IN THE SUPREME COURT OF FLORIDA

DERRICK JEROME WESSON,

Appellant/Petitioner,

v. CASE NO. 73,605

STATE OF FLORIDA,

Appellee/Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Respondent concurs in the statement of the case and facts as cited by appellant/petitioner with the following additions:

The victim testified at the revocation hearing that when he awoke in the middle of the night, appellant, who had been allowed to stay in the victim's apartment for two nights (R 5), was gone and so was the victim's Mustang automobile and thirty dollars **($30)** from his wallet (R **6-7).** The arresting officer testified that he had received a report on a stolen Mustang and spotted a vehicle fitting its description being driven by appellant (R **16).** Appellant admitted to the officer that he had taken the vehicle without the permission of the owner, but was going to return it (R **17-18).** Appellant admitted in court that he took the victim's vehicle and twenty ($20) dollars from him and stated he had no excuse for doing so (R **30-31).**

Appellant was presently on probation after having been found guilty of grand theft of a motor vehicle (R **46).** Appellant was found to have violated that probation by again committing the offense of grand theft second degree of a motor vehicle and failing to file the required monthly reports (R **34).** Appellant had been placed on probation in the prior grand theft case and had violated that previous probation (R **39-40).**

The Fifth District Court of Appeal affirmed the trial court's imposition of a departure sentence. (Appendix)

SUMMARY OF ARGUMENT

In answering the certified question, the emphasis should not be on whether a departure sentence can be based on an arrest without conviction, but on the character of a substantive violation found to have been committed by the trial court. While the guidelines may preclude a departure based on prior arrests, they say nothing to prohibit the consideration of subsequent offenses, the commission of which violate a defendant's conditions of probation. To hold otherwise would unreasonably require a stricter standard of proof for a substantive violation than for a technical violation, or would force the courts to sentence a probationer who violated his probation by committing a crime to the same penalty as one who had violated by committing only some technical violation like failing to file his monthly report. The decision of the district court should be affirmed by answering the certified question in the affirmative.

CERTIFIED QUESTION

> 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?[1]

The commission of a crime for which there has not yet been a conviction is a factor which cannot be scored and is not reflected on a guidelines scoresheet prepared to aid the court in imposing an appropriate sentence. However, the substantive nature of an offense which violates the conditions of the offender's existing probation should not be ignored, especially when the probationer admits during the revocation and sentencing proceeding that he did commit the subsequent crime. Although the arrest for the offense cannot be scored, Florida Rule of Criminal Procedure 3.701(d)(11) does not preclude the court from considering the subsequent crime as a basis for departure as its language refers only to a defendant's past record.

In Tuthill v. State, 518 So.2d 1300 (Fla. 3d DCA 1987)(Schwartz, C.J. dissenting), a plurality decision, one judge concurred in result only and another wrote a lengthy dissent emphasizing the clear language from State v. Pentaude, 500 So.2d 526 (Fla. 1987), which is as follows:

> [T]he controlling case of *State v. Pentaude*, [citation omitted] and those which follow it, emphasize that it is the violation itself--as opposed to some distinct factual demonstration and finding as to the

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[1] The same or similar question is presently before this court in Eldridge v. State, Case No. 73,201; Hamilton v. State, Case No. 73,398; and Young v. State, Case No. 72,047.

> basis of the violation--which is determinative.
>
> * * *
>
> "Where 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...."
>
> * * *
>
> By no means...does the rule [3.701 d. 14] even purport to completely limit the trial court's discretion in sentencing when compelling *clear and convincing* reasons call for departure....The trial judge has discretion to so depart based upon *the character of the Violation*....

518 So.2d at **1303.**

Appellant argues that a departure Standard must be beyond a reasonable doubt, and therefore a substantive offense which is the basis for a violation of probation could never be the reason to depart since the standard of proof for such a violation is less than a reasonable doubt. Judge Schwartz addressed this argument and pointed out that it was specious. The flaw in that argument is simply that such reasoning would have to apply to all technical violations of probation as well, and hence, a violation of probation or community control would never be the basis for departure. **518** So.2d **1304,** n.3. Appellee urges this court to adopt the reasoning of Judge Schwartz' dissent in Tuthill.

It is well established that violation of probation proceedings involve a lesser standard of proof than beyond a reasonable doubt. Revocation of probation can be based on the

greater weight of the evidence. Rita v. State, 477 So.2d 80 (Fla. 1st DCA 1985), rev. denied, 480 So.2d 1296. The trial court has the inherent power to revoke probation anytime the court determines the probationer has violated the law. Stafford v. State, 455 So.2d 385 (Fla. 1984). The evidence need only be sufficient to satisfy the conscience of the court that a substantial violation of a condition of probation has occurred. Clark v. State, 482 So.2d 43 (Fla. 4th DCA 1981). It is unnecessary to obtain a conviction for the unlawful act in order to revoke probation. Maselli v. State, 446 So.2d 1079 (Fla. 1984). The probationer can lose his right to probation notwithstanding his acquittal on the underlying substantive defense. Borges v. State, 249 So.2d 513 (Fla. 1971). By requiring a conviction for the subsequent substantive offense before a trial court can depart on the basis of the egregious nature of the violation, the impractical result would be to require the subsequent case to be tried before the probation violation hearing.

Appellant also argues the cause of the defendant in Hamilton v. State, 530 So.2d 926 (Fla. 5th DCA 1988), rev. granted, S.Ct. Case No. 73,398, in support of his position on the certified question; however, the trial court did not depart in the instant case based only on an offense for which conviction had not been obtained, and further distinguishing this case from Hamilton is appellant's admission to the court that he committed the subsequent offense. It is clear from the stated reason of the court that the appellant's commission of exactly the same kind of

crime for which he was originally placed on probation was the primary concern of the trial court, as well as the fact that this was appellant's second violation of probation. It is the character of the violation which concerns the court, not the mere fact of violation. See, Addison v. State, 452 So.2d 995 (Fla. 2d DCA 1984); Isqette v. State, 494 So.2d 534 (Fla. 4th DCA 1986).

The finding of a violation by the trial court should be binding and determinative in the sentencing process. As Chief Judge Schwartz stated:

> To hold otherwise by requiring proof beyond a reasonable doubt to support a guidelines departure in a probation situation . . . 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] requires proof of a violation sufficient only to satisfy the conscience of the court.

518 So.2d at 1304.

Based upon the above, the certified question should be answered in the affirmative.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Resectfully submitted,

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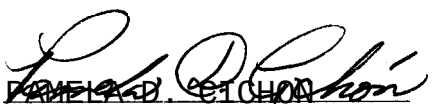
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by mail to Larry B. Henderson, Assistant Public Defender, counsel for the appellant/petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 20th day of March, 1989.



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