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047

IN THE SUPREME COURT OF FLORIDA

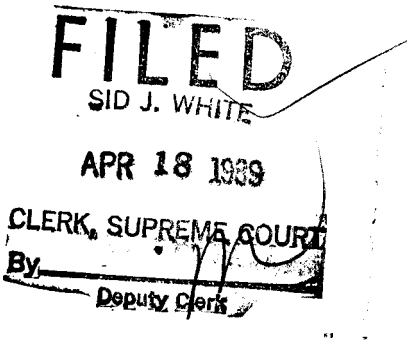
AARON HAMILTON,

Petitioner,

v. CASE NO. 73,398

STATE OF FLORIDA,

Respondent.
_____/



RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

POINT ONE: This court should affirm the trial court's finding that appellant had burned three barns while on community control and that this constituted egregious conduct beyond an ordinary violation, which was sufficient to justify a departure sentence. The trial judge was well aware of the level of proof "beyond a reasonable doubt" necessary to support a departure sentence. The evidence and testimony at the revocation hearing supports his conclusion, that appellant burned the three barns.

In this case, a jury later acquitted appellant of this offense but this may have been due to a jury pardon, or missing state witnesses, or any number of reasons. The judge, in this case, offered rational and convincing reasons why he did not believe appellant's testimony claiming he did not burn the barns, and only intended to "rip off" Dr. Erwin. Appellant's testimony apparently was believed by the jury when they acquitted appellant in a separate judicial proceeding.

However, the issue is not whether there was evidence presented at a separate jury trial sufficient for a conviction, but whether there was evidence beyond a reasonable doubt presented at the revocation hearing that appellant committed egregious conduct sufficient to justify a departure.

Therefore, this court should affirm the trial court's first departure reason based on appellant's burning three barns while on community control.

POINT TWO: The trial judge's other departure reason was based on the timing of the violations, not just the timing of the offenses as appellant argues. Appellant committed a number of violations, including smoking crack cocaine while on community control and burning three barns, within nine months after being placed on community control for drug offenses. This was a valid departure reason under either rationale, timing of the violations or timing of the offenses and this court should affirm the trial court.

POINT ONE

WHERE A TRIAL JUDGE FINDS THAT THE UNDERLYING REASONS FOR VIOLATION OF PROBATION (OR COMMUNITY CONTROL) 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 PROBATION (OR COMMUNITY CONTROL).
(Appellant's issue restated to conform with certified question in *Young v. State, Supreme Court Case No. 72,047, with the exception of parenthetical material).*

ARGUMENT

In *Young u. State, 519 So.2d 719 (Fla. 5th DCA 1988), rev. pending, Fla. Supreme Court Case No. 72,047; Eldridge u. State, 531 So.2d 741 (Fla. 5th. DCA 1988), rev. pending, Fla. Supreme Court Case No. 73,201,* the above question was certified as a question of great importance by the Fifth District Court of Appeal.

In the instant case, *Hamilton u. State, 533 So.2d 926 (Fla. 5th DCA 1988), rev. pending, Fla. Supreme Court Case No. 73,398,* the Fifth District Court of Appeal issued a *per curiam* opinion which stated "AFFIRMED on the authority of *Young u. State, 519 So.2d 719 (Fla. 5th DCA 1988)*"

The Fifth District certified conflict with *Tuthill u. State, 518 So.2d 1300 (Fla. 3d DCA 1987); Wilson u. State, 510 So.2d 1088 (Fla. 2d DCA 1987); Lewis u. State, 510 So.2d 1089 (Fla. 2d DCA 1987),* in previous cases on this issue.

In the instant case, after hearing the evidence, the judge departed from the guidelines based on two reasons. He stated

that he believed appellant's burning of the three barns was sufficient by itself to support departure (R 373, 3750.

It is immaterial whether, at a later and separate judicial proceeding, appellant was acquitted of burning the barns by a jury. For purposes of determining whether the trial court's reasons for departure were supported beyond a reasonable doubt, this court must look to the revocation hearing record of the evidence presented to the trial judge. Essential state witnesses may have been missing at the later jury trial. Any number of reasons, such as a jury pardon may have caused the later acquittal.

Moreover, from comparing a description of the appellant's testimony at trial as noted in ***Erwin*** *v. State, 532 So.2d 724, 727 (Fla. 5th DCA 1988)*, with the judge's reasoning at the probation revocation hearing, it is obvious that the judge did not believe appellant's testimony while the jury at the later trial may have (R 373-375).

Appellant' jury trial testimony as described in *Erwin,* at 532 So.2d at 727 stated:

> Aaron later testified at his own trial in a manner that might have exculpated the appellant in this trial, at least as to the arson counts. He was (ironically) acquitted. He testified that he did not set any fires. He and Oscar only planned to rip off Erwin and take his money. When Aaron arrived at the barns, they were already on fire. Aaron did not know who set the fires, but he thought he and Oscar had been set up!

While the jury at appellant's trial may have believed this testimony by appellant, it was obvious the judge reasoned differently at the revocation hearing:

> THE COURT:
>
> * * *
>
> And I feel like the burning barns, in and of itself is sufficient reason. If we believe the testimony, which I do, it's clear that he went there to burn something and the testimony was that he was hired to burn a home. That was discussed. They went to the area with a map. If they were going to rip off Dr. Erwin then all they would have had to do is drive to a pay phone. They would not have needed to drive to the farm to do anything. All they would have had to do was notify Dr. Erwin that the deed had been done, collected the money, and the barns were in fact burned.

(R **373,** 374)

This court in *State v. Pentaude, 500 So.2d 526, **528** (Fla. 1987)* said:

> [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 guideline range and impose an appropriate sentence within the statutory limit.

Id. This court delineated in *Pentaude* some of the factors which may support departure:

> The trial judge ha5 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 before violating the terms and conditions, and any other factor material or relevant to the defendant's character.

Id.

In regard to appellant's arguments, we will discuss these in the order presented in his brief.

I. Florida Rule of Criminal Procedure 3.701(d)(11) in stating "Reasons for deviating from the guidelines shall not include factors relating to prior arrests without convictions" refers to arrests prior to the substantive offense for which a person is placed on community control or probation.

In the instant case, this would be arrests which occurred prior to the offense, the three drug sales, for which appellant was placed on community control. The reasons for this are as follows:

First: There is a distinction between acts which do not result in convictions committed prior to an original offense and those committed after a defendant has been placed on probation on the original charge and extended judicial grace. The egregious circumstances forming the basis for revoking a defendant's probation and imposing sentence may not constitute a separate offense on which a separate sentence could be imposed. A trial court should be allowed to properly consider such circumstances as a basis for departing from the sentencing guidelines. *Rodriguez u. State, 464 So.2d 638 (Fla. 3d* ***DCA*** *1985).*

SECOND: *Pentaude* refers to a finding by the trial judge of an egregious offense, and does not require a conviction. *Young u. State, 519 So.2d at 722.* Although we acknowledge that in *Pentaude,* the defendant's probation violation resulted in a separate criminal conviction, nothing in the language of this court's decision

required a conviction. Furthermore, to require a conviction for egregious circumstances constituting a probation violation but allow departure under *Pentaude* for acts not rising to the level of substantive offenses is to penalize most of those defendant's who commit the least egregious violations and to forego penalizing those whose violations are most contemptuous of the probationary process.

Under the ruling, the defendant asks this court to make defendants who violate a number of conditions which are merely technical in nature or who are only on probation a short period of time before violating the terms and conditions of their probation could receive a departure sentence; whereas appellant and others who commit more egregious acts where the evidence is sufficient to convince a judge that they did those acts beyond a reasonable doubt, could not receive a departure sentence.

2. Appellant argues that where a defendant on probation violates his probation by committing acts constituting egregious circumstances, that absent a conviction for those acts, the judge is restricted by Rule 3.701(d)(11) from imposing a departure sentence for those acts. As support for this argument, appellant submits that while the level of proof for a revocation hearing is the greater weight of the evidence, the level of proof required for a departure sentence is "beyond a reasonable doubt," and therefore a conviction is necessary for a departure sentence.

In the instant case, the trial judge determined that the evidence presented at the revocation hearing demonstrated beyond a reasonable doubt that appellant had burned the three barns.

Therefore, a conviction is not necessary for a departure. Appellant's argument is that such a determination would have to be made in a separate judicial proceeding before a departure would be authorized. Such a rule would require that unless a defendant was tried and convicted before the revocation hearing, he could not receive a departure sentence for egregious conduct. Such a rule also in effect removes sentencing determination from a judge because, as happened in this case, the judge may find the offense was established beyond a reasonable doubt for purposes of a departure, while a jury may not, for purposes of a conviction.

As Chief Judge Schwartz of the Third District expressed in his dissent in ***Tuthill:***

> 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, ***State v. Mischler,*** 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) (citation omitted) 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.

Tuthill, 518 So.2d 1303-1304 (footnote omitted); Young, 519 So.2d at 722.

3) In regard to appellant's third argument that the acquittal of appellant at a later trial bars the departure reason, we have already discussed the fallacies in that argument. 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).* The departure reason was justified in this case "beyond a reasonable doubt" and a separate judicial proceeding should not be determinative of whether the departure was justified. The evidence before the judge at the revocation hearing is the relevant evidence for determination of whether the departure is justified. A departure reason should not be held hostage to the outcome of some other proceeding not before the court.

This court should affirm the trial court in finding that the burning of the three barns was established by the evidence "beyond a reasonable doubt" and a conviction at a separate judicial proceeding was unnecessary.

POINT II

THE TRIAL COURT DID NOT ERR 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 judge's first reason for departure was stated as follows:

> THE COURT: Okay. The Court exceeds the guidelines specifically based on two criteria. One, the violation occurred nine months after he was placed on community control, and I think that's a relatively short period of time.

(R 373)

On January 2, 1986, appellant was placed on community control (R 144). An affidavit for violation of community control was filed October 8, 1986, alleging that appellant violated three conditions of his community control: Condition (5): [i]n that on September 7, 1986, the community controllee along with his brother Oscar Hamilton and Dr. Erwin did conspire to burn and did burn three (3) barns located on "Another Episode Farm", as evidenced by his arrest on September 16, 1986 by the Marion County Sheriff's Department; Condition 9: [i]n that, since August 20, 1986 to the present, the community controllee failed to contact this reporting officer daily as instructed"; and Condition 11: [i]n that on August 20, 1986, August 27, 1986 and September 16, 1986 the community controllee was absent from his residence (R 145).

On April 19, 1987 an Amended Affidavit was filed alleging appellant had also admitted in open court on March 25, 1987 smoking "Crack Cocaine between September 7, 1986 and September 16, 1986 in violation of condition 5, and changing his residence without the consent of his community control officer (R 154). Appellant's Order of Revocation of Community Control states he was violated for condition, 5, 9, and 11 (R 171).

Appellant misconstrues the judge's first departure reason as being based on the timing of the arson offense and cites as support case law dealing with departures based on the timing of offenses. The judge's first departure reason refers to the timing of the violations which were based on appellant's failure to report, being absent from his residence, smoking crack cocaine while he was on community control for three drug offenses, as well as the burning of three barns.

The timing of a defendant's multiple probation violations have been held to be a valid departure reason. *State v. Pentaude, 500 So.2d 526 (1987); Bush v. State, 519 So.2d 1014 (Fla. 1st DCA 1987); Rodriguez v. State, 481 So.2d 24 (Fla. 5th DCA 1985).* But, even under the timing of the offenses, the line of cases which appellant cites, this departure reason was valid. *Harmon v. State, 531 So.2d 391 (Fla. 1st DCA 1988);* (offense committed within fifteen months), *Larry v. State, 527 So.2d 883 (Fla. 1st DCA 1988)* (offense committed within fourteen months); ***Gibson*** *v. State, 519 So.2d 756 (Fla. 1st DCA 1988)* (offense within fourteen months).

Therefore, the departure reason based on timing of the violations including a substantive offense within nine months was a valid departure reason and should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

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 mail to Daniel J. Schafer, Assistant Public Defender, **112** Orange Avenue, Suite A, Daytona Beach, Florida **32014**, this 14th day of April, **1989.**

LAURA GRIFFIN
Of counsel