

IN THE SUPREME COURT OF FLORIDA

EDWARD PAUL PETERS

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

Case No.

1-11
71,609
DEC 02 1987
CLERK SUPREME COURT
By _____
Deputy Clerk

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEPHEN KROSSCHELL
ASSISTANT PUBLIC DEFENDER

Polk County Courthouse
P.O. Box 9000-Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

PAGE NO.

| | |
|---|-----|
| STATEMENT OF THE CASE AND FACTS | 1 |
| SUMMARY OF THE ARGUMENT | 2 |
| ARGUMENT | |
| ISSUE: THE INSTANT DECISION CONFLICTS WITH OTHER FLORIDA CASES, BECAUSE (1) IT AUTHORIZES DOUBLE DIPPING AND (2) A ONE CELL DEPARTURE IS ONLY ALLOWED FOR CRIMES FOR WHICH PROBATION WAS REVOKED. | 3 |
| CONCLUSION | 4 |
| APPENDIX | |
| 1. Decision of the Second District Court in <u>Peters v. State</u> , <u>So.2d</u> (Fla. 2d DCA Case No. 86-1864, opinion filed December 2, 1987). | A-1 |
| 2. <u>Green v. State</u> , 12 F.L.W. 2422 (Fla. 4th DCA Oct. 14, 1987). | A-4 |
| CERTIFICATE OF SERVICE | |

TABLE OF CITATIONS

CASES CITED

PAGE NO.

| | |
|--|-----|
| <u>Frick v. State</u> 510 So.2d 1077 (Fla. 2d DCA 1987) | 3 |
| <u>Green v. State</u> 12 F.L.W. 2422 (Fla. 4th DCA 1987) | 2 |
| <u>Hendrix v. State</u> 475 So.2d 1218 (Fla. 1985) | 2,3 |
| <u>Meadows v. State</u> 498 So.2d 1018 (Fla. 2d DCA 1986) | 3 |

OTHER AUTHORITIES

| | |
|----------------------------|---|
| Fla.R.Crim.P. 3.701(d)(14) | 1 |
|----------------------------|---|

STATEMENT OF THE CASE AND FACTS

Petitioner was found to have violated his community control by committing a new substantive offense. His sentence for the new substantive offense was increased one cell (pursuant to Fla.R.Crim.P. 3.701(d)(14)) for violating his community control even though (1) he had never been placed on community control for the new offense and (2) the community control had already been scored on the scoresheet as points for legal status. The second district court of appeal rejected Petitioner's argument that this departure was improper. Petitioner now requests this supreme court to accept jurisdiction in his case.

SUMMARY OF THE ARGUMENT

The instant decision allows a trial court to increase a recommended sentence by one cell for a new substantive offense which constitutes a violation of community control. This result is contrary to Green v. State, 12 F.L.W. 2422 (Fla. 4th DCA 1987), which holds that the one cell departure is permitted only for the original offense, not the new offense. This result is also contrary to Hendrix v. State, 475 So.2d 1218 (Fla.1985) which forbids double dipping. Community control status cannot be both scored on the scoresheet for legal status and used as a reason to depart.

ARGUMENT

ISSUE

THE INSTANT DECISION CONFLICTS WITH OTHER FLORIDA CASES, BECAUSE (1) IT AUTHORIZES DOUBLE DIPPING AND (2) A ONE CELL DEPARTURE IS ONLY ALLOWED FOR CRIMES FOR WHICH PROBATION WAS REVOKED.

The instant decision conflicts with other cases in two ways.

First, it relies on Frick v. State, 510 So.2d 1077 (Fla. 2d DCA 1987) for the proposition that a court may increase a guidelines sentence one cell for violation of community control when the appellant is being sentenced on a new substantive offense. Frick recedes from Meadows v. State, 498 So.2d 1018 (Fla. 2d DCA 1986). In Green v. State, 12 F.L.W. 2422 (Fla. 4th DCA Oct. 14, 1987), however, the fourth district specifically relies on Meadows and holds that a one cell upward departure cannot be applied to new substantive offenses but only to the crime for which probation or community control is being revoked. Because the instant case is explicitly contrary to Meadows and because Green specifically relies on Meadows, the present case and Green are necessarily in conflict.

Second, the instant decision authorizes the trial court both to score a violation of probation on the scoresheet (for legal status) and to use the violation to depart from the guidelines by one cell. This double dipping is contrary to Hendrix v. State, 475 So.2d 1218,1220 (Fla.1985) ("We find a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines.")

CONCLUSION

Based on the preceding arguments, Petitioner requests this court to accept jurisdiction in his case.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Steve Krosschell
STEPHEN KROSSCHELL
Assistant Public Defender

Polk County Courthouse
P.O. Box 9000-Drawer PD
Bartow, FL 33830
(813) 534-4200

COUNSEL FOR PETITIONER