IN THE SUPREME COURT OF FLORIDA

JAMES REE,

Petitioner,)
)
vs. CASE NO. *71,424*

STATE OF FLORIDA,)
)
Respondent.)
)

RESPONDENT'S BRIEF IN OPPOSITION TO JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts.

In this brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as found on pages two (2) through four (4) of Petitioner's brief on jurisdiction, to the extent that they appear within the four corners of the opinion challenged sub judice. However, Respondent rejects those record citations which are not referred to in the opinion as an improper attempt to create conflict from the record rather than the opinion itself.

SUMMARY OF THE ARGUMENT

The instant opinion is not in conflict with Lerma v. State, 497 So.2d 736 (Fla. 1986) and its progeny which disapprove psychological trauma to the victim as a reason for departure in a sexual battery conviction or where the trauma is inherent in the offense charged. Petitioner has overlooked that Petitioner was not being sentenced for sexual battery or for a crime in which trauma is an inherent component of the crime but rather, being sentenced for revocation of probation and such trauma was properly considered as a circumstance surrounding the revocation of probation.

Nor is the instant opinion in conflict with State v. Rousseau, 509 So.2d 281 (Fla. 1987). The timing or recency of Petitioner's probation violation was not a factor scored in at arriving at his presumptive guidelines sentence. Rausseau, supra, is distinguishable where Rousseau's departure sentence was based on three separate burglary convictions, each of which was scored as a primary offense at conviction. At bar, Petitioner was being sentenced for grand theft for which he was placed on probation, and the recency of the violation was not otherwise taken into account.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT OR THOSE OF OTHER DISTRICT COURTS OF APPEAL.

Respondent submits that Petitioner has not demonstrated that there is "express and direct conflict" between the case sub judice and the holdings of this Court or other district courts of appeal on the same rule of law to produce a different result, than other state courts faced with substantially the same facts. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Petitioner first attempts to convince this Court that the first reason given by the trial court for departure, the psychological and emotional trauma of the sexual battery victims, is in conflict with this Court's decision in Lerma v. State, 497 So.2d 736 (Fla. 1986) and the decision in Austin v. State, 507 So.2d 132 (Fla. 1st DCA 1987) which disapprove psychological trauma as a reason for departure in sexual battery cases; and Casteel v. State, 498 So.2d 1249 (Fla. 1986) and State v. Rousseau, 509 So.2d 281 (Fla. 1987), which recognizes that notwithstanding Lerma, psychological trauma arising from extraordinary circumstances which are not inherent in the offense charged may properly serve as a clear and convincing reason for departure. Respondent maintains there is no conflict between the instant decision and the above-cited decisions where Petitioner's analysis overlooks the obvious fact that Petitioner was not being sentenced for sexual battery. Petitioner was not convicted of sexual battery

and being sentenced on that crime. Rather, his probation was revoked and he was being sentenced on burglary and possession of burglary tools charges. Simply stated, there is no conflict between the instant decision which holds that psychological trauma may be considered as a circumstance surrounding a probation revocation and the line of cases which preclude considering psychological trauma where it is an inherent element of the offense. Lerma, supra; Rosseau, supra; Casteel, supra. Lerma and its progeny disapprove emotional hardship as a clear and convincing reason for departure where the defendant is convicted of sexual battery, or the trauma is an inherent element of the crime. The instant case is not inconsistent with those decisions, and the rationale that the egregiousness of the underlying reasons for probation violations rather than the fact of the violation itself constitutes a valid reason for departure has been recognized by this Court in State v. Pentaude, 500 So.2d 526 (Fla. 1987).

Petitioner next contends the instant decision presents "express and direct" conflict with Mack v. State, 489 So.2d 205 (Fla. 2d DCA 1986) and consequently, this Court's decision in Williams v. State, 500 So.2d 501 (Fla. 1986). To this extent, Petitioner attempts to cull facts from outside of the four corners of the opinion in order to create conflict. A review of the district court opinion reveals that the district court only concluded that:

> We conclude that the first reason (psychological and emotional trauma of the sexual battery victims) was valid, as

> constituting consideration of the circumstances of forming the basis for the probation revocation. See, Isgette v. State, 494 So.2d 534 (Fla. 4th DCA 1986); Rodriguez v. State, 464 So.2d 638 (Fla. 3d DCA 19850.

Ree v. State, 12 F.L.W. 2252, 2253 (Fla. 4th DCA September 16, 1987). The opinion does not present any facts as to whether or not Petitioner had been convicted of criminal offenses at the time his probation was revoked and thus does not expressly and directly conflict with Mack, supra, or Williams, supra, which hold that reasons for departure shall not include factors relating to prior arrests without conviction. As these facts do not appear from the opinion at bar, Petitioner ha, not established direct and express conflict. This Court has condemned such misguided efforts to create conflict by resorting to record citations in Reaves v. State, 485 So.2d 829, 830 (Fla. 1986), f.n. 3:

> This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jursidiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.

See also, Jenkins v. State, supra. Moreover, the decision in Mack, supra, did not decide whether a trial judge may consider the substantive nature of the probation violation charges as

reasons for a departure, but found that the defendant's substantive violations which he had not been convicted of were improperly considered as arrests, in violation of Fla.R.Crim.P. 3.701(d)(11). Thus, it can been seen that the decision in Mack, supra turns on other grounds than the decision at bar, and the Fourth District Court was not applying the same rule of law to reach a different result.

Petitioner finally contends that the second reason for departure, that Petitioner was on probation for less than eight months before he committed the probation violation, conflicts with this Court's decision in State v. Rousseau, supra. This argument can only leave this Court puzzled and unconvinced. Petitioner has again failed to recognize that he was being sentenced upon revocation of probation and not on the substantive offenses which formed the basis of the revocation. Rousseau is distinguishable, where Rousseau was being sentenced on the three separate burglaries which occurred in the three-week span and each burglary had been scored as a primary offense. This problem is not present in the instant case as the timing of the probation violation was not factored into the guidelines scoresheet to arrive at a presumptive sentence. Indeed, in Williams v. State, *504* So.2d 392, 393 (Fla. 1987) this Court recognized that timing of criminal activity in relation to prior offenses was a valid reason for departure. See also, Spivey v. State, 481 So.2d 100 (Fla. 3d DCA 1986) (holding defendant's commission of two offenses within one month of being placed on probation valid reason) and

Jean v. State, *455* So.2d *1083* (Fla. 2d DCA *1984)* (defendant's violation of probation within one month upon release from first conviction held to be balid reason).

Respondent thus submits that this Court should decline to accept jurisdiction of this case where Petitioner has failed to show direct and express conflict between the decision sub judice and any other state appellate decision and in view of the recency of the Pentaude decision.

CONCLUSION

Based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of Respondnet in oppositon to jurisdiction has been been furnished, by courier, to ANTHONY CALVELLO, ESQUIRE, Assistant Public Defender, The Government Center, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida *33401* this 24th day of November, *1987.*

Of Counsel