IN THE SUPREME COURT OF FLORIDA

WILLIAM DEWBERRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 73,701

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the District Court of Appeal, First District. In this brief, the parties will be referred to as they appear before this Court. Attached hereto is the opinion of the lower tribunal. The symbol "R" will denote the record on appeal. The symbol "T" will denote the transcript.

STATEMENT OF THE CASE

By information filed June 5, 1984, petitioner was charged with possession of cocaine, the crime alleged to have occurred on May 11, 1984 (R 5). On September 16, 1985, upon a plea of no contest, petitioner was adjudicated guilty and placed on five years probation (R 18-29).

On January 27, 1986, an affidavit of violation of probation was filed (R 30). On December 14, 1987, that affidavit was dismissed (R 45). On December 21, 1987, an affidavit of violation of probation was filed, alleging that petitioner had committed a sexual battery (R 47). After a hearing on February 9, 1988, petitioner's probation was revoked and he was sentenced to five years in state prison as a departure from the recommended guidelines range (R 66-70).

On appeal, petitioner argued that his guidelines sentence could not be increased beyond the normal one-cell elevation for the probation violation. The lower tribunal disagreed, but certified the question and certified conflict with cases from the Second and Fourth Districts.

A timely notice of discretionary review was filed on February 14, 1989.

STATEMENT OF THE FACTS

V[redacted] L[redacted] S[redacted] testified that petitioner's mother lived next door to her, and that petitioner often came over to use her phone. On December 5, 1987, she was wrapping Christmas gifts when petitioner knocked on her door and she let him in. He sat down and later grabbed her and pulled her to his lap. He took off her underpants and had oral sex with her. He then had intercourse with her and left, all without her consent (T 6-24). Petitioner's mother testified that she heard nothing going on in the victim's apartment (T 46-50). Petitioner admitted having sex with V[redacted] but with her consent (T 53-61).

The court found "beyond a reasonable doubt" that petitioner had raped the girl (T 84). The court noted that the sentence on a violation of probation could be enhanced to the next cell of community control or 12-30 months (T 88). The prosecutor asked for a five year departure sentence (T 89).

The court cited State v. Pentaude, 500 So.2d 528 (Fla. 1987) and expressed the intention to depart from the guidelines because rape was "an incredibly serious offense" and because this was "an egregious violation of probation", although recognizing that petitioner had not yet been convicted of the new sexual battery charge (T 90). The court found that petitioner's commission of the sexual battery merited a departure sentence of five years (T 91).

The court revoked probation and imposed same (R 66-68). A notation on the bottom of the sentencing guidelines scoresheet

apparently sets forth as the sole written reason for departure that appellant committed the sexual battery (R 69).

The lower tribunal affirmed the departure sentence upon a holding that, while it was not necessary to find beyond a reasonable doubt that petitioner had committed a sexual battery, the evidence that he had done so was sufficient to satisfy the conscience of the court and to justify a departure sentence. The lower tribunal certified conflict with other cases and also certified the question.

SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the court below erred when it imposed a departure sentence of 5 years. The court's cited authority is not good support for its departure decision. Many recent cases hold that the court cannot use the commission of a new crime while on probation as a reason for departure where the defendant, as here, has not yet been convicted of the new crime.

This is especially true where the First District has sanctioned departure based upon the least restrictive "conscience of the court" standard of evidence, which conflicts with the standard of proof (beyond a reasonable doubt) which is applicable in criminal trials and which was applicable to guidelines departures when petitioner committed his original crime.

Petitioner will argue in the alternative that even if this Court accepts the lower tribunal's view, his departure sentence still cannot stand because of the nature of his alleged violation.

This Court must vacate the sentence and remand for resentencing within the guidelines, since the court's only reason for departure is invalid.

V ARGUMENT

THE LOWER COURT ERRED IN IMPOSING A FIVE YEAR DEPARTURE SENTENCE FOR THE VIOLATION OF PROBATION FOR THE SOLE REASON THAT PETITIONER HAD COMMITTED THE NEW CRIME OF SEXUAL BATTERY

The lower court was outraged that a probationer would go out and commit a sexual battery while on probation. The main problem with the court's justification for imposing the departure sentence of five years is that petitioner had not yet been convicted of the sexual battery, and for all we know, he has never been convicted of it. Cases are legion which hold that departure cannot be based upon crimes for which no conviction has been obtained. See, e.g., Smith v. State, 490 So.2d 1384 (Fla. 1st DCA 1986) and Fla. R. Crim. P. 3.701(d)(11).

In any sentencing guidelines appeal it is important to reiterate the fundamental principles embodied in the Fla. R. Crim. P. 3.701 (sentencing guidelines) which are:

> Sentencing guidelines are intended to eliminate unwarranted variations in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining their relative importance in the sentencing decision.

The elimination of subjective variations in the sentencing process which had heretofore existed geographically, and indeed from judge-to-judge, throughout the state is its goal.

A departure from the presumptive guidelines sentencing range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating a sentence. Rule 3.701(d)(11). This rule seeks to discourage unwarranted

departures from the sentencing guidelines. Albritton v. State, 476 So.2d 158 (Fla. 1985); Scurry v. State, 489 So.2d 25 (Fla. 1986).

Departures from the presumptive guidelines sentence range are discouraged, to be utilized only in limited circumstances. This Court in State v. Mischler, 488 So.2d 523, 525, (Fla. 1986), held:

> the "clear and convincing reasons" required by the sentencing statute must be "credible" and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that departure is warranted.
>
> * * *
>
> A reason which is prohibited by the guidelines themselves can never be used to justify departure. Santiago v. State, 478 So.2d 47 (Fla. 1985). Factors already taken into account in calculating the guidelines score can never support departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). A court cannot use an inherent component of the crime in question to justify departure. Steiner v. State, 469 So.2d 179, 181 (Fla. 3d DCA 1985). If any of the reasons given by the trial court to justify departure fall into any of the three above-mentioned categories, an appellate court is obligated to find that departure is improper.

In Keys v. State, 500 So.2d 134, 135 (Fla. 1986), this Court further held:

> Even if the "reason" is one which in the abstract may be appropriate for departure, the facts of the particular case must establish the reason beyond a reasonable doubt.

These requirements place a heavy burden on the party advocating a departure both from a persuasive and evidentiary standpoint. The judicial overlay of the statutory requirements have evidenced an intent to ensure the vast majority of sentences stay within the presumptive bounds set by the guidelines ranges.

At bar, petitioner was scored under the sentencing guidelines pursuant to Rule 3.701. Petitioner's presumptive guidelines sentence range was "any non-state prison sanction." Fla. R. Crim. P. 3.701(d)(14) deals specifically with a sentence imposed after revocation of probation. Said rule provides:

> the sentence imposed after revocation of probation 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.

The trial judge could have utilized this rule to increase petitioner's guidelines range to twelve (12) to thirty (30) months in prison. Obviously pursuant to Rule 3.701(d)(14) the trial court had the authority to sentence petitioner up to thirty (30) months in prison. However, the trial judge further departed and imposed a five year sentence, the statutory maximum allowed, even though petitioner had not been convicted by a jury of any degree of sexual battery.

The state never had to prove to a jury beyond a reasonable doubt that petitioner was guilty of sexual battery. Rule 3.701(d)(11) expressly prohibits departures based on "offenses for which the offender has not been convicted." Directly applying this prohibition, the courts have repeatedly held

invalid a sentencing departure greater than one-cell that was based on the defendant having violated his probation by the commission of a substantive offense, where that offense had not resulted in a conviction. See Fisher v. State, 489 So.2d 857, 858 (Fla. 1st DCA 1986); Mack v. State, 489 So.2d 205, 206 (Fla. 2d DCA 1986).

At the time of sentencing in the present case, petitioner had merely been arrested, but not convicted, of another offense. In accordance with Rule 3.701(d)(11), a departure from the recommended guidelines sentence thus may not be predicated upon conduct not resulting in a conviction. State v. Jaggers, 526 So.2d 682 (Fla. 1988); and State v. Tyner, 506 So.2d 405 (Fla. 1987).

The rule was cited as authority in Tuthill v. State, 518 So.2d 1300 (Fla. 3rd DCA 1987), rev. granted, case no. 72,096, for the proposition that one who is on probation for lewd assault and who commits another lewd assault upon the same child cannot receive a departure sentence unless he has been convicted by a jury of the second offense. See also Toles v. State, 14 FLW 364 (Fla. 2nd DCA February 3, 1989); Jacobs v. State, 533 So.2d 911 (Fla. 2nd DCA 1988); and Wilson v. State, 510 So.2d 1088 (Fla. 2nd DCA 1987).

Generally speaking, the sentence for a violation of probation is limited to the original cell (here, non state prison) or to the next-higher cell (here, community control or 12-30 months) unless some good reason other than the violation itself justifies a greater departure. Fla. R. Crim. P.

3.701(d)(14). The fact that a probationer "deliberately" violates probation is not a reason to go higher than the next cell because willfulness is always required of probation violations. Machansky v. State, 517 So.2d 101 (Fla. 2nd DCA 1987).

The lower courts hung their hats on Pentaude, supra. That case allowed a departure greater than one cell for repeated and multiple violations, where the probationer obviously was not interested in successfully completing probation. In addition, Pentaude was convicted of a new crime while on probation. See also Bush v. State, 519 So.2d 1014 (Fla. 1st DCA 1988) and Burton v. State, 513 So.2d 245 (Fla. 2nd DCA 1987).

Here, petitioner had been on probation for over two years and had only one prior violation filed, which had been dismissed. His probation officer related that he had been a good probationer (T 88-89). He has not been convicted of any new crime, and had not had repeated and persistent violations. Pentaude is not good authority for the lower tribunal's holding.

The bases for the probation revocation and the departure sentence were was the finding by the trial judge that petitioner committed the act of sexual battery. But the facts of the instant sexual battery, even if sufficient to revoke probation, are not so egregious as to allow departure. In Lerma v. State, 497 So.2d 736, 739 (Fla. 1986), this Court rejected psychological trauma to the victim as a reason for departure "because

nearly all sexual battery cases inflict emotional hardship on the victim." See also Keys v. State, supra.

In State v. Rousseau, 509 So.2d 281 (Fla. 1987), this Court revisited the concept of psychological trauma to the victim as a basis for departure. This Court held:

> the type of psychological trauma to a victim that usually and ordinarily results from being a victim of the charged crime is inherent in the crime and may not be used to justify departure.

Id. at 284. Thus, the first anomaly presented by this case -- If petitioner were being sentenced for the sexual battery, the judge would not be permitted to depart from the guidelines based upon the serious nature of the crime. Yet, that is exactly what the judge did here in the probation revocation context.

The nature of the sexual battery as a serious crime was not a clear and convincing reason for departure because it was a "routine" sexual battery with no other egregious facts to set it apart from the norm.

And now the second anomaly presented by this case -- the judge in a probation revocation is permitted to revoke upon a finding that the violation was committed by a standard of proof sufficient to satisfy the "conscience of the court." Bernhardt v. State, 288 So.2d 490 (Fla. 1974). This is certainly less than the reasonable doubt standard for departure orders in effect at the time of petitioner's 1984 crime, and even less than the preponderance standard currently in effect.

Yet the judge in a probation revocation is permitted to find a violation by a standard of proof far less than reasonable doubt and then use that same violation as the sole reason for departure, in violation of the reasonable doubt standard approved by this Court in State v. Rousseau, and Albritton, both supra.

It is unfair to allow departure for a new crime until and unless a jury finds the defendant guilty of the new crime, using the reasonable doubt standard. The instant case demonstrates the point. The new sexual battery charge, like many these days, was essentially a one-on-one swearing contest between the victim and petitioner, with no physical evidence to corroborate the victim. Petitioner admitted the encounter, but testified it was with the woman's consent. Just because the judge believed the victim, it cannot be said with any certainty that a jury would find her testimony to be credible and the charge proven beyond a reasonable doubt.

In short, the court expressed no good reason to depart from the guidelines and impose the maximum, because departure could not be based upon a crime for which petitioner has not yet been convicted, and because the facts of the sexual battery are not so egregious as to allow departure. A guidelines sentence is required, Shull v. Dugger, 515 So.2d 748 (Fla. 1987) or a one cell increase to community control or 12-30 months. State v. VanKooten, 522 So.2d 830 (Fla. 1988).

Even if this Court accepts the lower tribunal's holding and rules that a conviction for a new crime is not necessary to

support a departure, it still should not be applied to petitioner.

One can understand the frustration judges feel when they place a defendant on probation or community control, and he turns around and commits a new crime shortly after being placed on supervision, or he commits the exact same crime for which he was granted probation or community control. This view was expressed by Judge Schwartz, dissenting in Tuthill, supra, 518 So.2d at 1304, because the defendant there was granted probation for lewd assault and committed another lewd assault six months after being placed on probation.

This view was also expressed by the court in Lambert v. State, 517 So.2d 133 (Fla. 4th DCA 1987), rev. granted, case no. 71,890. There the defendant was on community control for aggravated assault and aggravated battery. Armed with a knife, he committed subsequent multiple counts of aggravated assault and aggravated battery on a woman and her small children.

But the instant case is totally different from either Lambert or Tuthill. Petitioner was on probation for a drug offense. He did not go out and commit another drug offense. He was on probation for over two years before being found guilty of a violation. Also compare petitioner with Mr. Pentaude, who was placed on probation on January 31 and had a probation violation filed on April 9. This Court expressed its frustration with him in this manner:

> [W]here Pentaude violated seven conditions of probation, two within the first two months of being on probation, and was

> convicted of a substantive crime during the probationary period, the trial court departed with good reason.

State v. Pentaude, supra, 500 So.2d at 528-29 (emphasis added).

Even if a departure beyond one cell is authorized, petitioner will argue that the departure in the instant case was excessive. Assuming arguendo that this Honorable Court finds that the trial judge was authorized to depart from petitioner's guidelines sentence, petitioner nevertheless contends that the extent of the departure from petitioner's presumptive guidelines range in this case was not justified.

It should be noted that petitioner's original offense and the imposition of probation both occurred prior to July, 1986. Thus the extent of departure is a viable basis for appeal herein. See Booker v. State, 514 So.2d 1079 (Fla. 1987).

In Albritton v. State, supra, this Court held:

> In our view, and we so hold, the proper standard of review is whether the judge abused his judicial discretion. An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and record to determine if the departure is reasonable. We disagree with and disapprove the holding below that the only lawful limitation on a departure sentence is the maximum statutory sentence for the offense.

476 So.2d at 160.

Petitioner's recommended guideline sentence with the Rule 3.701(d)(14) one-cell departure was in the twelve (12) to thirty (30) months prison range. The trial judge departed from this guidelines range and sentenced petitioner to five years in

prison. The trial judge abused his discretion when he departed from this guidelines range. Even if certain grounds are permissible for departure from the presumptive guidelines sentence, they surely do not allow the extensive departure here. The extent of the departure from the recommended range was an abuse of discretion in light of the presumptive guideline sentence, reasons for departure, the sentence actually imposed, and the record in this cause.

In Cankaris v. Cankaris, 382 So.2d 1197, 1203 (Fla. 1980), this Court adopted the following test for review of a judge's discretionary power:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

The record at bar supports petitioner's position that the departure was excessive. As argued above, the trial judge's belief that petitioner has committed another sexual battery cannot be used for departure. If petitioner is convicted of the sexual battery, he will be sentenced on the category 2 scoresheet, which is one of the most severe available, which will score his prior record and legal restraint, and there is nothing to prevent the sexual battery sentence from being run consecutively with the VOP sentence.

This probationer, a black male, was on probation from September 16, 1985, until his arrest and release on recognizance on December 23, 1987 (R 53), without having been found guilty of any probation violation -- over two years.

The category 7 scoresheet contains two cells in between the presumptively-correct 12-30 month cell and the five year cell which became petitioner's sentence. The judge should be instructed to reduce petitioner's departure sentence, if it is to be a departure at all, to a more reasonable level.

CONCLUSION

This Honorable Court should answer the certified question in the negative, hold that a departure sentence cannot be entered for a new crime unless the defendant has been convicted by a jury of that new crime, reverse petitioner's sentence and remand this cause to the trial court for imposition of a sentence within the guidelines range or at a lesser extent of departure.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, # 912811, 3950 Tiger Bay Road, Daytona Beach, Florida 32014, this 27 day of February, 1989.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER