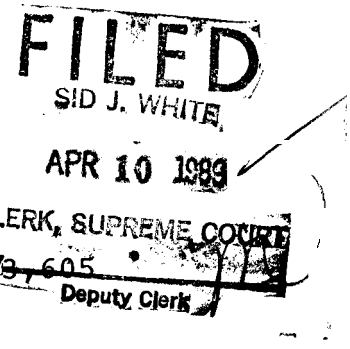
IN THE SUPREME COURT OF FLORIDA



DERRICK JEROME WESSON,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

CASE NO. 73,605

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

DERRICK JEROME WESSON, Appellant/Petitioner,	)	
vs.	)	CASE NO. 73,605
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REPLY BRIEF OF PETITIONER

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?

The state argues, "[T]he substantive nature of an offense which violates the conditions of the offenders existing probation should not be ignored, especially when the probationer admits during the revocation and sentencing proceeding that he did commit the subsequent crime.'' Answer brief at 4. Significantly, Wesson did not admit committing a crime in this case and he did not have an opportunity to present a defense in his own behalf in conformity with constitutional requirements. Specifically, Wesson's testimony was that he was drinking heavily when he took the automobile and that he did not intend to deprive the owner of its use (R32). Saying that he took the automobile

is not the same thing as saying he is guilty of theft. The record does not refute that Wesson was drinking heavily from two cases of beer and two fifths of whiskey (R32). The own r of the car testified, "Well, the night before we went to work, that day, and the night we came back to my apartment, we went (and) got some beer and a bottle and we sat around, talked and drank, and went to sleep; the next day got up and went to work." **(R5).** He testified that he did not know what time he went to sleep because he and the Defendant had been drinking (R6). the owner's car was taken by the defendant while the owner slept. When the defendant was apprehended, he was returning the car to his friend *so* that they could go fishing (R32). **A** viable jury question exists as to whether Wesson had the requisite specific intent to deprive the owner of his vehicle such that the failure to accord Wesson those rights prior to imposing a more onerous sanction than would otherwise be permitted violates the right to due process and a jury trial under the state and federal constitution.

The state's reliance on Judge Schwartz' dissent in Tuthill v. State, **518** So.2d **1300** (Fla. 3d DCA **1987)** is misguided, as is the dissenting opinion. Judge Schwartz failed to recognize that a punishment more severe than that authorized for a mere violation of probation is being visited upon the Defendant. The burden of proof notwithstanding, had the trial judge concluded merely that in his opinion Wesson had stolen the car and was therefore violating his probation and sentenced Wesson in accordance with the prescribed sanction, no argument would be advanced by Appellant as to either the revocation of probation or

the guideline sanction. Rather, the distinguishing feature here is that the judge is doing much more than simply revoking the order of probation and imposing the sanction prescribed by the sentencing guidelines. The judge is exceeding the recommended sanction, and basing that increased sentence on the fact that the Defendant committed another crime. Simply said, before a court may punish a defendant for committing another crime, it must in accordance with the constitution be proved that it was committed. This is not saying that the Defendant may not be punished for committing a new substantive offense while on probation, or for violating his probation by committing a new crime when the judge believes that a new crime has in fact been committed while the defendant is on probation, but instead that the punishment prescribed by the legislature for a violation of probation may not be exceeded until it is proved to constitutional standards that the subsequent crime has been committed.

Accordingly, this Court is respectfully asked to answer the certified question in the negative and to remand to the district court for proceedings consistent with its decision.

CONCLUSION

Because a departure cannot be based on a mere arrest without conviction by the express language of Florida's Sentencing Guidelines and because to do so otherwise violates constitutional rights to due process and a jury trial, the certified question should be answered in the negative and the case remanded for further proceedings.

Respectfully submitted,

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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 7th day of April 1989.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER