IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,890

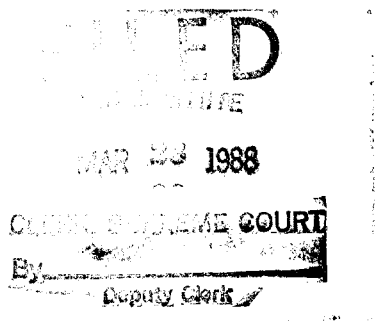
DAVID LAMBERT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

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ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Petitioner was the Appellant and the defendant, respectively, in the lower court.

In this brief, the parties will be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"SP"	Supplemental Record
"RA"	Respondent's Appendix

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State will accept Petitioner's statement of the case and facts as found on pages two through five of Petitioner's Brief on the Merits to the extent the statement represents an accurate, non-argumentative recitation of the proceedings below, subject to the following:

1) Petitioner was originally charged with the aggravated battery of Milton Moore, and aggravated assault of Esmin Santos by information filed March 21, 1984 (R 102).

2) Additional clarifications of the facts will be discussed as part of the argument of the issue involved.

3) The opinion of the Fourth District Court of Appeals is reported as Lambert v. State, 517 So.2d 133 (Fla. 4th DCA 1987); and a copy attached to this brief as Respondent's Appendix.

SUMMARY OF THE ARGUMENT

The trial court did not use the substantive offenses per se as his reason for departure. The Order of Departure and the court's oral pronouncements clearly show the judge found the underlying reasons for violation of probation were more than a minor infraction, and sufficiently egregious to support the departure sentence. Thus, under the authority of State v. Pentaude, 500 So.2d 526 (Fla. 1987), the trial court stated valid reasons for departure.

The certified question must be answered in the affirmative, and the Fourth District's opinion approved.

ARGUMENT

THE TRIAL COURT GAVE VALID REASONS FOR THE DEPARTURE SENTENCE.

At the sentencing hearing the trial court stated:

> At this point, the Court finds again he is on community control for aggravated battery where he shot somebody in the leg, and he put a gun to the head of a woman, threatened to kill her with a firearm. That's what he's on community control for. Those acts obviously are violent.
>
> In this particular case, over an insignificant domestic problem, this man when he wouldn't get out of somebody's house, and the woman who owns the house is trying to call the police for assistence, he comes up behind her and smacks her in the head. He also then takes a knife and stabs her three times, in the back, in the upper chest, and in the stomach, which she showed the Court the scars.
>
> Then goes outside with the woman where her children are trying to help and some other gentleman and he's swinging knives at them or according to the testimony it's the same object that was in the house. And according to one of the children he cut him in the leg and he has a severe scar.
>
> I heard no denials of any of this. The defendant did not wish to state anything in his own behalf and testify. There was conflict in the testimony but I have nothing to oppose the tenor of all of it being true.

> Hearing nothing to the contrary, this new act of violence indicates to this Court that the defendant is a violent person. That at a minor domestic dispute he's going to start stabbing people with knives and threatening to kill people with knives and cutting people with knives.
>
> He also has no respect for his community control. Here he is, after midnight, not home where he's supposed to be. He doesn't appreciate being on community control.
>
> The Court would find the totality of the circumstances indicate that these are more than minor infractions and are sufficienctly egregious and entitle the Court to depart from the presumptive guideline range and to impose an appropriate sentence within the statutory guidelines.

(R 98-100). The written order of departure provides:

> ORDERED AND ADJUDGED that the Defendant's sentence be aggravated to the maximum sentence of Fifteen (15) years incarceration in Florida State Prison and as grounds this Court states:
>
> 1. That the Defendant while on community control committed new substantive offenses.
>
> 2. That the new substantive offenses were committed while the Defendant was away from his approved residence without the permission or knowledge of his community control officer.
>
> 3. That the new substantive violations were violent in nature.
>
> 4. That the new substantive offenses resulted in charges identical to those for which the Defendant was placed on community control, those being Aggravated Battery and Aggravated Assault.
>
> 5. That the Defendant committed these new offenses with a weapon to-wit: a knife.
>
> 6. That the Defendant did stab the victim, Kathleen

Gordon, (the subject of violation of community control number two(2), in three(3)places leaving scars that were shown in open Court.

7. That the Defendant's violent actions in this matter were the result of an insignificant domestic problem.

8. That in addition to the stabbing of the victim, Kathleen Gordon, the Defendant committed three (3) counts of Aggravated Assault upon her minor children and her nephew who tried to come to her aid.

9. That one of Kathleen Gordon's children was also cut on the leg and bears a large scar which was displayed in open Court.

10. That during the course of this attack the Defendant threatened to kill the chil- victims.

In this Court's opinion that the violations of community control taken in total indicate that these are more than minor infractions of the law and are sufficiently egregious to entitle the Court to depart from the presumptive guideline range and to impose the sentence indicated above. State v. Pentaud, 12 FLW 29 (S.Ct. January 9, ~~1987~~).

(SR 18-19). The Fourth District agreeing with the trial court's finding of egregious circumstances, and relying on this Court's reasoning in State v. Pentaude, 500 So.2d 526 (Fla. 1987) Affirmed the departure sentence, but certified the following question:

> WHERE A TRIAL JUDGE FINDS THAT THE UNDERLYING REASONS FOR VIOLATION OF COMMUNITY CONTROL CONSTITUTE MORE THAN A MINOR INFRACTION AND ARE SUFFICIENTLY EGREGIOUS, MAY HE 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 HIS COMMUNITY CONTROL?

The State submits the question must be answered in the affirmative for the following reasons:

In State v. Pentaude, 500 So.2d 526 (Fla. 1987), this Honorable Court held:

> Finally, we note agreement with the district court's holding that the underlying reasons for violation of probation (as opposed to the mere fact of violation) are more than a minor infraction and are sufficiently egregious, he is entitled to depart from the presumptive guidelines range and impose an appropriate sentence within the statutory limit. 478 So.2d at 1149. See Taylor v. State, 485 So.2d 900 (Fla. 4th DCA 1986), citing Williams v. State, 480 So.2d 679 (Fla. 1st DCA 1985) (certifying to this Court identical questions); Monti v. State, 480 So.2d 223 (Fla. 5th DCA 1985); Gordon v. State, 483 So.2d 22 (Fla. 2d DCA 1985).
>
> Rule 3.701 d.14 merely recognizes that sentencing following revocation of probation is a serious matter, and so allows for a one cell departure without the necessity of any other reason. By no means, however, does the rule even purport to completely limit the trial court's discretion in sentencing when compelling clear and convincing reasons call for departure beyond the next cell. The trial judge has discretion to so depart based upon the character of the violation, the number of conditions violated, the number of times he has been placed on probation, the length of time he has been on probation before violating the terms and conditions, and any other factor material or relevant to the defendant's character.

> Here, where Pentaude violated seven conditions of probation, two within the first two months of being on probation, and was convicted of a substantive crime during the probationary period, the trial court departed with good reason.
>
> [Emphasis added]

Id. at 528. It is abundantly clear therefore, that in the instant case the trial court found the five violations of community control to be egregious, and more than mere infractions, and thus, the upward departure was for good reason.

The facts and circumstances herein support the departure sentence. Petitioner was originally charged with aggravated battery committed against Milton Moore, and aggravated assault committed on Esmin Santos (R 102). The factual basis for the charges were that Milton Moore had a dispute with Petitioner and went after Petitioner. Petitioner pointed a gun at Mr. Moore and advised Moore not to come forward anymore. Moore continues walking toward Petitioner, and while backing away, Petitioner shot Moore. Esmin Santos, who was Moore's girlfriend, was present and started to beat Petitioner when he shot Moore; Petitioner, to get her off him, pointed the gun at Esmin and threatened he would kill her if she did not get away from him (SSR 3, 10, 13-14).

The facts of the aggravated batteries and aggravated assaults which became the basis of the revocation of community control were as follows:

Kathleen Gordon testified when she arrived home on May 15, 1986, she found Petitioner asleep in her couch (R 29).

When she confronted Petitioner and asked him to leave, he asked if they could talk outside (R 29). After a discussion, Mr. Gordon came back in the house and picked up the telephone to call the police (R 31-32). Petitioner came in the house after her and asked her if she was calling the police; when she replied, "yes", Petitioner hit Ms. Gordon with a knife (R 32-33). Her two sons and a cousin of her were present and aided in getting Petitioner off of Ms. Gordon (R 34). Ms. Gordon took the three children outside, but Petitioner followed them and continued hitting Ms. Gordon (R 34). Cecil Butler picked up a bicycle rim and hit Petitioner with it (R 49-51). Timothy Landers, Ms. Gordon's son testified Petitioner had a knife (R 58). And Anthony Landers, Mr. Gordon's other son, testified Petitioner cut him on the leg leaving a "very heavy scar, about an inch long." (R 70-74).

Detective Farrell testified that on May 21, one week after the battery took place, Petitioner confessed to stabbing Ms. Gordon several times with a knife, as well as striking one of her children (R 16-21).

Contrary to Petitioner's allegation, it is clear the trial court did not depart from the recommended sentence guidelines merely based on offenses for which no conviction had been obtained. The order, in conjunction with the court's oral pronouncement at the hearing, reveal that the trial court found the fact that Petitioner had been given a "chance" by being placed on community control for an aggravated battery

and aggravated assault with a firearm, and that while still on community control, commits two more aggravated assaults and aggravated batteries, this time with a knife. These facts must be seen as falling under "the egregious" infractions allowed by Pentaude, to support a departure sentence.

In State v. Pentaude, supra, 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, 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 trial court was seeking to aggravate the sentence because of the nature and severity of the substantive violation, as opposed to relying on the assaults as separate and distinct convictions of Petitioner. The Court was outraged at Petitioner's violent nature, and was well aware he was not trying Petitioner on those charges. Because the nature and severity of Petitioner's acts were the aggravating factors used sub judice whether Petitioner was to be subsequently acquitted of those charges is of no moment, and the sentence herein would not have to be modified.

The revocation of probation hearing was held before the disposition of the substantive charges. Respondent simply maintains that these were to be two separate and distinct proceedings. The trial court on the violation of community control proceeding correctly departed on the basis of the circumstances surrounding the probation revocation where the court found that Petitioner has committed the counts as alleged in the affidavit. 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). Thus, the disposition of the new charges would not affect the outcome sub judice.

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 Kathleen Gordon, her nephew, and her son as to the facts of those assaults. Even at a trial on those changes, Petitioner may choose not to take the witness stand. That fact does not mean Petitioner will not be found guilty, nor that the court erred in finding sufficient evidence to convict. The trial court nonetheless may still correctly depart based on the circumstance surrounding the probation revocation where the conscience of the court was satisfied that these acts occurred.

Respondent will also point to the Fifth Circuit's opinion in Young v. State, 13 F.L.W. 325 (Fla. 5th DCA February 4, 1987) where in joining the Lambert Court in certifying the question to this Court, the Fifth Circuit stated:

> It is true under the facts in Pentaude, as observed by the majority opinion in Tuthill, the defendant's probation violation had resulted in a separate criminal conviction prior to the revocation hearing. But Pentaude does not discuss whether or not such a conviction, as opposed to a finding pursuant to a revocation hearing, constitutes a sine qua non for a multi-cell departure sentence. As we read the language in Pentaude, quoted above, it refers to a finding by the trial judge of an egregious offense, not to a conviction thereof. We are in agreement with Lambert and with the reasoning of Chief Judge Schwartz of the Third District, as expressed in his dissent in Tuthill:
>
> I think it clear, first of all, that the nature and character of the conduct which constituted the violation of probation as found by the trial judge was properly considered as a clear and convincing reason for departure even though Tuthill was not separately convicted of the substantive crime. In my view, nothing in any rule, statutory provision, or the cases cited by Judge Baskin justifies the position that

this is required. To the contrary, the determinative case of State v. Pentaude, 500 So.2d 526, 528 (Fla. 1987), and those which follow it, emphasize that it is the violation itself-as opposed to some distinct factual demonstration and finding as to the basis of the violation which is determinative.

* * *

To hold otherwise by requiring proof beyond a reasonable doubt to support a guidelines departure in a probation situation-either, as Judge Baskin suggests, by necessitating a 'conviction' under Fla.R. Crim.P. 3.701(d)(1) or, as the appellant contends, pursuant to the rule that the factual basis for a departure must be supported by that degree of proof, see Mischler v. State, 488 So.2d 523 (Fla. 1986) - is unjustifiably contrary to the entire basis of the concept of probation, which, because it is purely a matter of judicial grace (for which Tuthill successfully pleaded at his first sentencing), Bernhardt v. State, 288 So.2d 490 (Fla. 1974), requires proof of a violation sufficient only to satisfy the conscience of the court. Randolph v. State, 292 So.2d 374 (Fla. 3d DCA 1974), cert. denied, 300 So. 2d 901 (Fla. 1974) see Lee v. State, 440 So.2d 612 (Fla. 3d DCA 1983). I cannot agree that every probation violation hearing should be rendered meaningless in determining the propriety of a departure and would hold, to the contrary, that a finding of violation is binding and determinative in the sentencing process.

12. F.L.W. at 2251 (footnote omitted).

Therefore, sub judice, where Petitioner violated several conditions of probation, and several of the violations by committing offenses similarly serious as the ones he was placed on community control for, the trial court departed with good reason. The reasons presented by the trial court clearly show the departure was based upon the character of the violation, the number of conditions violated, and the fact that Petitioner is a very violent person as can be seen from the aggravated battery committed on Ms. Gordon and her young son. The reasons herein are well supported by the record and should be approved. Booker v. State, 514 So.2d 1079 (Fla. 1987).

CONCLUSION

WHEREFORE based upon the foregoing analysis and authorities cited herein, Respondent requests this Court answer the certified question in the affirmative, and approve the district court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent on the Merits has been furnished by courier to: JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, Counsel for Petitioner, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401 this 24th day of March, 1988.

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Of Counsel