OA 9-1-88

App. Pg.

IN THE SUPREME COURT OF FLORIDA

CASE NO: 72,096

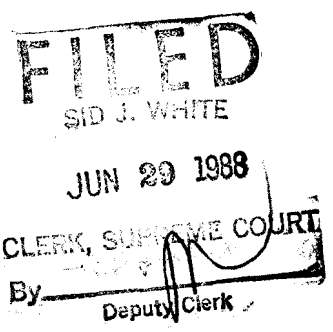
THE STATE OF FLORIDA,

Petitioner,

vs.

HAROLD TUTHILL,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, **the State of Florida**, was the Appellee in the District Court of Appeal and the prosecution in the trial court. Respondent, **Harold Tuthill**, was the Appellant in the District Court of Appeal and the Defendant in the trial court. The parties will be referred to as they stood in the trial court. The symbol "R" will designate the 60 page record on appeal and "T" the 27 page transcript of proceedings, both of which will be transmitted to this Court by the Clerk of the District Court on July 8, 1988. The State has contemporaneously filed a motion to supplement the record with the 153 page Supplemental Record, which was part of the record on appeal in the Third District, but which was mistakenly omitted from the instant record by the Clerk of that court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

In April of 1983 Respondent was charged with committing lewd and lascivious acts in the presence of an eleven year old child, Circuit Court Case No. 83-6740 (R.1,1a). On May 10, 1983, Respondent pleaded guilty to the above charge and was placed on four years probation (R.9.10). On September 14, 1984, an affidavit alleging violation of probation was entered against Respondent (R.11), alleging that Respondent violated his probation by committing a new substantive offense, to wit, lewd and lascivious acts upon a minor. The affidavit was amended on November 20, 1984 (R.12), altering the date on which the new offense occurred.

A probation violation hearing was conducted on December 3, 1984, at which the victim of the new offense, her brother (an eyewitness), her mother, and the investigating detective all testified (S.R. 1-151). The trial court found Respondent in violation, and sentenced him to fifteen years imprisonment (S.R. 148-149). Respondent was not separately convicted of the lewd and lascivious act which formed the basis of the violation.[1]

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[1] Respondent was arrested and charged with this new offense in Circuit Court Case No. 84-20799, however, upon revocation of probation the State entered a nolle prosse of the new charge. (S.R.149).

Respondent appealed to the Third District, which affirmed the probation violation, but reversed the sentence because the trial court did not afford Respondent sufficient opportunity to be heard at sentencing. Tuthill v. State, 478 So.2d 409 (Fla. 3d DCA 1985).

After remand the case was reassigned to Judge Edward Cowart for resentencing. Judge Cowart held sentencing on March 3, 1986 (T.1-27), at the conclusion of which he departed above the recommended maximum of thirty months, and sentenced Respondent to fifteen years imprisonment (T.25). The written reasons for departure were:

> 1. That the defendant was placed on probation in case number 83-6740 for Lewd and Lascivious Act Upon a Child.
>
> 2. That the defendant was found to be in violation of his probation in a hearing before Judge Mastos and came before this Court for sentencing following the recusal of Judge Mastos.
>
> 3. That the substantive offense which was the basis of the probation violation was substantially similar to the charge on which the defendant was placed on probation.
>
> 4. That the new offense occurred within six months of the defendant being placed on probation.
>
> (R.43).

Respondent appealed his sentence to the Third District, which held that because Respondent was not independently

convicted of the criminal acts which constitued the violation, the trial court could not deviate more than one cell above the recommended guideline range. Tuthill v. State, 12 F.L.W. 2250 (Fla. 3d DCA, September 15, 1987). The State filed a timely motion for rehearing, which was denied on February 16, 1988. During the pendency of the motion, the Fourth and Fifth Districts issued their opinions in Lambert v. State, 13 F.L.W 70 (Fla. 4th DCA, December 30, 1987), and Young v. State, 13 F.L.W. 325 (Fla. 5th DCA, February 4, 1988), in which both Courts expressly rejected the Third District's holding in Tuthill, supra.

Based on this express conflict, Petitioner sought discretionary review in this Court, which granted review and set oral argument for September 1, 1988.

STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT IN REVOKING PROBATION, MAY DEPART ABOVE THE AUTOMATIC ONE CELL INCREASE BASED UPON THE EGREGIOUS NATURE OF THE VIOLATION, WHERE THE VIOLATION CONSISTS OF A NEW SUBSTANTIVE OFFENSE OF WHICH THE DEFENDANT WAS NOT SEPARATELY CONVICTED.

SUMMARY OF THE ARGUMENT

This Court's landmark decision in Pentaude does not directly address the instant dispute, however as Chief Judge Schwartz outlined in his vociferous dissent below, the focus of Pentaude is the nature and extent of the violation. Where the violation is sufficiently egregious, as is certainly the case here, departure is warranted. Nothing in Pentaude even remotely suggests that where such egregious conduct also constitutes a separate crime, the State must first obtain a conviction before it can be considered as a basis for departure. Indeed, Judge Baskin's opinion does not rely on any language from Pentaude, but rather on certain provisions of the Sentencing Guidelines which forbid the sentencing court from considering, as a basis for departure, conduct of the defendant for which he has not been convicted. As stressed by the dissent, to blindly apply these provisions to the probation revocation setting is to ignore the purpose and function of the revocation process, and the fundamental differences between that process and other sentencing proceedings. When a defendant is initially convicted, the sentencing court has no business considering unrelated conduct of the defendant for which he has not been convicted. Prior convictions are entered on the scoresheet, and all other prior conduct is irrelevent. At the revocation hearing, on the other hand, it is the court's sole function to scrutinize the defendant's conduct and determine whether

it constitutes a violation, and if so, the proper sentence to be imposed. It makes absolutely no sense that the trial court, having determined that the defendant's conduct constituted a violation, cannot then enter a departure sentence based on the egregious nature of that violation. In this setting, the fact that the defendant could have been separately convicted is irrelevant, and to hold otherwise would emasculate the probationary process in a manner never intended by the framers of the guidelines.

The same is true of the former requirement, adopted by this Court in Mischler but since amended by the legislature, that the facts constituting the reasons for departure be found beyond a reasonable doubt. The standard for revocation has always been and continues to be the conscience of the court standard. Having determined under the appropriate standard that the violation occurred, and that it was especially egregious, it is illogical to apply a different standard in assessing the departure sentence.

In sum, the opinion of Judge Baskin is a classic case of mixing apples and oranges. The essence of Pentaude is that the guidelines did not subvert or restrict the inherent sentencing powers of the revoking court. This Court should honor that essence by reversing and reinstating the defendant's richly deserved fifteen year sentence.

ARGUMENT

THE TRIAL COURT, IN REVOKING PROBATION, MAY DEPART ABOVE THE AUTOMATIC ONE CELL INCREASE BASED UPON THE EGREGIOUS NATURE OF THE VIOLATION, WHERE THE VIOLATION CONSISTS OF A NEW SUBSTANTIVE OFFENSE OF WHICH THE DEFENDANT WAS NOT SEPERATELY CONVICTED.

In Pentaude v. State, 500 So.2d 526 (Fla. 1987), this Court held that upon revocation of probation, the trial court may depart above the automatic one cell increase provided by Fla.R.Cr.P. 3.701 (d)(14), where the nature and extent of the violation is severe enough to provide a clear and convincing basis for departure. In Pentaude, unlike here, the defendant had already been convicted of the new substantive offense prior to the revocation hearing. However nothing in Pentaude suggests that a prior conviction is necessary, and indeed the opposite is true:

> [3] Finally, we note agreement with the district court's holding that "[w]here a trial judge finds 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.

(emphasis added), Id at 528.

In the instant case the defendant committed a lewd and lascivious act upon a minor within six months of being placed on probation for the same offense. At the revocation hearing the court heard extensive testimony concerning the nature and extent of the defendant's violation (S.R.12-143), including the testimony of the young victim (S.R.103-125) and her brother (S.R.80-102), who witnessed the offense. A review of the defendant's conduct reveals such egregious behavior as to constitute not merely the existence of a violation,[2] but a

[2] The condition of probation violated is the requirement that the defendant live and remain at liberty without violating any law. Condition (5) of the probation order states: "You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation." (R.9,10).

compelling clear and convincing basis for departure as well.

In holding Pentaude inapplicable to this cause, Tuthill v. State, 518 So.2d 1300 (Fla. 3d DCA 1987), the Third District[3] relied on Fla.R.Cr.P. 3.701(d)(11), which prohibits a departure based on conduct for which the defendant has not been convicted, as well as this Court's decision in Mischler v. State, 488 So.2d 523 (Fla. 1986), which required that the facts supporting the departure be found beyond a reasonable doubt. As cogently argued by the dissent, the application of these provisions to the revocation process is illogical and unwarranted:

> 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) [2] 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 State v. Mischler, 488 So.2d 523 (Fla.1986)[3]-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

[3] Judge Baskin authored the opinion, with Judge Pearson concurring in the result only, and Chief Judge Schwartz entering a vigorous dissent.

> 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 [4] 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.
>
> (2) There is no doubt that the reasons assigned for departure-inherent in the revocation of probation-that Tuthill committed a horrific act against a child [5] which was both virtually identical to the one for which he was placed on probation and took place a short time afterward[6]-are more than sufficiently clear and convincing to support a departure. Pentaude; Cahill; Gissendaner; compare Saldana v. State, 510 So.2d 1238 (Fla. 3d DCA 1987).
>
> Tuthill, supra at 1304

In order to appreciate the wisdom of the above analysis, it is necessary to consider the fundamentally different roles of the trial court at the initial sentencing, upon conviction, versus the revocation sentencing following the probationary hearing. At the initial sentencing, the trial court has absolutely no business delving into unrelated criminal conduct for which the defendant has not been convicted. Such conduct is wholly extraneous to the sentencing equation. At the revocation proceeding, on the other hand, the court's sole function is to review this conduct, determine if it constitutes a violation, and if so, the proper sentence.

That this conduct might also have supported an independent conviction is irrelevant in the revocation setting.

Judge Baskin also relied on the fact that since the existence of the violation is determined by the conscience of the court standard, this Court's decision in Mischler v. State, 488 So.2d 523 (Fla. 1986), requiring that the facts underlying the violation be found beyond a reasons doubt, bars departure unless a separate conviction is first obtained. It should first be noted that in response to Mischler, the legislature enacted F.S. 921.001(5) effective July 1, 1987, which provides that the underlying facts need only be established by a preponderance of the evidence, which the State submits is the functional equivalent of the conscience of the court standard. Thus in cases arising after the effective date, Mischler no longer applies.[4]

Even if Mischler is given effect in this cause, it is nevertheless inapplicable in the probation revocation setting. As the dissent points out, the standard for determining whether a violation has occurred is the conscience of the court standard. To require a greater standard at sentencing would subvert the entire probationary scheme. To assume the legislature intended such a result,

[4] It could also be argued that, given the prompt legislative response, Mischler from its inception was an incorrect expression of the legislative will, and thus the adoption of F.S. 921.001 (5) was not an alteration, but rather a clarification of existing law.

especially in view of the enactment of F.S. 921.001(5), would entail reliance on logic of the most woefully deficient sort. Indeed, the heart and soul of Pentaude is that the guidelines were never intended to displace the sentencing discretion of the revoking court.

In sum, the instant case presents a crucial question of legislative interpretation and intent. Certainly the guidelines were intended to apply to probation revocations, as Rule 3.701(d)(14) clearly states. However, it does not automatically follow that each and every guidelines provisions will apply uniformly in every conceivable sentencing scenario. The purpose of any given provision must be examined in order to uncover its intended scope. As regards Rule 3.701(d)(11), its obvious purpose is to prohibit consideration of extraneous illegal conduct in the departure equation. The question here presented is whether this salutory purpose is in any manner served by the application of this provision to the revocation arena, where the trial court's sole and solemn duty is to examine such conduct, determine whether it constitutes a violation, and if so, the appropriate penalty. Common sense, the granddaddy of all reason, dictates in no uncertain terms a negative response.

In accord with Tuthill, supra, see Lewis v. State, 510 So.2d 1089 (Fla. 2d DCA 1987). In accord with the dissent see Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988) and Lambert v. State, 517 So.2d 133 (Fla. 4th DCA 1988).

A final point which must be addressed is that portion of Judge Baskin's opinion holding that because the legislature amended the guidelines to prohibit appellate review of the extent of departure, the defendant should be allowed to withdraw his election to be sentenced under the guidelines. The first problem with this analysis is that it puts the cart before the horse, in that the extent of the departure does not become an issue until and unless the grounds for departure are upheld. Here Judge Baskin determined that the grounds were improper, thus the extent of the departure could hardly have been more irrelevant. The portion of the opinion dealing with that issue is therefor meaningless dicta. However, should this Court hold the departure grounds valid, this issue must be addressed.

As the dissent points out, the proper remedy for guidelines amendments falling within the dictates of Miller v. Florida, 482 U.S. _____, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), is to deny the amendment retroactive application to offenses committed prior to the effective date, and to apply the guideline provisions in effect at the time of the offense. Thus, the proper resolution of this issue is to ignore the amendment and examine the reasonableness of the extent of departure. As stated by the dissent, the defendant's despicable conduct, virtually identical to that for which he was placed on probation and within six months thereof, was more than an adequate basis for the 12 1/2 year upward departure.

Judge Baskin's decision to allow the defendant to withdraw his guidelines election defies explanation. Should this Court reach this issue, its proper resolution is, to put it mildly, readily apparent.

CONCLUSION

The decision of the District court below is erroneous, and should therefor be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **BETH WEITZNER**, Assistant Public Defender, Appellate Division, 1351 N. W. 12th Street, Eighth Floor, Miami, Florida 33125 on this 27th day of June, 1988.

RALPH BARREIRA
Assistant Attorney General

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