IN THE SUPREME COURT OF FLORIDA

DERRICK JEROME WESSON,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

CASE NO. 73,605

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

INITIAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR APPELLANT

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INITIAL BRIEF OF PETITIONER

STATEMENT OF THE CASE AND FACTS

The state charged DERRICK JEROME WESSON (hereafter Wesson) with grand theft second-degree [1]. (R45) [2] Wesson pled guilty, was adjudicated guilty, and on December **19, 1986** placed on a three year period of probation. **(R46-47)** On June **11, 1987** Wesson's probation officer filed an affidavit of violation of probation alleging that Wesson had violated his order of probation by failing to file monthly reports for December, **1986** and January, **1987**, and that Wesson had committed a grand theft of a motor vehicle on or about February 7, **1987**. (R48)

Wesson admitted when he testified at the probation revocation hearing that he took a car without permission. (R30)

1/ Violation of Section **812.014** Fla. Stat.
2/ (R) refers to the record on appeal in this case.

He testified that he had been drinking heavily at the time and did not intend to deprive his friend (the vehicle's owner) the use of the automobile (R32). He stated that he was returning the automobile when arrested (R33). He similarly admitted that he did not file written reports for the months of December and January. (R26-27) The court found that Wesson violated two conditions of the Order of Probation. (R34)

The recommended guideline sanction was any non-state prison sanction based on an uncontested 24 point total. (R57) Because the sentence followed a violation of probation the sanction could be increased one cell and not constitute a departure. On July 23, 1987 Judge Powell sentenced Wesson to five years imprisonment with credit to be received for 306 days time served. (R52-53) The judge gave the following reasons in writing to support the four cell departure:

> The Court finds as clear and convincing reasons for the departure sentence of 5 years imposed herein after revocation of probation the following:
>
> 1. Defendant committed a new substantive offense of grand theft second degree of a motor vehicle while on this probation for the offense of grand theft second degree of a motor vehicle.
>
> 2. Defendant has had one previous violation on an earlier grand theft probation.

Wesson appealed and, in Wesson v. State, 14 FLW 120 (Fla. 5th DCA Jan. 5, 1989) the Fifth District Court of Appeal affirmed Wesson's sentence and certified the following as a question of great public importance:

CAN A DEPARTURE SENTENCE ON ONE OFFENSE BE BASED ON THE DEFENDANT'S COMMISSION OF A SECOND OR SUBSEQUENT OFFENSE AS TO WHICH, AT THE TIME OF SENTENCING ON THE FIRST OFFENSE, THE DEFENDANT HAS NOT BEEN CONVICTED?

Wesson. 14 FLW at 120. This brief follows.

SUMMARY OF ARGUMENTS

In simpler terms, this certified question asks whether a departure sentence can be based on an arrest without a conviction. The question is answered by Fla.R.Crim.P. 3.701(d)(11) which, in pertinent part, expressly provides, "Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction." (emphasis added). Not only do the guidelines expressly forbid basing a departure on an arrest without a conviction, to do so violates due process and the right to a jury trial under the state and federal constitutions, in that a defendant is punished without the state having proved the defendant's guilt beyond a reasonable doubt to a jury of the defendant's peers. This is so because, by statute, the maximum permissible sanction that attends a violation of probation (a one-cell bump-up) is exceeded, resulting in the defendant being punished, on the basis of an arrest, more severely than legislated by statute for the crime of which he was initially convicted.

CERTIFIED OUESTION

CAN A DEPARTURE SENTENCE ON ONE OFFENSE BE BASED ON THE DEFENDANT'S COMMISSION OF A SECOND OR SUBSEQUENT OFFENSE AS TO WHICH, AT THE TIME OF SENTENCING ON THE FIRST OFFENSE, THE DEFENDANT HAS NOT BEEN CONVICTED?

The answer to the foregoing question is no, a departure sentence cannot be based on a crime for which the defendant has not yet been convicted of committing, because to do so contradicts a controlling statute and otherwise violates principles of due process. At the onset, it is critically important to recognize, appreciate, and not confuse the distinction between 1) revoking an order of probation based on a violation of law, and 2) imposing a greater punishment than that prescribed by the legislature, e.g., departing from the recommended guideline sanction.

The trial court's ability to base a revocation of probation on a defendant's commission of a substantive offense while on probation is NOT contested. Further, it is NOT contested that a trial court may determine that an order of probation has been violated without having to find that the violation occurred beyond and to the exclusion of a reasonable doubt. Those well-established principles are wholly unaffected by the issue presented herein. This case concerns what happens AFTER a violation of probation has been found by the trial judge to have occurred.

Prior to the passage of sentencing guidelines, a trial judge had absolute discretion to sentence a defendant anywhere up

to the statutory maximum with very few limitations. That vast discretion ended with implementation of Fla.R.Crim.P. 3.701 and Section 921.001(5) Fla.Stat. (1987). Although a trial judge still enjoys some discretion in sentencing a defendant, that discretion is closely regulated by the guidelines. In pertinent part, Fla.R.Crim.P. 3.701(d)(11) provides: "Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction." (emphasis added). This language is unequivocal. See Mack v. State, 489 So.2d 205, 206 (Fla. 2d DCA 1986) ("Although the defendant had been arrested on the charges of committing two felonies, he had not been convicted of these charges at the time of the sentencing in this case. We reject the state's argument that the trial judge's finding, for purposes of probation revocation, that the defendant committed these felonies was tantamount to conviction.") Based on the language of the rule alone, the certified question must be answered no because a departure sentence cannot be based on an "arrest without conviction."

Other reasons require that the certified question be answered in the negative. The guidelines affirmatively address resentencing following revocation of probation.

> Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

Fla.R.Crim.P. 3.701(d)(14). Under this rule, based on a belief by the trial judge that a defendant violated his probation by committing a new offense, the court may move up to the next higher guidelines range even if a defendant is ultimately acquitted on the new substantive charges. For example, in Hamilton v. State, 533 So.2d 926 (Fla. 5th DCA 1988), rev. granted, Sup. Ct. Case No. 73,398, the court based a departure sentence following revocation of probation on a finding that the defendant committed an arson while on probation, an offense for which Hamilton was later acquitted [3/]. Pursuant to Fla.R.Crim.P. 3.701(d)(11) and (14), Hamilton could properly be sentenced on the violation of probation to the next higher cell, because that sentence is permitted under the rules and is therefore not considered a departure. However, when a sanction greater than a one-cell bump is visited upon Hamilton for committing an offense for which he is acquitted, a clear denial of Due Process has occurred. This is so because the state failed to prove the defendant's guilt beyond a reasonable doubt, yet he is receiving greater punishment based on that "offense." Thus, allowing a mere arrest to have the force of a conviction violates the letter and spirit of the Constitution of the United States, the

3/ Hamilton was a Per Curiam: Affirmed decision with citation to Young v. State, 419 So.2d 719 (Fla. 5th DCA 1988), Sup.Ct. Case No. 72,047, a case presently pending review in this Court also on the basis of a certified question similar to the one here presented. Jurisdiction exists for this Court to review Hamilton pursuant to Jollie v. State 405 So.2d 418 (Fla. 1981). This Court may take judicial notice of the facts contained within its own records. Sections 90.202(2),(12), Florida Statutes (1987).

Constitution of Florida, and the sentencing guidelines. Amendments V, VI and XIV, United States Constitution; Article 1, Sections 9, 16 and 22, Fla. Const. (1976).

CONCLUSION

Because a departure cannot be based on a mere arrest without conviction by the express language of Florida's Sentencing Guidelines, the certified question should be answered in the negative and the case remanded for further proceedings.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0353973
112 Orange Avenue, Suite A
Daytona Beach, Florida 32014
Phone: 904/252-3367

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014, in his basket at the Fifth District Court of Appeal and mailed to Derrick J. Wesson, #490158, P.O. Box 628, Lake Butler, Fla. 32054-0628 on this 28th day of February 1989.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER