IN THE SUPREME COURT OF FLORIDA

KEVIN BELL,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 72,979

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Kevin Bell, the subject of the violation of probation proceeding and appellant below in Bell v. State, 528 So.2d 554 (Fla. 4th DCA 1988) (appended),will be referred to as "petitioner." Respondent, the State of Florida, petitioner's opponent below, will be referred to "the State."

References to the five-volume record on appeal will be designated "(R:)." References to the one-page supplemental record will be designated "(SR:)."

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

Subject to the descriptive additions and clarifications included in the argument portion of this brief, the State accepts petitioner's "statement of the case and facts" as a reasonably accurate narrative synopsis of the legal occurrences and the evidence adduced below for the purpose of resolving the narrow legal issue presented upon certiorari.

SUMMARY OF ARGUMENT

The judge below properly departed from the sentence recommended under the guidelines upon revoking petitioner's probation for aggravated battery based both upon petitioner's use of excessive violence in committing this crime and upon his use of same in subsequently arsonistically misbehaving himself. Hence, the Fourth District properly affirmed this departure.

ISSUE

THE JUDGE BELOW PROPERLY DEPARTED FROM THE SENTENCING GUIDELINES, AND THE FOURTH DISTRICT PROPERLY AFFIRMED THIS DISPOSITION

ARGUMENT

Petitioner essentially alleges that the judge below reversibly erred by departing from the Fla.R.Crim.P. 3.988(d) and 3.701(d)(14) recommended net incarcerative ceiling of 3½ years (R 791) to impose a 15 year sentence (R 792-793; 749-751) upon violating his probation for aggravated battery (R 784; 799) because the two reasons the judge advanced for this departure were inadequate. Specifically, petitioner charges that the first reason - the excessively violent nature of the arsonistic criminal escapade upon which his probation was partially violated (R 792-793; 799) - was legally improper because he was subsequently acquitted of the substantive underlying offenses (SR 1). Petitioner charges that the second reason - the excessively violent nature of the aggravated battery for which he was being sentenced itself (R 793) - was legally improper because it was not advanced by the judge who initially placed him on probation (R 784), and was also factually unproven (R 799; 766-768). Petitioner alleges that he is entitled to be resentenced within the guidelines as a result of these purported errors. The State disagrees with all of petitioner's contentions.

We turn to the first reason first. Petitioner correctly does not contest that the excessively violent manner in which a probationer perpetrates subsequent acts of misconduct may ordinarily serve as a predicate for a departure sentence upon the revocation of his probation. State v. Pentaude, 500 So.2d 526, 528 (Fla. 1987); Isgette v. State, 494 So.2d 534, 536-537 (Fla. 4th DCA 1986); Rodriguez v. State, 464 So.2d 638 (Fla. 3rd DCA 1985). Petitioner further commendably does not contest that under the Fourth District's recent decision of Lambert v. State, 517 So.2d 133, 134 (Fla. 4th DCA 1987), review granted, Case No. 71,890 (Fla. 1988), a conditional libertarian need not be convicted of the substantive offenses forming the basis for a revocation in order to receive a departure sentence due to the excessively violent nature of the substantive offenses; see also Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988), review granted, Case No. 72,047 (Fla. 1988); contra, Tuthill v. State, 518 So.2d 1300 (Fla. 3rd DCA 1987), review granted, Case No. 72,096 (Fla. 1988). The State fully expects that this Honorable Court will approve the holdings in Lambert and Young as consistent with its prior holding in Pentaude, see also Tuthill v. State, 518 So.2d 1300, 1303-1305 (Schwartz, C.J., dissenting), thus resolving the instant dispute.

Petitioner's attempt to distinguish Lambert from his case, on grounds that that defendant was apparently not subse-

quently acquitted of the excessively violent substantive offenses forming the basis of his revocation, is unpersuasive for three reasons. First, it ignores the fact that the sentencing judge here explicitly found beyond a reasonable doubt that petitioner had committed the substantive offenses based upon his observations as the presiding judge at petitioner's first trial, in which the jury deadlocked 10-2 in favor of convicting petitioner (R 749; 725). The fact that another jury subsequently voted to acquit petitioner of these substantive offenses is logically irrelevant because these verdicts could have been influenced by improper considerations such as a jury pardon or the improper admission of defensive evidence rather than by the inconclusiveness of the prosecution's evidence. See Gragg v. State, 429 So.2d 1204, 1206 (Fla. 1983), cert. denied, 464 U.S. 820 (1983). It is legally irrelevant because the task of weighing the evidence upon which a sentencing guideline departure may be based belongs to the sentencing judge, not a jury.

Second, the procedural ramifications to our system of justice in permitting a defendant to employ an apparent jury-pardon acquittal to retrospectively vitiate a sentencing departure which was clearly valid when it was entered under Pentuade would be nightmarish. Compare Holland v. State, 466 So.2d 207, 209 (Fla. 1985) and Amoros v. State, 13 F.L.W. 510 (Fla. Sept. 15, 1988) with State v. Perkins, 349 So.2d 161 (Fla. 1977).

The State would suggest that a defendant's subsequent acquittal on the substantive offenses for which his probation was revoked could form an appropriate basis for a discretionary reduction in sentence under Fla.R.Crim.P.3.800(b) by the trial judge, but should not form the basis for a mandatory reduction in sentence by a reviewing court. The trial judge, better than a reviewing court, will know the reasons behind a defendant's acquittal and whether they justify mitigation.

Third, proof beyond a reasonable doubt that a probationer committed a subsequent substantive offense is simply not necessary to revoke his probation and impose a more stringent sanction. Russ v. State, 313 So.2d 755 (Fla. 1975), cert. denied, 423 U.S. 924 (1975); Bernhardt v. State, 288 So.2d 490, 500 (Fla. 1974); compare §921.001(5),Fla. Stat. (1987), Fla.R. Crim.P. 3.701(b)(6) and Abt v. State, 528 So.2d 112, 114 (Fla. 4th DCA 1988).

Just as petitioner's attack upon the first reason expressed for the instant departure cannot survive decisions adverse to the criminal defense bar in Lambert, Young and Tuthill by this Court, the State recognizes that its defense of this reason cannot survive decisions adverse to it in these cases. However, regardless of who wins the battle over the first reason expressed for the departure, the State should win the war over whether this departure itself should be upheld, inasmuch as the second and final reason expressed therefore is

indisputably valid, compare Albritton v. State, 476 So.2d 158, 160 (Fla. 1985) with §921.001(5) and Abt v. State.

The Florida courts have intimated that the excessively violent manner in which a probationer perpetrated the offense for which he was placed on probation may ordinarily serve as a predicate for a departure sentence upon revocation, see e.g. Roberge v. State, 484 So.2d 82 (Fla. 2nd DCA 1985), cause dismissed, 488 So.2d 831 (Fla. 1986). Petitioner's argument that Shull v. Dugger, 515 So.2d 745 (Fla. 1987) requires that the nature of the offense for which a defendant was originally placed upon probation cannot be considered as a predicate for departure upon revocation is both contrary to the command of Fla.R.Crim.P. 3.701(d)(3) that "the penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense," and absurd. By what logic should a defendant who has already reaped the benefit of being undersanctioned once be allowed to parlay that ill-gotten gain into partial immunity from a departure sentence upon revocation? Shull applies to bar redepartures where all the reasons advanced for a departure at the defendant's first sentencing have been struck down as invalid, but nothing therein even remotely suggests that a judge otherwise inclined to give a defendant a break at his first sentencing by placing him upon probation despite the excessively violent nature of the offense must either depart thereupon right then or forever hold his peace.

The practical result of petitioner's interpretation of Shull, if adopted, would be to penalize many good candidates for probation.

Petitioner's argument that the excessively violent nature of the aggravated battery for which he was placed upon probation was not factually proven below is not presented for certiorari review given his failure to object when the judge announced that he was departing upon this basis in open court (R 751), Dailey v. State, 488 So.2d 532 (Fla. 1986). The State would alternatively submit that excessively violent nature of petitioner's act of slicing his victim's left ear in half with a sharp object was sufficiently established by the probable cause affidavit upon which the judge relied (R 799; 766-768).

Because both reasons advanced for the instant departure are legally and factually inviolable, this Court should approve the departure itself. Petitioner's argument to the contrary ultimately is based less upon an analysis of the applicable law than upon his subjective belief that this departure is somehow "repugnant to fair play and fundamental fairness," a phrase he employs in substantially the same form eight telling times. The State is confident that this Court's resolution of this case will be based upon the law, and not petitioner's view of what is equitable. However, if petitioner can offer an objective definition of "fundamental fairness" in his reply brief, the State will be happy to debate for academic purposes whether this departure is "fundamentally fair" at oral argument.

CONCLUSION

WHEREFORE, the State urges that this Honorable Court APPROVE the decision of the Fourth District affirming the sentence imposed by the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Answer Brief of Respondent on the Merits" with Appendix has been furnished by courier to MARGARET GOOD, Assistant Public Defender, 15th Judicial Circuit, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 11th day of October, 1988.

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Of Counsel