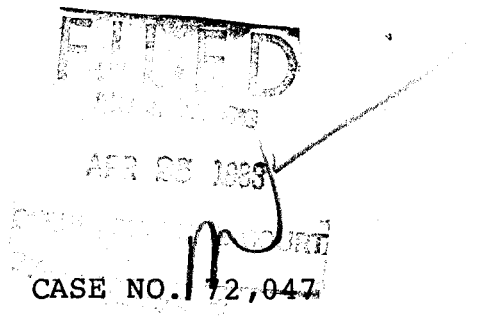
IN THE SUPREME COURT OF FLORIDA



BERHINE W. YOUNG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 72,047

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The decision of the District Court of Appeal, Fifth District, related the facts of the case as follows: [See, Reaves v. State, 485 So.2d 829 (Fla. 1986)].

"Young initially pled guilty to two counts of selling cocaine and was sentenced on January 2, 1985, to two concurrent terms of five years' probation, with a condition on each term that Young serve 90 days in jail. On January 20, 1987, an amended violation of probation affidavit was filed, alleging that Young violated his probation by possession a firearm and by possessing cocaine on three separate occasions.

"At the probation revocation hearing, testimony was presented by a confidential informant for the sheriff's department that he bought cocaine from Young on October 27 and December 4, 1986. Positive lab reports were submitted into evidence. Other testimony included that from an officer who testified that when Young was arrested on December 11, 1986, two pieces of rock cocaine were found in the trunk of his car.

"Following the hearing, the court revoked Young's probation based on its finding that the defendant was guilty of the sale of cocaine on October 27, 1986 and December 4, 1986. An order of revocation of probation was entered on March 31, 1987, with the court finding that the probation was violated by 'violating

Condition (5).'[1] The guidelines scoresheet prepared for sentencing showed a total of 96 points, placing Young in the two-and-a-half to three-and-a-half year range with the one-cell increase for violaiton of probation.[2] The court determined to depart from the guidelines, and sentenced Young on the two previous sale charges to two concurrent 15-year terms of imprisonment. The court's order providing for departure states:

> The reason for the guidelines departure is that the Defendant committed a substantive violation of his probation in that the Defendant was on probation for two counts of selling cocaine and violated his probation by twice more selling cocaine. See Townsend v. State, 458 So.2d 856 (Fla. 2d DCA 1984) and case cited therein."

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[1]Condition (5) provided:

> You will live and remain at liberty without violating any law. A conviction in a court of law shll not be necessary in order for such a violation to constitute a violation of your probation.

[2]At the hearing, it was determined that the guideline scoresheet was incorrect, and that the correct score was 78 points, which was within the same cell as the scoresheet indicated.

SUMMARY OF ARGUMENT

The trial court correctly concluded that the commission of new offenses involving cocaine while on probation for two sales of cocaine constituted sufficiently egregious conduct to warrant departure beyond the one cell increase permitted by Rule (d)(14). Fla. R. Crim. P. 3.701(d)(14); State v. Pentaude, infra. The extent of departure does not constitute an abuse of discretion.

The following question was certified as one of great public importance by the District Court of Appeal, Fifth District:

> WHERE A TRIAL JUDGE FINDS THAT THE UNDERLYING REASONS FOR VIOLATION OF PROBATION CONSTITUTE MORE THAN A MINOR INFRACTION AND ARE SUBSTANTIVE VIOLATIONS, 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 PROBATION?

Respondent respectfully requests this honorable court to adopt the reasoning of the district court and answer the question in the affirmative.

POINT ONE

THE TRIAL COURT GAVE A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE RECOMMENDED GUIDELINES SANCTION WHICH HAS BEEN APPROVED BY THIS HONORABLE COURT.

Petitioner contends that the trial court erroneously departed from the recommended guidelines sanction in this violation of probation case. He contends that the trial judge's reliance on Townsend v. State, 458 So.2d 856 (Fla. 2d DCA 1984), was misplaced because the second district has supposedly receded from Townsend in Alexander v. State, 513 So.2d 1117 (Fla. 2d DCA 1987) and McClure v. State, 513 So.2d 1119 (Fla. 2d DCA 1987). Respondent disagrees with this contention; moreover, with all due respect for the second district, they cannot overrule a decision from this honorable court as petitioner suggests. See, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

Petitioner's attempt to distinguish this case from State v. Pentaude, 500 So.2d 526 (Fla. 1987) is unavailing. As in Pentaude, the violation here was for new substantive offenses, not minor infractions like failing to file monthly reports. Moreover, petitioner's new offenses involved cocaine, as did the offenses for which he was on probation. See, Grissendaner, infra. The district court decision cites at length from Pentaude, then concluded:

> Following the test enunciated in Pentaude we have no difficulty in determining that Young's violations of probation, as found by the trial judge, were more than minor infractions -- the cocaine

> possession and sales were substantive offenses sufficiently egregious to warrant departure.

Petitioner has failed to demonstrate any need to disturb this conclusion.

POINT TWO

A CONVICTION IS NOT A PREREQUISITE FOR A JUDGE TO DETERMINE THAT SUBSTANTIVE VIOLATION OF PROBATION ARE SUFFICIENTLY EGREGIOUS TO WARRANT DEPARTURE PURSUANT TO STATE V. PENTAUDE.

After the violation of probation hearing, the court revoked petitioner's probation, finding that testimony and other evidence established that petitioner sold cociane on October 27 and December 4, 1986. Other testimony was presented that when he was arrested on December 11, cocaine was found in the trunk of his car. The petitioner was acquitted of the October 27 sale of cocaine charge in a separate proceeding and found guilty instead of possession cocaine on that date. However, at the violation of probation hearing, the court was satisfied that a sale occurred October 27. Petitioner contends that the court cannot rely on this conduct as a substantive offense which is sufficiently egregious to warrant departure under Pentaude.

Respondent emphasizes the fact that petitioner was subsequently convicted of the December 4 sale, and was found guilty of possession cocaine on October 27. Therefore, it is somewhat misleading to suggest that the departure was based upon crimes for which petitioner had not been convicted. Petitioner was convicted of possessing cocaine on October 27 and December 11, and convicted of selling cocaine on December 4, 1986. Respondent contends that this conduct was sufficiently egregious to warrant departure.

It is well established that violation of probation

proceedings involve a lesser standard of proof than beyond a reasonable doubt. Revocation of probation can be based on the greater weight of the evidence. Rita v. State, 470 So.2d 80 (Fla. 1st DCA 1985), rev. denied, 480 So.2d 1296. The trial court has the inherent power to revoke probation anytime the court determines the probationer has violated the law. Stafford v. State, 455 So.2d 385 (Fla. 1984). The evidence need only be sufficient to satisfy the conscience of the court that a substantial violation of a condition of probation has occurred. Clark v. State, 482 So.2d 43 (Fla. 4th DCA 1981). It is unnecessary to obtain a conviction for the unlawful act to revoke probation. Maselli v. State, 446 So.2d 1079 (Fla. 1984). A probationer can lose his right to probation notwithstanding his acquittal on the underlying substantive offense. Borges v. State, 249 So.2d 513 (Fla. 1971). Respondent suggests that by requiring a conviction of the underlying substantive offense before a trial court can depart on the basis of the egregiousness of the violation, the impractical result would be to require the substantive case to be tried before the probation violation.

Contrary to petitioner's contention, the trial court did not depart merely based on offenses for which convictions had not been obtained. Convictions were had on two of the three offenses as noted previously. It is clear from the stated reason that the petitioner's commission of exactly the same kind of crime for which he was on probation was the main concern of the trial court. It is the character of the violations which concerned the court, not the mere fact of violation. See, Addison v. State,

452 So.2d 995 (Fla. 2d DCA 1984); Rodriquez v. State, 464 So.2d 638 (Fla. 3rd DCA 1984); Isgette v. State, 494 So.2d 534 (Fla. 4th DCA 1986).

Respondent respectfully requests this honorable court to adopt the well-reasoned decision of the district court, which adopted the reasoning of Chief Judge Schwartz, as follows:

"It is true that under the facts in Pentaude, as observed by the majority opinion in Tuthill v. State, 518 So.2d 1300 (Fla. 3d DCA 1987) 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 jduge 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)(11) 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. 3rd 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.

(518 So.2d at 1303-1304) (footnote omitted)." Respondent respectfully requests this honorable court to adopt the reasoning of the iffith district and Chief Judge Schwartz and answer the certified question in the affirmative.

POINT THREE

THE EXTENT OF DEPARTURE IS WITHIN THE TRIAL COURT'S SOUND DISCRETION AND IS REASONABLE IN THIS CASE.

As his last point on appeal, petitioner contends that the sentence imposed is an excessive departure. When the district court addressed this issue, it determined:

> Young's last contention is that, given departure, it was excessive pursuant to Albritton v. State, 476 So.2d 158 (Fla. 1985). Young's offenses were committed prior to the effective date (July 9, 1986) of Chapter 86-273, Laws of Florida, which precluded appellate review of the extent of departures, hence we may not constitutionally apply that statute to the instant appeal. See Miller v. Florida, _____ U.S. _____, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). The test, then, is the abuse of discretion standard explicated in Canakaris.[3] See Albritton, 476 So.2d at 160. Given Young's repeated involvement with cocaine, we find that reasonable men could differ as to the propriety of the departure sentence imposed by the trial judge.

The fact that petitioner committed crimes involving cocaine while on probation for selling cocaine justifies aggravated punishment. Gissendaner v. State, 504 So.2d 474 (Fla. 1st DCA 1987); Brooks v. State, 505 So.2d 442 (Fla. 1st DCA 1987); Sumter v. State, 506 So.2d 1144 (Fla. 1987). It cannot be said that reasonable persons could not differ that the sentence imposed was

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[3]Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

reasonable, and hence no abuse of discretion has been demonstrated.

CONCLUSION

Based on the arguemnts and authorities presented herein, respondent respectfully requests this honorable court affirm the decision fo the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by U.S. Mail, to Thomas W. Turner, P.A., counsel for petitioner, at 56 E. Pine Street, Suite 300, Orlando, FL 32801, this 22nd day of April, 1988.

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