3-29

IN THE SUPREME COURT OF FLORIDA

DAVID LAMBERT,

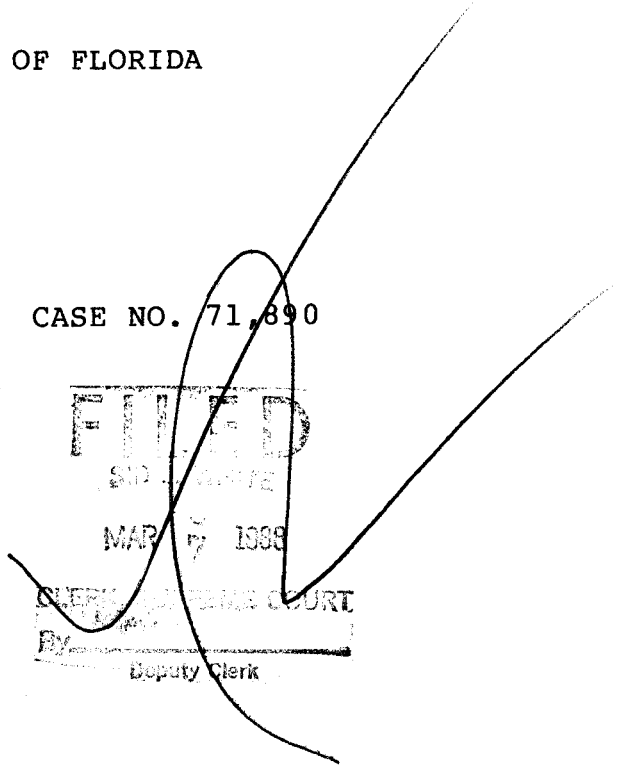
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 71,890



PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the court below and the defendant in the trial court. Respondent was the Appellee in the court below and the prosecution in the trial court. A copy of the district court's opinion is attached to this brief as part of the Appendix.

The following symbols will be used in this brief:

"R"	Record on Appeal
"A"	Appendix
"SR"	Supplemental Record

STATEMENT OF THE CASE AND FACTS

On December 3, 1984, Petitioner, DAVID LAMBERT, pleaded nolo contendere to one count of aggravated battery and one count of aggravated assault (R103). On December 3, 1984, an order was entered placing Petitioner on community control for a period of one and one-half (1 1/2) years (R105-106).

On June 19, 1986, an affidavit and warrant for violation of community control was filed against Petitioner (R107-108). The affidavit alleged that Petitioner violated his community control by: (1) leaving his residence without approval; (2) committing a battery on Kathleen Gordon; (3) committing an assault on Timothy Landers; (4) committing an assault on Anthony Landers; and (5) committing an assault on Cecil Butler (R107-108). On February 10, 1987, a hearing on the allegations of violation of community control was held (R1-101).

At the hearing, Petitioner was advised by his attorney not to testify because of the upcoming trial on the new substantive offenses (R86). The trial judge then asked Petitioner if he wanted to testify in his own behalf (R86). Petitioner asked if the hearing was a trial or a violation hearing (R87). After being informed that the proceeding was a violation hearing, Petitioner chose not to present any evidence in his defense (R87).

The state's evidence at the hearing indicated that on May 15, 1986, Kathleen Gordon returned home to her residence to find Petitioner asleep on her couch (R29-30). Petitioner had previously been Gordon's boyfriend and he had some property at Gordon's house (R43). Gordon woke Petitioner and told him to

leave (R29-30). Petitioner asked if they could talk outside (R29-30). Gordon and Petitioner went outside to talk (R29-30). After they talked, Gordon went inside and started to use the phone to call the police when Petitioner struck her on the back of the head (R31). Petitioner also struck her on the stomach and on her back (R33). Gordon testified that she saw a steak knife in Petitioner's s hand when he struck her (R33). She testified that at the time she was being struck she did not know what she was being struck with (R32,40-41). Gordon later knew that Petitioner had a steak knife because she found one outside of her house the next day (R41). Gordon testified that the cuts she received were minor (R35).

Anthony Landers, Timothy Landers, and Cecil Butler tried to stop Petitioner from striking Gordon (R34). Petitioner swung at Anthony Landers (R59,72). Cecil Butler grabbed Anthony Landers and Kathleen Gordon and pushed them out of the house (R51). Petitioner followed and began to strike at Kathleen Gordon again (R51). Cecil Butler tried to stop Petitioner (R51). Petitioner then struck at Butler but missed (R51). Butler hit Petitioner in the head with a bicycle rim (R51). Petitioner fell down and was later found by police lying prone in the middle of the road with a gash on his forehead (R14,53). Petitioner was transported to the hospital for treatment (R15). The ambulance was originally called for Gordon but her cuts did not require treatment at the hospital (R35).

The trial court found Petitioner guilty of each of the five (5) violations charged and entered an order revoking Petitioner's community control (SR20-21). The trial court adjudicated Petitioner guilty of the offenses he was placed on community control for -- aggravated battery and aggravated assault (R109). Petitioner's recommended guideline sentence was twelve (12) to thirty (30) months in prison (R112). On February 10, 1987, the trial court departed from the recommended guideline sentence and sentenced Petitioner to fifteen (15) years in prison for aggravated battery and five (5) years in prison for aggravated assault (R110-111). The trial court gave the following written reasons for departure:

1. That the Defendant while on community control committed new substantive offenses.

2. That the new substantive offenses were committed while 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. The 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 victims.

(A2,SR18).

On March 6, 1987, Petitioner timely filed his notice of appeal (R113).

On December 30, 1987, the Fourth District Court of Appeal affirmed Petitioner's sentence (A1-4). On Appeal Petitioner argued that the reasons for departure involved offenses for which he had not been convicted of and could not be used for departure (A2). The district court affirmed the departure holding that a conviction was not necessary and 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?
>
> (A3).

On January 28, 1988, Petitioner timely filed his notice to invoke this Court's discretionary review. On February 10, 1988, this Court set forth a briefing schedule for this review.

SUMMARY OF THE ARGUMENT

1. All of the trial court's reasons for departure involved factors relating to new substantive offenses which caused Petitioner's community control to be revoked. At the time of sentencing no convictions were obtained for the new substantive offenses. Consequently, the reasons for departure were invalid. Petitioner's sentence must be reversed and this cause remanded for resentencing within the recommended guideline range.

ARGUMENT

POINT INVOLVED

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE.

Appellant's recommended guideline sentence was 12 to 30 months in prison (R112). Petitioner's probation officer testified that there were extenuating circumstances involved in the original charges and recommended that Petitioner be sentenced to three years in prison (R97-98). The trial court departed upward from the guidelines and imposed sentences of five (5) and fifteen (15) years (R110-111). The trial court gave the following written reasons for departure:

1. That the Defendant while on community control committed new substantive offenses.

2. That the new substantive offenses were committed while 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. The 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 victims.

(A2,SR18).

These reasons all involve factors relating to the battery and assaults Petitioner allegedly committed while he was on community control. The issue is whether the substantive offenses for which there are no convictions constitute clear and convincing reasons for departure. They do not.

Since no convictions were obtained for these offenses prior to sentencing, the reasons for departure were invalid. Rule 3.701(d)(11), Fla.R.Crim.P., is clear that "reasons for departure shall not include factors relating to prior arrests without convictions." Rule 3.701(d)(11) has been applied in situations as this to prohibit departure based on offenses causing a violation of probation where no convictions have been obtained. See Tuthill v. State, 12 F.L.W. 2250 (Fla. 3d DCA, September 15, 1987); Lewis v. State, 510 So.2d 1089 (Fla. 2d DCA 1987); Wilson v. State, 510 So.2d 1088 (Fla. 2d DCA 1987); Royal v. State, 508 So.2d 1313 (Fla. 2d DCA 1987).

It must also be noted that the standard of proof needed to find a violation of probation or community control is lower than that needed for a criminal conviction. The facts relied upon for

revocation only have to be proven so as to satisfy the "conscience of the court." Lewis, supra at 1090. Whereas, the facts upon which a guidelines departure is based must be proven "beyond a reasonable doubt." State v. Mischler, 488 So.2d 523 (Fla. 1986). Therefore, the proof of the assaults may be used as a basis for finding Petitioner in violation of his community control, but not as a justification to depart from the guidelines.

The low standard of proof required for revocation may influence a defendant to forego defending himself against the new substantive offenses at the revocation hearing, as opposed to fully defending himself against the charges as he would later do at trial. The instant case is a perfect example of this. As the following portion of the record shows, Petitioner was advised by his attorney not to testify at the hearing due to the upcoming trial on the new substantive offenses and when Petitioner made certain that the proceeding was only the revocation hearing, and not the trial, he decided not to present evidence in his defense:

> MR. DIAZ: Judge, I'm going to advise my client not to testify at this hearing at this point. Certainly, I believe he may be entitled to. My advice to him coming with a pending trial would be that he not testify at this point but I certainly believe he had the right to testify is he wants to.
>
> Do you want to testify? He doesn't want to testify, Judge.
>
> THE COURT: Do you understand that you can if you want to?
>
> THE DEFENDANT: Yes, I understand.
>
> THE COURT: But you don't want to testify. You heard all the witnesses testify here today.

THE DEFENDANT: Yes, I have.

THE COURT: You don't want to present any testimony in your own behalf; is that right?

THE DEFENDANT: Is this a trial or a violation hearing?

THE COURT: This is the violation.

THE DEFENDANT: No.

THE COURT: Do you have any other evidence to present?

MR. DIAZ: No, Judge.

THE COURT: You rest?

MR. DIAZ: Yes, sir.

THE COURT: Okay.

MR. DIAZ: Other than -- well, I took it that we'd have time to argue over what was said.

THE COURT: Okay, let me just get the affidavit out and warrant and see what we've got here.

Okay. Are you going to make any argument regarding not being at his residence?

MR. DIAZ: I don't think I can honestly do that.

(R86-87) (emphasis added).

It is apparent from this colloquy that Petitioner chose not to present evidence in his behalf due to the low standard of proof and because he could not in good faith challenge the allegation that he had left his residence without permission (R87). The unauthorized absence from residence itself is sufficient to revoke Petitioner's community control. Consequently, there would not be a significant benefit in Petitioner introducing evidence to rebut the substantive allegations. On the other hand, Peti-

tioner could weaken his chances at the later trial by prematurely revealing his evidence. In otherwords, Petitioner was not foregoing to defend himself because he was guilty, rather, he was choosing only to defend himself at a time when it would do him the most good -- at trial. Under these circumstances, it would be illogical to consider substantive offenses which are undefended against at a revocation hearing, and merely proven to the satisfaction of the conscience of the court, as clear and convincing reasons for departure.

One must also consider that even though Petitioner is found in violation of his community control based on the trial court's belief that he committed the substantive offenses, he may well be acquitted of the substantive offenses later at trial when he presents his full defense and where the state has a higher burden of proof. It cannot be disputed that acquittal of the substantive offenses would bar the use of them for departure. See, Fla. R.Crim.P., Rule 3.701(d)(11) ; Borrell v. State, 478 So.2d 1185 (Fla. 4th DCA 1985); Weaver v. State, 475 So.2d 1365 (Fla. 2d DCA 1985); Fletcher v. State, 457 So.2d 570 (Fla. 5th DCA 1984). In Royer v. State, 488 So.2d 649, 650 (Fla. 5th DCA 1986) the Fifth District Court of Appeal recognized that a departure could not be based on substantive offenses occurring while the defendant is on community control where he is acquitted of the offenses at a later trial. The same potential danger is present here where Petitioner did not present evidence in his defense and faced a low standard of proof at the revocation hearing.

In the present case, State v. Pentaude, 500 So.2d 526 (Fla. 1987) was cited by the lower courts for the proposition that a departure was justified where the substantive offenses causing the revocation are more than minor infractions and are sufficiently egregious. However, as was recognized in Tuthill v. State, 12 F.L.W. 2250 (Fla. 3d DCA, September 15, 1987) the defendant in Pentaude had been convicted of the substantive offense committed while on probation:

> In imposing sentence on Tuthill, the trial court correctly pointed to the character of the probation rather than the mere fact of the violation; however, unlike the defendant in Pentaude, Tuthill was never convicted of the substantive crime on which the probation violation was based because the state dropped that charge. It is well established that "[r]easons for deviating from the guidelines shall not include factors relating to the instant offense for which convictions have not been obtained." Fla.R.Crim.P. 3.701(d)(11). Recent cases have reiterated that principle. Clark v. State, 490 So.2d 1349 (Fla. 1st DCA 1986); Mack v. State, 489 So.2d 205, 206 (Fla. 2d DCA 1986); see Williams v. State, 500 So.2d 501 (Fla. 1987).

12 F.L.W. at 2251 (emphasis added).

The same view was expressed by the Second District Court of Appeal in Wilson v. State, 510 So.2d 1088 (Fla. 2d DCA 1987):

> The trial court also found as a reason for departure that Wilson had committed an armed robbery while on community control. At the time of sentencing, Wilson was charged with but not convicted of this offense. Reasons for departure cannot include factors relating to prior arrests for which there have been no conviction. Fla.R.Crim.P. 3.701(d)(11). Use of such reasons constitutes reversible error. *** For the reasons given, we reverse and remand for resentencing within the guidelines.

510 So.2d at 1089 (emphasis added).

These decisions are consistent with Pentaude where this Court noted that a conviction of a substantive crime during probation was a valid reason to depart:[1]

> Here, where Pentaude violated several 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.
>
> 500 So.2d 528-529 (emphasis added).

In turn, Pentaude is consistent with Rule 3.701(d)(11) Fla.R. Crim.P. which prohibits a departure without conviction. In the present case it was error to depart for the substantive crimes which had not resulted in conviction. Since none of the reasons for departure were valid, Petitioner's sentence must be reversed and he must be resentenced within the recommended guideline range.

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[1] All the other violations of probation in Pentaude were technical in nature. 500 So.2d at 528.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner would request this Honorable court to reverse the decision of the district court with directions that Petitioner be sentenced within the recommended guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 4th day of March, 1988.

Jeffrey L. Anderson
Of Counsel