IN THE SUPREME COURT OF FLORIDA

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JAMES REE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO: *71,424*

RESPONDENT'S BRIEF ON THE MERITS

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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 Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"SR"	Supplemental Record on Appeal
"PB"	Petitioner's Brief on the Merits
"RA"	Respondent's Appendix

STATEMENT OF THE CASE AND FACTS,

Respondent accepts Petitioner's Statement of the Case and facts as found on pages two (2) through seven (7) of Petitioner's Brief on the Merits, with the following additions and/or clarifications:

A[redacted] B[redacted], age 12, testified that she did not say anything about the incident wherein Petitioner felt her "private spot" with his finger because she was afraid. (R 79-80). A[redacted] B[redacted] further testified that Petitioner had touched her in the breast area. (R 77). When M[redacted] K[redacted] [redacted] went outside her trailer, Petitioner began feeling her "private spot" with his finger. (R 79). According to A[redacted] M[redacted] came in and saw what Petitioner was doing and told him to stop it. (R 91). Petitioner said he was just playing a joke. (R 91).

SUMMARY OF THE ARGUMENT

POINT I

The trial court correctly departed from the sentencing guidelines based upon the egregious circumstances surrounding Petitioner's probation revocation, the fact that he violated his probation after only 8 months of being placed on probation, and Petitioner's acts which indicate a trend toward criminality of increasing severity.

POINT II

The trial court's written order of departure reasons, entered 5 days after the sentencing hearing, was sufficiently contemporaneous with pronouncement of sentence where Petitioner was afforded the opportunity to dispute every reason for departure advanced by the prosecutor.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DEPARTED FROM THE PRESUMPTIVE GUIDELINES RANGE.

In the instant case, the trial judge relied upon four reasons for departure from the sentencing guidelines range. Respondent maintains that three of the four reasons given for departure are valid, and that the absence of an invalid reason would not have affected the departure sentence beyond a reasonable doubt. Albritton v. State, 476 So. 2d 158 (Fla. 1985).

Petitioner was informed against in the Seventeenth Judicial Circuit with Count I, burglary, Count 11, possession of burglary tools, and Count 111, criminal mischief. (R 227). Petitioner pled nolo contendere to all three counts and on December *19, 1984,* was placed on two years probation. On August 28, 1985, an affidavit of violation of probation was filed charging Petitioner with: Count I, violating the law by committing a sexual battery upon [redacted]; and Count II, violating the law by committing a sexual battery upon [redacted]. (R 230). At the conclusion of the probation revocation hearing, the trial court found that Petitioner had violated his probation. (R 189). The trial court'swritten order of

revocation of probation found that Petitioner had committed both counts of violation as alleged in the affidavit. (RA 1).

The first reason relied upon for departure was as follows:

> 1. That substantial psychological and emotional trauma has been caused to the victim as a result of the Defendant's acts which have led to this violation of probation, the magnitude of which may only be fully realized at a stage much later in her life.

Petitioner contends this reason is invalid under this Court's decision in Lerma v. State, *497* So.2d *736* (Fla. *1986)* and Keys v. State, 500 So.2d *134* (Fla. *1986).* Respondent maintains that Petitioner's reliance on Lerma v. State, supra, and Keys v. State, supra, is misplaced. Respondent acknowledges that these cases disapprove psychological trauma as a reason for departure in sexual battery cases. Notwithstanding, psychological trauma arising from extraordinary circumstances which are not inherent in the offense charged may properly serve as a clear and convincing reason. See, State v. Cote, *487* So.2d *1039* (Fla. *1986);* Hankey v. State, *485* So.2d *827* (Fla. *1986).* Petitioner's argument over looks 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. As such, Lerma, supra, and it's progeny are inapplicable as Lerma, supra, disapproves emotional hardship as a clear and convincing reason for departure where the defendant is convicted of sexual battery because such trauma is inherent in the crime charged.

Respondent maintains that the Fourth District correctly concluded that the trial court's reason for departure was valid as constituting "consideration of the circumstances forming the basis for the probation revocation." Ree v. State, 512 So.2d 1085, 1086 (Fla. 4th DCA 1987). In State v. Pentaude, 500 So.2d 526, 528 (Fla. 1987), this Court found that such factors as "the character of the violation, the number of conditions violated, the number of times [the defendant] has been placed on probation, [and] the length of time he has been on probation before violating the terms and conditions" may constitute a valid reason for departure in a probation revocation case. Thus, for example, in Isgette v. State, 494 So.2d 534 (Fla. 4th DCA 1986), the Fourth District applied this rationale and held that a trial court may consider the nature of violence used by a defendant in committing the offense which provided the basis for probation revocation as a reason for departure. Similarly, in Rodriquez v. State, 464 So.2d 638 (Fla. 3rd DCA 1982), the defendant was convicted and placed on probation. His probation was later revoked when

he committed an auto theft. The Third District found that the trial court properly considered the circumstances surrounding the auto theft in departing from the guidelines in sentencing the defendant for the original offense. ~~See also~~, Addison v. State, 452 So.2d 995 (Fla. 2nd DCA 1984)(violation of substantive condition of probation can be the basis for the trial court to exercise discretion in sentencing outside of the guidelines upon revocation of probation). Respondent maintains the trial court correctly departed from the guidelines on the basis of the circumstances surrounding this probation violation and that the Fourth District did not succumb "to the temptation to formulate its own reasons to justify the departure sentence". Casteel v. State, 498 So.2d 1249, 1252 (Fla. 1986). It is clear on the record sub judice that the trial judge was seeking to aggravate the sentence because of the nature and severity of the substantive violation, and the trial court's reason for departure amply supports this rationale.

Petitioner next contends, that in any event, that the circumstances surrounding the probation violation is not a valid reason for departure in that Petitioner "was never convicted of the offense for which his probation was violated". (PB 15). See, Mack v. State, 489 So.2d 205, 206 (Fla. 2nd DCA 1986). Respondent would initially point out that this argument was not made in the trial court nor was it advanced in the Fourth District Court of Appeal. As such, the argument has been presented

for the first time to this Court. Respondent maintains that this issue is not preserved for review. In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on review must be part of that presentation if it is to be considered preserved for review. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985). One may not tender a position to the trial court on one ground and successfully offer a different basis for that position on appeal. Sapp v. State, 411 So.2d 363 (Fla. 4th DCA 1982). Thus, this Court need not address this issue. Respondent would further point out that the record does not reveal whether or not Petitioner was convicted of the two sexual batteries. This fact was not developed sufficiently in the record below. It is not known if these charges against Petitioner were nolle prossed, dismissed, or if Petitioner was acquitted. It has been repeatedly held that an appellant may not present an alleged error for appellate consideration on an incomplete record if the matter might affect the determination of the reviewing court. Montalvo v. State, 323 So.2d 674 (Fla. 3rd DCA 1976); Johnson v. State, 408 So.2d 813 (Fla. 3rd DCA 1982).

Assuming arguendo this Court reaches this issue, Respondent maintains Petitioner's argument is without merit. In the present case, the revocation of probation hearing was held before the unknown disposition of the substantive charges.

Respondent maintains that the trial court correctly departed on the basis of the circumstances surrounding the probation revocation where the court found that Petitioner had committed both counts as alleged in the affidavit. (RA 1). In this regard, it is important to note the different standard of proof involved in a revocation proceeding. The power to revoke probation is an inherent power of the trial court which may be exercised any time that the court determines the probationer has violated the law. Stafford v. State, *455* So.2d *385* (Fla. *1984).* It is not necessary that there be a conviction of the unlawful act. Maselli v. State, *446* So.2d *1079* (Fla. 1984). The burden of proof for a revocation of probation based upon the alleged commission of a crime is by the greater weight of the evidence, not beyond a reasonable doubt. Rita v. State, *470* So.2d *80* (Fla. 1st DCA 1985), rev. denied *480* So.2d *1296.* Probation may be revoked where there is sufficient evidence to satisfy the conscience of the court that a substantial violation of conditions of probation have occurred. Clark v. State, *402* So.2d *43* (Fla. 4th DCA *1981).*

Respondent submits that it is appropriate to depart from the guidelines on the basis of a circumstance surrounding the probation violation where the substantive violation has been demonstrated to exist to the conscience of the court, which is the only burden the State need meet. This very issue

was certified to this Court in Lambert v. State, 13 F.L.W. 70 (Fla. 4th DCA December 30, 1987). In Lambert, the court held that where a judge finds that underlying reasons for violation of community control are sufficiently egregious, he may depart from the presumptive guidelines range and impose an appropriate sentence within the statutory limit even though the defendant has not been "convicted" of the crimes which the trial judge concluded constituted a violation of community control. The Fourth District in Lambert found that a "conviction" was not necessary to this Court's holding in State v. Pentaude, supra. Respondent submits that requiring that there be a conviction of the underlying substantive offense before a trial court can depart on the basis of the egregiousness of the violation would have the impractical effect of requiring that the substantive cases be tried first before the probation violation can be heard. Sub judice, the trial court heard evidence presented from both R[redacted] and A[redacted] B[redacted] that Petitioner put his finger in their "private spots". (R 14-15, 21, 25, 79), as well as testimony from Dr. Robelen that each girl had a torn hyman and abnormally large vaginal opening. (R 47, 51-52). The trial court correctly departed based on this circumstance surrounding the probation revocation where the conscience of the court was satisfied that these acts occurred.

The trial court's second reason for departure is likewise valid:

> 2. The Defendant was on probation for less than eieht months before he committed acts for which he was in violation leading this Court to conclude he is not suitable for rehabilitation. (emphasis added).

Contrary to Petitioner's argument, it is plain that the entire thrust of this departure reason is that Petitioner committed the acts for which he was in violation within 8 months of being placed on probation. Respondent submits that this is clearly a valid reason for departure. In Williams v. State, 504 So.2d 392, 393 (Fla. 1987) this Court approved timing of the offenses as a valid reason. Petitioner misconstrues this Court's holding in State v. Rousseau, 509 So.2d 281 (Fla. 1987), to disapprove of this reason. In Rousseau, the fact that the defendant had committed three burglaries within three weeks was held not to justify departure, since each of the burglaries was scored as a primary offense in determining the guideline sentence. This Court stated, "The record reveals no additional facts concerning the timing of these offenses which were not already factored into the guidelines score sheet. Therefore, this reason cannot justify departure." 509 So.2d at 283 (emphasis added). Thus, this Court did not hold that temporal circumstances could never justify departure. In the

instant case, the timing of Petitioner's probation violation vis a vis the time he was initially placed on probation is not a factor which was taken into account on the scoresheet, as in Rousseau, supra. The trial court was not concerned with the timing of Petitioner's primary offense, the burglary. Rather, the additional facts present in this record reveal that Petitioner was placed on probation on December 19, 1984 and an affidavit of violation was filed August 28, 1985 (R 230), a mere eight months later. Departure reasons taking into account the temporal circumstances of the offenses are proper. Jones v. State, 501 So.2d 178 (Fla. 4th DCA 1987) (commission of new offense only eight days after being released from prison valid reason); Brooks v. State, 490 So.2d 173 (Fla. 5th DCA 1986)(timing of offense upheld as a valid reason); Nixon v. State, 494 So.2d 222 (Fla. 1st DCA 1986)(commission of attempted burglary only three and one-half months after release from prison valid reason); Decker v. State, 482 So.2d 511 (Fla. 1st DCA 1986)(temporal circumstances acceptable reason for departure). Moreover, cases involving gaps of time longer that 8 months have upheld the timing of the offenses to be valid. See, Roseman v. State, 13 F.L.W. 405 (Fla. 5th DCA February 11, 1987)(eleven months gap between release on parole and commission of new offense valid reason); Hogan v. State, 12 F.L.W. 2375 (Fla. 1st DCA October 7, 1987). In a

case specifically dealing with a probation violation, Spivey v. State, 481 So.2d 100 (Fla. 3rd DCA 1986), the court held that where the defendant committed two offenses within a month of being placed on probation, this constituted a valid reason for departure from the guidelines in sentencing the defendant following his revocation of probation. ~~See also~~, Jean v. State, 455 So.2d 1083 (Fla. 2nd DCA 1984)(defendant violated his probation within one month upon release from first conviction held to be valid).

Respondent further submits that the trial court was correct in considering Petitioner's poor prospects for rehabilitation in articulating its second reason for departure. The court's finding that Petitioner is not suitable for rehabilitation rests not on his history of prior convictions already factored in the scoresheet, but rather, was based on the recency of his commission of a probation violation. Petitioner demonstrated an inability to be rehabilitated and thus departure is warranted. See, e.g., Fleming v. State, 456 So. 2d 1300 (Fla. 2nd DCA 1984); Jean v. State, supra. Jean, supra, permitted departure for lack of a defendant's rehabilitation where the defendant committed new offenses while out on probation, as did Petitioner.

Respondent submits the Fourth District erred in concluding that the fourth reason relied upon by the trial court for departure was not supported by the record. The

fourth reason given was:

> 4. The Defendant's acts while on probation indicate a trend toward criminality of increasing severity and indicate the Defendant's sociopathic tendencies making departure essential for the safety and well being of the public.

The trial court was obviously concerned that Appellant's criminal career has progressed from committing a burglary to violating his probation by committing two capital sexual batteries. Respondent maintains this is an acceptable reason for departure. Keys v. State, supra, (escalation from crimes against property to crimes against persons valid reason); Pittman v. State, 492 So.2d 741 (Fla. 1st DCA 1986) (escalating pattern of criminal conduct valid reason); Booker v. State, 482 So.2d 414 (Fla. 2nd DCA 1985)(escalating criminal involvement valid reason for departure).

Thus, under Albritton v. State, supra, it is clear beyond a reasonable doubt that the absence of one invalid reason would not have affected the departure sentence. A review of the court's written order reflects that the court was very troubled by the acts which formed the basis of Petitioner's probation revocation. Respondent submits the court would have imposed the same sentence based upon any or all of the reasons given.

Petitioner next contends that the extent of departure was an abuse of discretion in the instant case. See, Albritton v. State, supra. Petitioner's recommended guideline sentence with a one cell departure under Fla. R. Crim. P. 3.701(d)(14) was the twelve to thirty months prison range. (R 190, SR). (RA 2). The trial judge imposed a sentence of 5 years in prison on Count I, five years in prison for Count 11, and six months in the county jail on Count III with credit for time served with the sentences to run consecutively. (R 216-217, 236-238).

In Cankaris v. Cankaris, 382 So.2d 1197, 1203 (Fla. 1980), this Court adopted the following test for a review of a judge's discretionary power:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial judge abused its discretion.

Respondent maintains that the extent of departure sub judice is not an abuse of discretion. Petitioner was being sentenced on two serious felonies, after having violated his probation.

The sentence imposed of five years incarceration on the burglary and possession of burglary tools offenses to run consecutively is not excessive. In Joyal v. State, 488 So.2d 611 (Fla. 1st DCA 1986), the court found that two consecutive sentences of five years imposed upon the defendant, who had committed a grand theft after having adjudication of guilt withheld on a charge of burglary and then committed additional crimes shortly after being placed on community control in the burglary case and having probation continued in the theft case, was not excessive. Appellant's sentence is within the statutory maximum and no abuse of discretion has been shown.

POINT II

THE TRIAL COURT CORRECTLY DEPARTED FROM THE SENTENCING GUIDELINES WHERE ITS WRITTEN ORDER WAS SUFFICIENTLY CONTEMPORANEOUS WITH THE SENTENCING HEARING.

Respondent submits that the Fourth District erred in "reluctantly" concluding that Petitioner's sentence must be reversed because the trial court's written order of departure was not contemporaneous with its pronouncement of sentence. Ree v. State, 512 So.2d at 1086. At bar, it is clear the sentencing hearing afforded due process where Petitioner addressed Respondent's motion to aggravate sentence in its entirety. As can be seen from the transcript of the March 21, 1986 sentencing hearing, Petitioner challenged every reason for departure submitted by Respondent. (R 193-211). In its written order of reasons for departure, the trial court was persuaded by four of the reasons argued by the prosecutor, although it considered Petitioner's argument that all of the reasons submitted by the prosecutor were invalid. Thus, Petitioner had a meaningful opportunity to dispute the reasons relied upon by the trial court in its March 26, 1986 written order. However, the Fourth District concluded that the written order entered a mere 5 days after

the sentencing hearing was not contemporaneous with the pronouncement of sentence, relying on this Court's decision in State v. Oden, 478 So.2d 51 (Fla. 1985).

In Oden v. State, 463 So.2d 313, 314 (Fla. 1st DCA 1984), the court held, "It was reversible error for the trial court to depart from the guidelines without providing a contemporaneous written statement of the reasons therefore at the time each sentence was pronounced. Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984)." In State v. Oden, 478 So.2d 51, this Court approved the decision of the district court and quoted but did not adopt the foregoing language. Respondent submits that this language has resulted in the district court requiring that the written reasons for departure be entered simultaneously with the sentencing hearing, as illustrated in Matthews v. State, 486 So.2d 47 (Fla. 5th DCA 1986) and Elkins v. State, 489 So.2d 1222 (Fla. 5th DCA 1986).

The rendition of the written order 5 days after the sentencing hearing ~~sub~~ judice is in marked contrast to the written order entered 5 weeks after the sentencing hearing in Elkins v. State, supra. In Elkins, 489 So.2d at 1223, the Court held:

> We do not deem this delay to comply with the Oden requirement. But we do not mean to imply, as the

> special concurrence does, that the contemporaneity must be at the very instant that sentence is pronounced. What the supreme court means by contemporaneous is for the Supreme Court to say finally, all we are saying is that five weeks after the fact is not contemporaneous in our opinion.

Respondent adopts the position of Judge Sharp in the dissent in Elkins v. State, supra. Respondent submits that construing this Court's opinion in State v. Oden to require written reasons for departure to be produced at the time of sentencing is impracticable for trial courts to comply with. As Judge Sharp cogently observed:

> However, as in this case, a defendant's rights are normally adequately protected if the evidence or basis for the grounds to depart are presented at the sentencing hearing, and the defendant is given due opportunity to rebut such evidence or question its accuracy.

Elkins v. State, 498 So.2d at 1224.

Respondent would request that this Court clarify its opinion in State v. Oden, supra. Unlike the instant case, both State v. Oden, supra, and Jackson v. State, supra, involved cases where the sentencing judge failed altogether to give written reasons for departure. Thus, the "contemporaneous"

language can therefore be read as contemporaneous with the imposition of a written sentence rather than the sentencing hearing. As observed by Judge Sharp in her dissent in Elkins v. State, supra, this interpretation best comports with the language employed by Judge Barkett in Boynton v. State, 473 So.2d 703, 707 (Fla. 4th DCA), aff'd, 478 So.2d 351 (Fla. 1985), cert. denied. 106 S.Ct 1232 (1986), which was quoted in Jackson, supra:

> Much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately ommitted in their written orders. ... [T]he development of the law would best be served by requiring the precise and considered reasons which would be more likely to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing.

The language in State v. Oden, supra, should not be read as to require trial judges to formulate their written reasons in advance of the sentencing hearing. It is undisputed on this record that Petitioner had the opportunity to be heard on every reason for departure advanced by the prosecutor. Respondent maintains that the written order of the trial court was sufficiently contemporaneous with the pronouncement of sentence, and that no error has been demonstrated.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court affirm the sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to Anthony Calvello, Assistant Public Defender, 9th Floor, Governmental Center, 301 N. Olive Avenue, West Palm Beach, Florida 33401, this 17th day of March, 1988.

Amy Lynn Diem
Of Counsel