IN THE SUPREME COURT OF FLORIDA

WILLIAM DEWBERRY,

Petitioner,

v. CASE NO. 73,701

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S AMENDED BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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RESPONDENT'S AMENDED BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, William Dewberry, Defendant/ Appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, Plaintiff/Appellee below, will be referred to herein as "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent is in substantial agreement with Petitioner's version of the case and facts.

SUMMARY OF ARGUMENT

The trial court properly revoked Petitioner's probation and sentenced him in excess of the recommended sentencing guidelines range where, pursuant to a hearing, the trial court determined beyond a reasonable doubt that Petitioner had committed a sexual battery while on probation although Petitioner had not yet been convicted of the rape. The trial court was justified in so doing where it determined that the unscored subsequent offense was egregious and significantly worse than the "instant" or original offense.

ARGUMENT

ISSUE

WHERE A TRIAL JUDGE FINDS THAT THE UNDERLYING REASONS FOR VIOLATION OF COMMUNITY CONTROL OR PROBATION CONSTITUTE MORE THAN A MINOR INFRACTION AND ARE SUFFICIENTLY EGREGIOUS, MAY HE DEPART FROM THE PRESUMPTIVE GUIDELINES RANGE AND IMPOSE AN APPROPRIATE SENTENCE WITHIN THE STATUTORY LIMIT EVEN THROUGH THE DEFENDANT HAS NOT BEEN "CONVICTED" OF THE CRIMES WHICH THE TRIAL JUDGE CONCLUDED CONSTITUTED A VIOLATION OF HIS COMMUNITY CONTROL OR PROBATION?

The State respectfully requests that this Court answer the certified question in the affirmative.

The Petitioner in the instant case was convicted of possession of cocaine and sentenced to five years probation on September 16, 1985 (R 18-29). On February 9, 1988, Petitioner's probation was revoked pursuant to a hearing in which the judge determined that Petitioner had committed a sexual battery which constituted a violation of the terms of his probation. Petitioner was sentenced to five years in the custody of the Department of Corrections as a departure from the recommended guidelines range (R 91). In departing upwardly from the recommended guidelines sentence, the judge noted the "egregious violation of probation", remarking that he considers rape an incredibly serious offense (R 90).

In upholding Petitioner's departure sentence, the First District Court of appeal below found that the departure was justified because the reason given by the court complies with the standard enunciated by this Court in State v. Pentaude, 500 So.2d 526 (Fla. 1987). A departure sentence is permitted in circumstances where the trial court "... finds that the underlying reasons for violation of probation ... are more than a minor infraction and are sufficiently egregious ...", entitling it "... to depart from the presumptive guidelines range and impose an appropriate sentence within the statutory limit." Pentaude, supra at 528.

The Petitioner contends that since the underlying reason and circumstance for the violation of probation and departure was an offense for which Petitioner had not yet been convicted, the departure sentence was improper. In support of this contention, Petitioner relies on Rule 3.701(d)(1), Florida Rules of Criminal Procedure, which states in pertinent part that "(r)easons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained."

The district court below held that a conviction of the latter offense for which a revocation of probation is obtained is not required, as Petitioner suggests. The court cited Judge Schwartz's dissent in Tuthill v. State, 518 So.2d 1300 (Fla. 3d DCA 1987), review granted, No. 72,096 (Fla. May 24, 1988),

wherein Judge Schwartz stated; (T)he instant offense is the original charge for which sentence was imposed, not the facts underlying the violation of probation." Tuthill, supra at 1304, n. 2 (Schwartz,, J., dissenting) (emphasis supplied). Here, the "instant offense" was possession of cocaine, not the sexual battery, therefore Petitioner did not have to be first convicted of the sexual battery in order to have his probation violated or for the judge to depart based on the egregious character of the subsequent offense.

In Pentaude, supra, this Court expressly found that Rule 3.701, Florida Rules of Criminal Procedure, does not limit the trial court's discretion in sentencing when compelling clear and convincing reasons call for departure beyond the next cell. The trial judge has discretion to depart based on the character of the violation and any other factor which is material or relevant to the defendant's character. Pentaude, supra at 528.

Since Petitioner had not yet been convicted of the sexual battery, it was proper to rely on this violation to depart upwardly from the presumptive guidelines score because the violation was not calculated into the scoresheet. A defendant's violation of probation can be used as the basis for departure from the sentencing guidelines beyond an increase to the next higher guidelines range. Simmons v. State, 483 So.2d 530 (Fla. 1st DCA 1986).

The Petitioner further contends that the trial court should have employed the "guilty beyond a reasonable doubt" standard in finding Petitioner in violation of his probation, citing State v. Mischler, 488 So.2d 523 (Fla. 1986) and Keys v. State, 500 So.2d 134 (Fla. 1986). Petitioner overlooks the fact that this is precisely what the court did. At R 84 the trial judge stated: "... I'm convinced beyond a reasonable doubt that the man raped this woman."

In any event, the district court below held that "... to require proof beyond a reasonable doubt of the underlying offense on which a revocation of probation is based "is unjustifiably contrary to the entire basis of the concept of probation, which, because it is purely a matter of judicial grace, ... requires proof of a violation sufficient only to satisfy the conscience of the court."" Dewberry v. State, slip opinion p. 4, citing Tuthill v. State, supra at 1304 (Schwartz, J., dissenting).

Judge Schwartz's position is squarely in agreement with this Court's pronouncement in Bernhardt v. State, 288 So.2d 490 (Fla. 1974), wherein this Court stated that:

> ... due process require(s) that a hearing must be accorded to the person charged before probation (can) be revoked and the evidence upon which to predicate a revocation introduced at the hearing must be sufficient to satisfy the conscience of the court that a condition of probation has been violated.

Bernhardt, supra at 495. Consequently, under either standard, the reason for departure is supported by clear and convincing evidence.

Petitioner contends that since the subsequent offense was a ""routine" sexual battery" that departure was unjustified (Petitioner's brief, page 11). The State submits that no sexual battery is "routine", and departure was justified because the sexual battery was not a "mere infraction", but was a considerably more serious crime than the "instant offense", i.e. possession of cocaine.

In addition, this Court has stated that Rule 3.701(d)(14), relating to a trial court's right to depart one cell above the recommended range without giving any reason, was not designed

> ... to completely limit the trial court's discretion in sentencing when compelling clear and convincing reasons call for departure beyond the next cell. The trial judge has 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, the length of time he has been on probation before violating the terms and conditions, and any other factor material or relevant to the defendant's character.

Pentaude, supra at 528. It is evident, therefore, that the trial court properly exercised its right to depart from the recommended guidelines sentence in the instant case.

Departure sentences imposing punishments greater than the next higher cell despite the lack of conviction for the subsequent offense have been approved not only by the First District Court of Appeal below, but also by the Fourth and Fifth Districts. See Hamilton v. State, 13 F.L.W. 2529 (Fla. 5th DCA, November 17, 1988), Eldridge v. State, 531 So.2d 741 (Fla. 5th DCA 1988); Young v. State, 519 So.2d 719 (Fla. 5th DCA 1988); Lambert v. State, 517 So.2d 133 (Fla. 4th DCA 1987), review granted, No. 71,890 (Fla. argued September 1, 1988).

The Second and Third Districts however have rejected this position. See Wilson v. State, 510 So.2d 1088 (Fla. 2d DCA 1987); Tuthill v. State, 518 So.2d 1300 (Fla. 3d DCA 1987). Judge Schwartz's dissent in Tuthill, supra, persuaded the First District to adopt the former position, and the State submits that a reading of that well-reasoned dissent should persuade this Court as well.

CONCLUSION

Based on the above cited legal authorities, Respondent prays this Honorable Court answer the certified question in the affirmative and affirm Petitioner's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 22nd day of March, 1989.

Bradley R Bischoff

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