IN THE SUPREME COURT OF FLORIDA

CARLOS A. PIMENTAL

Petitioner,

v. CASE NO. 76,044

STATE OF FLORIDA

Respondent.

_____/

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

BRIEF OF RESPONDENT
ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Respondent would clarify the case and facts in one respect. The trial court's fourth statement as to the reasons for departure was not just that Petitioner attacked a policeman, as Petitioner's fact statement would seem to suggest. The court pointed out that he was on probation in two different cases when he did this.

SUMMARY OF THE ARGUMENT

The departures appealed were based on factors the guidelines neither consider nor prohibit and are therefore not precluded by Lambert v. State, 545 So. 2d 838 (Fla. 1989), and its progeny. The guidelines make no provision for taking into account the multiplicity of the violations, the timing, or other factors the trial court considered here.

The issue in Lambert was not the propriety of departure in resentencing after violations of probation where there are proper grounds for departure. The departures reversed and disapproved there were based on factors the guidelines either already consider in calculating recommended sentence, or exclude from consideration in sentencing. To vary the law of departure with the type of sentencing involved would elevate form over substance and achieve results contrary to the intent of the guidelines.

The departures at issue should be affirmed without necessity for remand. Whether or not the interrelated factors the trial court considered in departing were all sufficient to support departure individually, they were sufficient together, none was "invalid" in the sense of being actually improper, and the court noted its intent to depart based on any one such factor.

ARGUMENT

ISSUE (RESTATED)

THE CHALLENGED DEPARTURES WERE BOTH PERMISSIBLE AND JUSTIFIED UNDER THE CIRCUMSTANCES.

Petitioner contends that the departure sentences he received were improper under Lambert v. State, 545 So. 2d 838 (Fla. 1989), and its progeny. He would seemingly view Lambert as prohibiting departure in any sentencing in which the defendant has violated probation, whether the violation is sentenced separately or jointly with other cases, and whether or not there are circumstances which might otherwise justify departure. While there is language in Lambert and some other such cases which might be read to suggest that, it is not the logical reading. It does not follow from the problems Lambert addressed or from the reasoning employed, and it would be inconsistent with the standards for departure generally.

The propriety of departure is not intended to be a question of form. The tendency of litigants, and sometimes even courts, to consider the question in terms of buzz words, artificial categories and such, and to hold departures consistantly valid or invalid depending upon the wording of the reasons stated, the particular proceeding and such, has led to confusion, conflict and seemingly constant change in the applicable law. The tendency to elevate form over substance and take a checklist approach may stem from the fact that the guidelines are designed to operate that way internally, but, whatever the logic behind

the approach, it is not correct. This Court has repeatedly discussed the analysis departure requires, making it clear that the propriety of departure depends upon the facts and circumstances that persuaded the trial court to depart in that instance. They must be proper considerations and significant enough to justify the departure.

In Brown v. State, 15 F.L.W. S 607 (Fla. Nov. 15, 1990), the Court recently addressed the apparent conflict on the question of whether a dependant's disrespect for the law is a valid reason for departure or an invalid reason, and explained that it was actually neither. The court noted that it was merely a conclusion or characterization, that it could be a very good reason for departure conceptually, but could mean any number of things, many of which would be improper and/or insufficient to support departure. The statement alone cannot support departure for this reason. The trial court has to have provided some means of determining the facts and reasoning which served as the basis for this conclusion and these factors must be examined to determine the propriety of departure.

The same is true of most other "reasons" commonly stated to support departures. A statement that timing is significant, or that a pattern of some kind exists is obviously a conclusion as well. The facts upon which such "reasons" are based may or may not justify departure. Stated "reasons" of this type are not all necessarily invalid alone, as the more general of them are, because some, like timing and pattern, are specific enough to

permit the court to understand what facts the trial court thought significant and why. Such "reasons" are not necessarily valid either, however. The appellate court must again examine the underlying facts and circumstances to confirm that the pattern or whatever is shown and is significant enough to justify departure, alone or with other factors that can properly be considered.

The focus of Lambert is the necessity for analyzing the specific factors upon which a departure is based to determine whether they are factors which can properly be considered for that purpose. The Court emphasized the fact that many factors which tend to suggest the need for a longer sentence may not justify departure, however significant they may be, because the guidelines themselves take such factors into account in calculating the recommended sentence. Since the number and type of prior offenses, the fact that the defendant was on probation, the offenses that constituted the violations, and the like are already factored into the sentence from which the court is departing, they cannot be grounds for the departure. That would count them twice, which this Court characterized in Lambert as double-dipping. Likewise, factors the court is precluded from scoring to calculate the recommended sentence, like offenses for which there is no conviction, cannot be considered in the departure because they are not factors which can properly affect the length of the sentence.

The lawful sentencing range is determined by the legislature. Imposing a greater sentence than the guidelines

permit, based on factors the guidelines sentence already takes into account, would substitute the judgment of the court for that of the legislature as to the sentence that is appropriate on those facts. Likewise, considering factors deliberately excluded in determining the guidelines sentence would substitute the court's judgment as to the propriety of basing sentences on such considerations. The only factors which can properly be considered are those which the guidelines neither consider nor prohibit, but simply have no mechanism for scoring.

That is the point made by the Court in Lambert. The defendants in the combined cases at issue there had violated probation, of course, and the departures had occurred when they were resentenced, but the problem was with the purported support for the departures, not with the type of proceeding in which they occurred. The Court noted that the result would be the same whether the scoresheet was based on the subsequent offenses after convictions were obtained, or on the offenses underlying the violations. Departures can never be based on factors the guidelines include or specifically exclude, whether there is a probation violation involved or not.

It was logical for the discussion of this problem to arise in the context of probation violations because, courts were accustomed to increasing sentences substantially when defendants on probation committed further offenses, and had generally continued the practice through departures, without showing anything that could properly be considered beyond what the

guidelines already took into account. Since the guidelines themselves are designed to increase sentences where violations occur, the factors the courts had traditionally considered, and had then offered to support departures, were largely considered by the legislature in determining what the usual sentencing range would be.

The Court did not hold an otherwise proper departure improper simply because the defendant was on probation, and should not do so. If the violation and the substantive offense are sentenced together, Lambert still applies, whichever serves as the basis for the scoresheet. The Court made that clear in Lambert. If the subsequent offenses included a capital crime, departure would normally be proper. It would make no sense at all to guarantee a defendant on probation a lesser sentence than he could have received had he been a first offender. Likewise, if a defendant committed new offenses the day he was released from custody, the court could ordinarily depart, and it would make no sense to ensure the defendant of lesser punishment when he still has probation to serve than when he is no longer under any constraint. Such results would not only be illogical. They would be contrary to the intent of the guidelines, which call for greater punishment when the defendant is on probation, not less. The test is logically the same whether the sentencing involves a probation violation or not. If there are circumstances which the guidelines neither include nor exclude, and they are sufficient to justify departure, it is proper. Otherwise, it is not.

In the instant case, there are a number of circumstances the guidelines have no mechanism for scoring, including but not limited to the "second violation" the district court noted. Petitioner engaged in a deliberate pattern of conduct designed to permit him to commit crimes with impunity, and it worked quite well to a point. Whenever he was arrested, he would give a name and address which were either false or soon to be invalid, be sentenced to probation as a first offender, abscond from his probation, and discard that identity.

Petitioner was released on probation in May of 1987, after conviction and sentencing for robbery. After a couple of months of some partial compliance, he moved, broke off all contact, committed another offense in another name, and was sentenced as a first offender for the second time. He absconded from that probation the moment he left the courtroom, not even reporting for the first day, all within four months of the robbery sentencing. (R 16-19, 24, 25-26, 36, 38, 40-41, 42-43, 45, 46-49)[1]

Petitioner's whereabouts were unknown for purposes of cases for over a year, and he committed further offenses in the interim, this time fighting the officers in an attempt to avoid even an arrest. (R 30; Tr. 4-9) Petitioner was unlucky this third

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[1] The transcript of the hearing has not been renumbered for inclusion in the record, and the page numbers shown there are duplicated in the portion of the record numbered by the clerk. Therefore, the transcript is cited as "Tr.__", and the remainder of the record as "R __".

time, drawing the same judge who sentenced the robbery, and the connections between his various cases began to be discovered a few months later. (R 30, 36)

By the time the cases were all connected and the hearing at issue was held[2], Petitioner had committed offenses on three ocasions and probation violations on four occasions with impunity. The capias issued when he absconded in the original robbery case was somehow served a few months before the hearing, but the court and the State had not yet learned of Petitioner's other cases, and his probation was simply extended two years for those technical violations, which did little more than make up

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[2] The hearing at issue was a combined revocation and sentencing proceeding. Petitioner's first criminal case and his third, which were pending in the same division, were apparently the first to be recognized as having the same defendant, and the affidavit charging the third offenses as violations of probation refers only to his probation in the first case. (R 30) By the time the hearing occurred, his second case had been discovered and transferred to that division. (R 36) Proceedings thereafter had been joint, and number of proceedings had been held jointly in all those cases in the weeks preceding the hearing. (R 1-3, 36-37, 61-62, 63-66, 67-70, 71-74, 75-77) No one seems to have realized that the affidavit showed one of his probations, and that the only affidavit in the second case file reflected only the violations he committed by absconding. (R 47-49) The judge noted his understanding at the outset of the revocation hearing that the allegations, if proven, would be violations of both probations, and defense counsel expressly agreed with this. (R. Tr. 3) Respondent argued on appeal that the revocation should stand: The confusion resulted from Petitioner's own misconduct. It could not have resulted in prejudice because defense counsel was prepared in both cases. He also thought both were at issue, and the defense would have been the same in any event. Furthermore, defense counsel expressly waived the error. See Mobley v. State, 348 So. 2d 373 (Fla. 3d DCA 1977); Jones v. State, 296 So. 2d 519, 521 (Fla. 3d DCA 1974), reversed as to sentencing, 327 So. 2d 28 (1976). The second district reversed the revocation in the second case, however. Respondent would submit that this was error.

for the supervision he had managed to avoid in that case previously. (R 24, 25-26, 29; Tr. 11-13)

At the time of the hearing, the two occasions upon which Petitioner committed subsequent offenses in violation of his first probation, and the two substantive offenses and various technical violations he committed in the second case had not been taken into account in any fashion. Nor had the fact that he absconded from his first probation, committed another offense, and absconded from that probation, all within four months of being sentenced for robbery. Likewise, his general pattern of behavior had not, and his pattern of ever-increasing resistance to rehabilitation and attempted deterrence also had not. None of these factors is either considered or prohibited by the guidelines, and Respondent would submit that they are probably sufficient to support departure individually and certainly are as a whole.

The trial judge stated four interrelated reasons. They are essentially as Petitioner reports at page two of his case and fact statement except as to the fourth stated reason, wherein the court noted that Petition was on two separate probations when he attacked the officers, not just that the attack occurred. (R 78, Tr. 13) The reasons are not stated eloquently. The trial judge does not purport to be a wordsmith, and the reasons appear on the written order exactly as he pronounced them at the hearing. (R 78, Tr.13) This Court has subsequently determined that the reasons should in fact be provided in their final form at the

sentencing, as was done here, notwithstanding the lesser clarity to be expected in the midst of a hectic hearing; that the written reasons need not reflect the more leisurely thought, careful draftsmanship, and detailed facts and reasoning which would be possible later, as the Court had recommended initially. Compare Ree v. State, 565 So. 2d 1329 (Fla. 1990), with State v. Jackson, 478 So. 2d 1054, 1056 (Fla. 1985). Perfection is obviously not to be expected. So long as the appellate court can determine what factors the trial court considered in deparating, the factors will show the propriety or impropriety of the departure.

Although the written reasons are stated in the shorthand fashion and largely in terminology which had met with approval in other cases, factors considered in this case would seem to be obvious. The judge concluded overall that Petitioner was not likely to be rehabilitated or deterred from crime through any means other than incarceration. In addition to Petitioner's obvious practice of absconding, the judge based this conclusion on the multiplicity of cases and violations, the timing, and the fact that Petitioner had progressed from disappearing two or three months after sentencing, to immediate disappearance, to using violence to avoid arrest in the first place.

Respondent would submit that none of the considerations underlying the departure were invalid in a sense that could require remand. The first is more a general conclusion, as explained in Brown, and therefore might not have supported departure alone. Others might conceivably be deemed insufficient

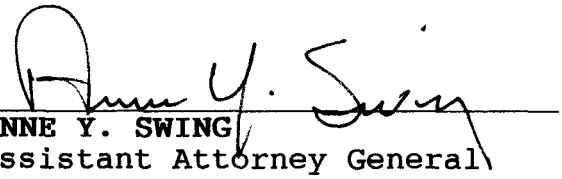
alone as well, but all are valid in context with each other, and that is not the sort of "invalidity" which would require remand of sentences that predate the amendment making one valid reason sufficient as a general rule. It is certainly clear in this case that the departures would have occurred despite any such invalidity, because the order specifically notes that the court would have departed for any one of the reasons considered. (R 78) The departures appealed should therefore be affirmed without remand.

CONCLUSION

For the reasons herein stated, the sentences appealed should be affirmed without necessity for remand.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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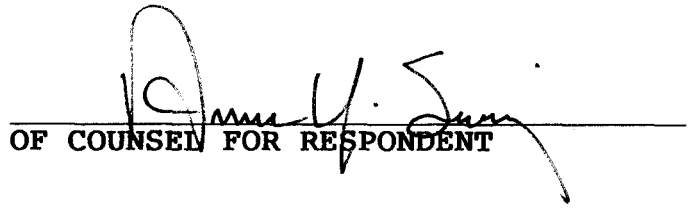
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Stephen Krosschell, Esquire, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 10th day of January , 1991.



OF COUNSEL FOR RESPONDENT