IN THE SUPREME COURT OF FLORIDA

AARON HAMILTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPREME COURT CASE NO.: 73,398

PETITIONER'S BRIEF ON MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On January **2, 1986** Petitioner was placed on **18** months community control after pleading no contest to three drug sale offenses. (R 144, **183, 198)**

On October **8, 1986** an affidavit was filed alleging Petitioner violated three conditions of his community control. One of the allegations in the affidavit was that Petitioner violated criminal law in that "he and others conspired to burn and did burn three barns as evidenced by his arrest by the Marion County Sheriff's Department." (R 145)

After a hearing the trial court found Petitioner guilty of violating community control and proceded to sentencing. (R **368)** The guideline recommended sentence (including the one cell increase allowed in violation of probation cases) was up to 3½ years in prison. The Court decided to depart from the recommended range and sentenced Petitioner to fifteen (15) years for the following reasons, as noted in writing on the scoresheet:

(1) violation occurred nine months after being sentenced to community control.

> (2) burning three barns was a substantial violation and was flagrant, "egregious" State v. Pentaude, 500 So.2d 526 (Fla. 1987). (R 162)

On appeal Petitioner asserted that a sentencing guideline departure could not be based on a substantive criminal offense for which he had neither been tried nor convicted. The Fifth District Court of Appeal rejected this argument in an opinion which stated only the following:

> AFFIRMED on the authority of Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988).

Hamilton v. State, 533 So.2d 926 (Fla. 5th DCA 1988). (Appendix A) Judge Cowart dissented stating his opinion that "this Court should recede from Young v. State . . . and follow the majority view . . . to the effect and result that a 'subsequent offense' should not be used to justify a departure in any event unless the defendant is convicted of the subsequent offense. . ." Judge Cowart also suggested the following question should be certified as one of great public importance:

> CAN A DEPARTURE SENTENCE ON A PRIOR OFFENSE BE BASED ON A SUBSEQUENT OFFENSE AS TO WHICH, AT THE TIME OF SENTENCING, THE DEFENDANT HAD NOT BEEN CONVICTED?

On December 2, 1988 Petitioner filed timely Notice to Invoke Discretionary Jurisdiction. Jurisdiction was accepted in an order dated March 2, 1989.

SUMMARY OF ARGUMENT

In Point I herein, Petitioner argues that the trial court erred in basing a guideline departure on the facts of an offense for which Petitioner was charged, but eventually acquitted. The sentencing guideline rule prohibits departure based on factors relating to prior arrests without conviction. Further, the facts upon which the trial court relied to depart were obviously not proven beyond a reasonable doubt.

In Point 11, Petitioner argues the trial court's second reason for departure was also invalid. Though "timing of the offense" has been held to be a valid reason for departure in an appropriate case, this rationale is not appropriate in Petitioner's case. A violation committed nine months into an eighteen month term of community control can hardly be considered extraordinary.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINE RECOMMENDED RANGE WHERE THE REASONS FOR DEPARTURE RELATED TO AN OFFENSE FOR WHICH PETITIONER HAD BEEN ARRESTED BUT NOT CONVICTED.

Petitioner was found guilty of violating conditions of community control by committing two technical violations and one new criminal offense. At sentencing one of the trial court's reasons for departure from the guidelines was the egregious nature of the substantive violation; the fact that Petitioner had been arrested and charged with burning three barns. State v. Pentaude, 500 So.2d 526 (Fla. 1987) However, at the time the barn burnings were used to justify a departure sentence, Petitioner had been arrested but ~~not~~ convicted for the arson charged. In fact, as Judge Cowart points out in his dissent in this case, Petitioner was eventually acquitted in the barn burning case. Hamilton v. State, 533 So2.d 926 (Fla. 5th DCA 1988); Erwin v. State, 532 So.2d 724, 726 (Fla. 5th DCA 1988).

At issue in this case is whether a guideline departure sentence may be based on an offense for which Petitioner had been arrested and on which a community control violation has been based; but for which the defendant had not been convicted. This issue is pending before this Court in several cases. Young v. State, Supreme Court case no. 72,047; Wesson v. State, Supreme Court case no. 73,605; State v. Tuthill, Supreme Court case no. 72,096; Lambert v. State, Supreme Court case no. 71,890. Arguments

already made in pending cases will therefore be repeated only in brief:

(1) Florida Rule of Criminal Procedure 3.701(d)(11) expressly provides, "Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction." (emphasis added) Therefore, the guidelines rules directly prohibits the departure reason used in this case.

(2) The standard of proof needed to find a violation of probation or community control is lower than that needed for criminal conviction. The facts relied upon for revocation only have to proven *so* as to satisfy the "conscience of the court". Louis v. State, 510 So.2d 1089 (Fla. 2nd DCA 1987). Whereas the facts upon which a guideline departure is based must be proved "beyond a reasonable doubt." State v. Mischler, 488 So.2d 523 (Fla. 1986). Therefore, in this case, the arson charges could properly be used as a basis for finding Petitioner in violating of his community control, but not as a justification to depart from the guidelines.

(3) Even if arrest for a substantive offense could justify departure, it cannot be disputed that acquittal of the substantive offense would bar its use in justifying departure. The Fifth District Court of Appeal, despite its decision in Petitioner's case, has itself recognized this principal. Royer v. State, 488 So.2d 649, 650 (Fla. 5th DCA 1986).

This Court should reverse Petitioner's sentence, holding that even in community control or probation violation cases, departure may not be based on arrests without convictions.

POINT II

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE RANGE BASED ON THE FACT THAT PETITIONER'S VIOLATION OCCURRED NINE MONTHS AFTER HE WAS PLACED ON COMMUNITY CONTROL.

The trial court also stated as reason for departure from the guidelines that fact that Petitioner's violation occurred only nine months after he was placed on community control. In Williams v. State, 504 So.2d 392 (Fla. 1987), this Court wrote that:

> Neither the continuing or persistent pattern of criminal activity nor the timing of each offense in relation to prior offenses and relief from incarceration or supervision are aspects of a defendant's prior criminal history which are factored in to arrive at a presumptive guideline sentence.

This Court has therefore accepted the "timing of the offense" rationale for a departure sentence. However, the District Courts of Appeal have issued many conflicting opinions on the question of just how soon after release from incarceration or supervision an offense need occur to justify departure under this rationale. In Harmon v. State, 531 So.2d 391 (Fla. 1st DCA 1988), the Court upheld a departure where the defendant had committed a new offense approximately fifteen months after being released on parole. The Court considered this to be "recent release from incarceration". On the other hand, in Saldana v. State, 510 So.2d 1238 (Fla. 3rd DCA 1987), departure was disallowed where the defendant violating a two year probation by committing an

offense five months after the term began. The Court wrote that "committing a nonviolent third degree felony some five months after the term began involves nothing more than an 'ordinary' violation which does not justify an departure beyond the one cell increase automatically authorized. . . " See also, Larry v. State, 527 So.2d 883 (Fla. 1st DCA 1988) (offense committed fourteen months after release from prison, valid reason for departure); Gibson v. State, 519 So.2d 756 (Fla. 1st DCA 1988) (offense committed fourteen months after release, valid reason for departure); Ferquson v. State, 13 FLW 1702 (Fla. 3rd DCA July 19, 1988) (offense committed five and one half months after being placed on probation, not valid reason for departure); Bruton v. State, 510 So.2d 1243 (Fla. 1st DCA 1987) (offense 22 months after release from prison, not valid reason for departure).

Petitioner would first suggest that the decisions cited above show that the "timing of the offense" reason for departure is unmanageable in that it will inevitably lead to the type of unwarranted disparity in sentencing that the guidelines were created to avoid. This Court should recede from Williams v. State, supra, before the exception swallows the rule.

If the Court is unwilling to recede from Williams, the use of the "timing" reason in Petitioner's case should still be held invalid. Logically, a reason for departure must be something which separates the case under consideration from the norm. It is not enough that the guidelines do not take a particular factor into account; that factor must have some significance which is relevant to the sentencing decision. Therefore the

question in Petitioner's case must be: In community control violation cases, is the fact that the violation occurred nine months after the beginning an 18 month term of supervision different from the norm in some significant way? Clearly it is not. Therefore, "timing of the offense" cannot be a valid reason for departure in this case.

Because neither reason given by the trial court supports departure, on remand the trial court must sentence Petitioner within the recommended guideline range. Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

CONCLUSION

Based on the arguments and authorities cited herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this case and order the case remanded for resentencing within the recommended guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, FL 32014, in his Basket, at the Fifth District Court of Appeal, and a copy mailed to: Aaron Hamilton, 1150 S.W. Allapattah, Indiantown, FL 33456, this 27th day of March, 1989.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER