(14) A PERSON FOUND GUILTY OF VIOLATION OF PROBATION MAY BE SENTENCED BEYOND THE NEXT HIGHER CELL UPON CONSIDERATION BY THE TRIAL COURT OF CIRCUMSTANCES SURROUNDING THE VIOLATION FOUND BY THE TRIAL COURT TO BE CLEAR AND CONVINCING REASONS FOR DEPARTURE?

Respondent submits that the foregoing question should be answered as follows:

UNDER RULE 3.701(d)(14) A PERSON FOUND GUILTY OF VIOLATION OF PROBATION MAY NOT BE SENTENCED BEYOND THE NEXT HIGHER CELL UPON CONSIDERATION BY THE TRIAL OF CIRCUMSTANCES SURROUNDING THE VIOLATION FOUND BY THE TRIAL COURT TO BE CLEAR AND CONVINCING REASONS FOR DEPARTURE.

Assuming arguendo that Respondent properly elected guideline sentencing, his five year prison sentence must be reversed since the departure from the recommended guideline sentence was not based upon clear and convincing reasons. The primary reason given for departure was the fact that Respondent had violated his probation (R-60). Respondent's sentencing occurred November 1, 1984, after the effective date of Florida Rules of Criminal Procedure 3.701(d)(14). The present case involves an interpretation of that rule and is one of first impression.

Rule 3.701(d)(14) provides:

Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

(Emphasis supplied). According to the appellate courts, this new rule became effective July 1, 1984. Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984). McGrath v. State, 454 So.2d 694 (Fla. 1st DCA 1984); O'Malley v. State, 10 FLW 267 (Fla. 4th DCA January 30, 1985). Under this rule, the trial court, based upon Respondent's violation of probation, could properly have imposed a sentence in the 12-30 month incarceration range. Rule 3.988(c), Category 3 (Robbery) Fla.R.Crim.P. The trial Court, however, deviated from the guidelines, imposing

a five year term of imprisonment, based upon Respondent's violation of probation. Since the guidelines themselves already make provisions for increasing punishment due to a violation of probation, Respondent contends this factor cannot then be utilized as a basis for departure.

Respondent is fully cognizant of the plethora of cases which have held that a violation of probation constitutes a clear and convincing reason for departure. E.g., Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984); Addison v. State, 542 So.2d 955 (Fla. 2d DCA 1984); Tucker v. State, 10 FLW 462 (Fla. 3d DCA February 19, 1985); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984). However, none of these reported cases deal with the propriety of a violation of probation serving as a basis for departure after the enactment of Rule 3.7019(d)(14). Since the rule now provides that a violation of probation justifies an increase in punishment one cell, Respondent contends that the trial court is not now permitted on the basis of a violation of probation. Moreover, the judge's allusion to a prior conviction of Respondent as a basis of departure from the guidelines also constitutes an impermissible double-counting, as prior convictions are accounted for on the guidelines scoresheet.

Numerous cases have condemned deviations based upon factor already accounted for within the guidelines recommended sentencing range. State v. Carney, 476 So.2d 165 (Fla. 1985)

(factors that "the robbery was premeditated and calculated and for pecuniary gain" and "(that) there was no provocation (for the robbery)" are inherent components of robbery and hence already embodied in the guidelines recommended sentencing range; factors thus impermissible basis for departure); State v. Burch, 476 So.2d 663 (Fla. 1985) (fact that defendant on parole not proper basis for departure since "legal status" at time of offense already scored); Napoles v. State, 10 FLW 337 (Fla. 1st DCA February 7, 1985) (fact that defendant on probation improper basis for departure since that fact already taken into consideration in computing recommended sentence); Sarvis v. State, ____ So.2d ____ (Fla. 1st DCA March 13, 1985) Case No. AV-337 (improper to deviate based upon facts which have already been included within the determination of the guideline sentence); Callaghan v. State, 462 So.2d 832, (Fla. 4th DCA 1984) (court not at liberty to aggravate a sentence by using elements which go to make up the crime for which the defendant is being sentenced; use of firearm improper reason for deviation since crime of shooting in a dwelling necessarily involves use of a firearm); Bowdoin v. State, 10 FLW 472 (Fla. 4th DCA February 20, 1985) (defendant's use of a firearm during commission of robbery with a deadly weapon improper ground for departure since use of firearm already factored into the presumptive sentence);

Knowlton v. State, 10 FLW 457 (Fla. 4th DCA February 20, 1985) (following State v. Carney, supra; fact that robbery planned in advance improper ground for deviation since inherent in robbery).

Accordingly, neither reason cited by the trial judge as a basis for departure from the guidelines is a clear and convincing permissible one, and therefore Respondent's sentence should be reversed and the cause remanded for resentencing.

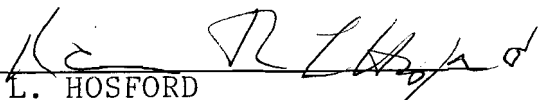
IV. CONCLUSION

Respondent respectfully urges this Court to vacate Respondent's sentence and order a new sentence in accordance with Rule 3.701, Florida Rules of Criminal Procedure. Respondent further urges this Court to answer the certified question as follows:

UNDER RULE 3.701(d)(14) A PERSON FOUND GUILTY OF VIOLATION OF PROBATION MAY NOT BE SENTENCED BEYOND THE NEXT HIGHER CELL UPON CONSIDERATION BY THE TRIAL OF CIRCUMSTANCES SURROUNDING THE VIOLATION FOUND BY THE TRIAL COURT TO BE CLEAR AND CONVINCING REASONS FOR DEPARTURE.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT


KENNETH L. HOSFORD
Special Assistant Public Defender
210 Office Plaza
Tallahassee, Florida 32304
904/878-0308

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail in accordance with Rule 9.420, Florida Rules of Appellate Procedure, to Henri Cawthon, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32301, and to Michael Allen Pentaude, #727666, Brevard Correctional Institution, Post Office Box 340, Sharpes, Florida 32959, on this 17th day of February, 1986.


KENNETH L. HOSFORD