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IN THE SUPREME COURT OF FLORIDA

CARLOS A. PIMENTAL, :

Petitioner, :

vs. : Case No. 76,044

STATE OF FLORIDA, :

Respondent. :

------------------------------:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On November 6, 1986, the Hillsborough County state attorney charged the petitioner, CARLOS A. PIMENTAL, under the name of Jose Alberto Quinones, with having committed armed robbery on August 11, 1986. (R8) On March 5, 1987, after he pleaded guilty to simple robbery, the court placed him on probation for three years. (R18) On June 24, 1987, he was charged under the name Carlos Pimental with having possessed cocaine with intent to sell or deliver on June 4, 1987. (R38) On July 29, 1987, after he pleaded guilty, the court placed him on probation for three years. (R45) On October 14, 1988, after an affidavit alleged various technical violations of probation for over a year under the name Jose Quinones, the court modified the robbery probation by making it a five year term. (R24, 29) Evidently, the different judges did not know that Pimental was on probation in two cases under different names.

On October 5, 1988, his probation officer charged him under the name Carlos Pimental with violating his cocaine possession probation by failing to report for over a year as instructed by his probation officer. (R47) On December 21, 1988, his probation officer alleged that he had violated his robbery probation when he was arrested under the name of Neiver Castro Guzman for possession of cocaine and battery on a law enforcement officer. (R30) A probation revocation hearing for both probations was held on February 27, 1989.

At the hearing, officer Douglas Maxwell testified that, around 11 p.m. on August 15, 1988 outside a Tampa bar, he arrested Beverly

Gladden for cocaine possession. (R90-91) She said she bought the cocaine from a black male wearing a straw hat inside the bar. (R91) When officer Gray went inside to get the man, Pimental was the only person wearing a white straw hat. (R91, 94) Both officers testified that, when Gray and Pimental emerged, Pimental struck Gray with his fist and tried to run away. (R93-95) He put his hand in his pocket and threw a pack of cigarettes on the ground. (R94) Gray picked it up and found that it was filled with cocaine. (R95) Maxwell had to help Gray arrest Pimental. (R93, 95)

At the hearing, Pimental denied hitting the officer or selling cocaine but admitted possessing cocaine on August 15. (R96) Judge Coe revoked both probations and sentenced Pimental to fifteen years in prison for the robbery and fifteen years consecutive for the cocaine possession. (R97-99) The guidelines recommendation was two and a half to three and a half years in prison. (R59) The written reasons for departure were (1) unamenability to probation, (2) timing of violation, (3) second violation, and (4) nature of violation (attacking a police officer). (R78)

On appeal, the second district held that the departure sentence was legal, citing Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990). Pimental v. State, 560 So.2d 1387 (Fla. 2d DCA 1990). The court, however, held that one of the probations was illegally revoked because no evidence was presented on the charged violation. This court accepted review on October 15, 1990.

SUMMARY OF THE ARGUMENT

This court has already decided in previous cases that multiple violations of probation are not a valid reason for departure from the guidelines. Accordingly, this court implicitly receded from an earlier case which held otherwise.

ARGUMENT

ISSUE

THIS COURT HAS ALREADY DECIDED THAT MULTIPLE VIOLATIONS OF PROBATION CANNOT BE USED AS A REASON TO DEPART FROM THE GUIDELINES.

The four listed reasons for departure from the guidelines were (1) unamenability to probation, (2) timing of violation, (3) second violation, and (4) nature of violation (attacking a police officer). (R78) All of these reasons related to the violation of probation. Accordingly, they could not be used as reasons to depart. Wesson v. State, 559 So.2d 1100 (Fla. 1990); Ree v. State, 565 So.2d 1329 (Fla. 1990); Lambert v. State, 545 So.2d 838 (Fla. 1989). See also Gibson v. State, 553 So.2d 701 (Fla. 1989) (fourteen months between offenses did not justify a departure based on the timing of the offenses); Williams v. State, 15 F.L.W. D2072 (Fla. 1st DCA Aug 8, 1990) (unamenability to probation not a valid reason to depart).

In its decision below, the second district relied on Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), which in turn relied on Adams v. State, 490 So.2d 53 (Fla. 1986), for the proposition that multiple revocations of probation are a valid reason for departure. Wesson, Ree, and Lambert, however, effectively receded from Adams, just as they receded from Pentaude v. State, 500 So.2d 526 (Fla. 1987). See Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989) (Ree overruled Adams); Irizarry v. State, 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990) (same). Consequently, this reason for departure

is no longer valid. Petitioner notes that Williams is pending review in this court (case no. 75,919), and he relies on the arguments made by the defendant in Williams.

The policy argument in favor of upholding multiple violations of probation as a reason to depart is presumably that probationers who are given a second chance warrant more punishment than those who have had only one chance. This argument is unsound, because the amount of mercy shown initially does not logically correlate with the amount of punishment imposed later when the mercy is withdrawn. Twice as much mercy does not logically justify twice as much punishment. The guidelines already provide for a one-cell increase in the recommended sentence for a violation of probation. If a court concludes that a first violation is not so egregious that it warrants incarceration, then it is incoherent to say that this same non-egregious violation could warrant increasing the sentence to the statutory maximum when the court determines the amount of punishment to impose on a second violation. Such a rule would entice judges to offer probation to defendants twice and thereby give them the rope to hang themselves.

If this court disagrees with the above arguments that multiple violations of probation are an invalid reason to depart, petitioner argues alternatively that the second violation in this case was atypical. On October 14, 1988, the court increased the probationary term, because Pimental violated his probation by failing to stay in contact with his probation officer during the previous year. (R29, 98) On February 27, 1989, the court found a second

violation and revoked probation because Pimental sold cocaine and battered a police officer on August 15, 1988. The conduct that constituted the second violation occurred (August 15, 1988) before the first violation was found to exist (October 14, 1988). Under these circumstances, the argument does not apply that probationers should be punished more harshly if they commit new violations after being given a second chance. Pimental did not commit a new violation after being given a second chance. Consequently, the two violations of probation that occurred in this case did not constitute a valid reason to depart from the guidelines.

Contrary to the attorney general's views, petitioner disagrees that Pimental's use of aliases is relevant. The attorney general argued to the district court that Pimental's initial brief was confusing and misleading, primarily because it did not show to the attorney general's satisfaction how Pimental used aliases to evade punishment. Undersigned counsel, however, did mention in the initial brief that Pimental used aliases for his different crimes.[1] Counsel saw no need to discuss this point further because (1) the aliases were not listed as a reason to depart, and (2) Pimental was not charged with using aliases to obstruct justice.

If the state wanted to punish Pimental for obstructing justice by using false names, it could have charged him with that crime, which had a maximum sentence of one year. Caines v. State, 500

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[1]The factual statements in this brief and in the district court's brief are almost identical, but counsel has added some language (especially the last sentence in the first paragraph of the statement of the case and facts) which he hopes will alleviate the attorney general's concerns on this point.

So.2d 728 (Fla. 2d DCA 1987); § 843.02, Fla. Stat. (1985). Instead, Judge Coe increased the guidelines sentence by more than twenty-six years. To the extent that the departure was based on this uncharged crime (and petitioner agrees that it was the real though unstated reason for departure), it was obviously improper and vastly disproportionate to the offense. Fla. R. Crim. P. 3.701(d)(11).

If this court decides that all of the reasons for departure were invalid, then it should remand for sentencing within the guidelines. Shull v. Dugger, 515 So.2d 748 (Fla. 1987). If it concludes that only some of the reasons for departure were invalid, then it should remand for reconsideration whether a departure sentence was appropriate. Albritton v. State, 476 So.2d 158 (Fla. 1985). The district court overlooked Albritton, which controls this case because the offenses were committed before July 1, 1987, the effective date of Chapter 87-110, section 2, Laws of Florida.

CONCLUSION

Pimental asks for resentencing within the guidelines.

Carlos A. PIMENTEL a/k/a Jose Quinones a/k/a Neiver Castro Guzman, Appellant,

v.

STATE of Florida, Appellee.

No. 89-00748.

District Court of Appeal of Florida, Second District.

May 11, 1990.

Defendant appealed from orders of the Circuit Court, Hillsborough County, Harry Lee Coe, III, J., imposing sentence after he was found guilty of violating terms and condition of his probation. The District Court of Appeal, Schoonover, J., held that defendant who was charged with violating probation by failing to report to his probation officer could not have his probation revoked based on evidence of other, uncharged offenses.

Affirmed in part, reversed in part and remanded.

1. Criminal Law ⟹982.9(4)

Probation cannot be revoked for conduct not charged by affidavit and warrant. West's F.S.A. § 948.06(1).

2. Criminal Law ⟹982.9(4)

Defendant who was charged with violating probation by failing to report to his probation officer could not have his probation revoked based on evidence of other, uncharged offenses. West's F.S.A. § 948.06(1).

James Marion Moorman, Public Defender, and Stephen Krosschell, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Anne Y. Swing, Asst. Atty. Gen., Tampa, for appellee.

SCHOONOVER, Judge.

The appellant, Carlos A. Pimentel, a/k/a Jose Quinones, a/k/a Neiver Castro Guzman, challenges the final judgments and sentences imposed upon him after he was found guilty of violating the terms and conditions of his probation in two different cases. We affirm in part and reverse in part.

The appellant, while serving two different terms of probation, under two different names, was charged with violating his probation in both cases. He pled not guilty to the charges, and one hearing was held in connection with both cases.

In circuit court case number 86-12147, the appellant under the name of Jose Alberto Quinones was charged with and found guilty of violating the terms and conditions of his probation when he committed two new crimes under the name of Neiver Castro Guzman. The trial court revoked his probation and sentenced him to serve a departure sentence of fifteen years imprisonment for the underlying crime of robbery. We find no merit in the appellant's contention that the trial court's reasons for departure were invalid. We, accordingly, affirm the judgment and sentence entered in that case. *See Williams v. State,* 559 So.2d 680 (Fla. 2d DCA 1990).

In circuit court case number 87-6875, the appellant under the name of Carlos A. Pimentel was charged with violating the terms and conditions of his probation by failing to report to his probation officer. At the probation revocation hearing, the state presented no evidence concerning this violation. The trial court, however, found him guilty of violating the terms and conditions of his probation. The court then revoked his probation and sentenced him to serve a departure sentence of fifteen years imprisonment for the underlying offense of possession of cocaine with intent to sell or deliver. The court ordered this sentence to be served consecutively to the sentence imposed in case number 86-12147.

[1, 2] A person's probation cannot be revoked for conduct not charged by affida-

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vit and warrant. *See* § 948.06(1), Fla.Stat. (1987); *Harris v. State,* 495 So.2d 243 (Fla. 2d DCA 1986). In case number 87-6875, the state charged the appellant with violating his probation by failing to report to his probation officer and at the probation revocation hearing failed to present any evidence that he was guilty of that charge. Although sufficient evidence was presented to establish that the appellant was guilty of other offenses, we have held that probation cannot be revoked for one reason when the affidavit and warrant state another. *Mack v. State,* 342 So.2d 562 (Fla. 2d DCA 1977). The trial court, therefore, erred by revoking the appellant's probation in case number 87-6875.

We, accordingly, reverse and remand with instructions to reinstate the appellant's probation in case number 87-6875. The state, however, is not precluded from taking any further appropriate action it deems advisable in connection with the appellant's probation on this charge.

Affirmed in part, reversed in part, and remanded with instructions.

RYDER, A.C.J., and PARKER, J., concur.

DKJ, INC., a dissolved Florida corporation, d/b/a Upstairs/Downstairs Lounge, Appellant,

v.

Frank SWIERSKI, Appellee.

No. 90-303.

District Court of Appeal of Florida, Third District.

May 15, 1990.

Plaintiff brought action against dissolved corporation to recover for personal injuries on premises of corporation. The Circuit Court, Dade County, Maria M. Korvick, J., denied corporation's motion to quash service of process and to dismiss for lack of jurisdiction. Corporation appealed. The District Court of Appeal, Cope, J., held that plaintiff could serve former director as trustee of corporation.

Affirmed.

Corporations ⚷630(3)

Statute, which makes directors of dissolved corporation trustees of corporate property so long as corporation holds record interest in real estate or for three years after dissolution, did not limit right of plaintiff to serve former director as trustee more than three years after dissolution of corporation. West's F.S.A. §§ 48.101, 607.297, 607.301, 607.301(3).

Gaebe, Murphy, Mullen & Antonelli, Coral Gables, and David Kleinberg, Miami, for appellant.

Arthur J. Morburger, Weinstein, Bavly & Moon, Miami, and Albert E. Moon, Coral Gables, for appellee.

Before FERGUSON, COPE and GERSTEN, JJ.

COPE, Judge.

DKJ, Inc., a dissolved Florida corporation, appeals a nonfinal order denying its motion to quash service of process and to dismiss for lack of jurisdiction. We affirm.

According to plaintiff Frank Swierski's complaint, he sustained personal injuries on the premises of DKJ, Inc. in 1982. In 1983 DKJ was dissolved. In 1985 Swierski brought his personal injury action against DKJ, Inc. In 1988 Swierski served process on Linda Induisi, as Trustee of DKJ, Inc.

DKJ moved to quash service of process, and to dismiss the action, on the ground that it was not amenable to service of

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of November, 1990.

Respectfully submitted,

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SK/mlm