047 w/app.

IN THE SUPREME COURT OF FLORIDA

PEDRO FERNANDEZ, :

Petitioner, :

vs. : Case No. 76,525

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

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE AND FACTS

On March 10, 1986, the State for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Petitioner, PEDRO FERNANDEZ, with delivery of cocaine in violation of section 893.13(1)(e), Florida Statutes (1985), and possession of cocaine in violation of section 893.13(1)(a)2, Florida Statutes (1985), both of which allegedly occurred on September 18, 1986 (R6, 7). On July 16, 1986, Mr. Fernandez entered pleas of guilty to both charges and was placed on three years of concurrent probation (R10-12). On December 10, 1986, the State Attorney filed an information charging Mr. Fernandez with the following: two counts of delivery of cocaine in violation of section 893.13(1)(a)1, Florida Statutes (1985); two counts of possession of cocaine in violation of section 893.13(1)(e), Florida Statutes (1985); and conspiracy to deliver cocaine in violation of section 893.13(1)(a)(1), Florida Statutes (1985), and section 777.04(3), Florida Statutes (1985). The dates of these alleged offenses were November 18 and 19, 1986 (R33-35). On January 21, 1987, Mr. Fernandez entered nolo contendere pleas to one count to deliver, one count of possession, and one count of conspiracy to deliver. He was then placed on concurrent terms of two years of community control (R38-43). At this same time Mr. Fernandez was also charged in another information with possession of cocaine in violation of section 893.13(1)(e), Florida Statutes (1985); and possession of paraphernalia in violation of section 893.147(1)(a), Florida Statutes (1985). The offenses allegedly

occurred on November 20, 1986 (R57, 58). Mr. Fernandez apparently also plead to these charges, was given time served on the paraphernalia charge, and was given two concurrent probations on the possession charges (R42, 62-65).

Due to the filing and convictions of the November 1986 charges, an affidavit of violation of probation was filed in the September 1986 case (R13-15). On May 27, 1987, affidavits of violation of community control were filed in the other two cases (R51). On May 28, 1987, the trial court conducted a violation of probation/community control hearing. At that hearing Mr. Fernandez admitted to the allegation of having violated his probation on September 1986 charges and testimony established his having violated his community control. After hearing the evidence, the trial court revoked Mr. Fernandez's community control and probation (R80-90, 22, 51, 71).

On the same date the court sentenced Mr. Fernandez as follows: for the September 1986 charges he received 30 months imprisonment each with credit for 55 days, said sentences to run concurrent with each other but consecutive to the November charges; for the November 18 charges he received 3 1/2 years imprisonment with credit for 64 days time served, said sentences to run concurrent with each other but consecutive to the September 1986 charges and the November 19, 1986, charge; and for the November 19, 1986, charge he received 3 1/2 years of imprisonment with credit for 64 days served, said sentence to run consecutive to the September 1986 and November 18, 1986, charges. This came to a

total of 9 1/2 years imprisonment. The guidelines recommended community control or 12 to 30 months, and the one-cell bump up for a violation of probation/community control would have allowed for 2 1/2 to 3 1/2 years imprisonment (R16-21, 40, 41, 44-50, 66-70, 72, 73).

On June 8, 1987, Mr. Fernandez filed a motion to correct sentence based on the upward departure from the guidelines without reasons. This motion was denied on June 15, 1987 (R74, 100-110). Mr. Fernandez timely filed his notice of appeal on all three cases on June 18, 1987 (R75); and on July 25, 1990, the Second District Court of Appeal held that the consecutive sentences were a departure from the guidelines. The court, however, remanded the case with the understanding that the trial court could depart if it supplied valid written reasons.

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. In addition, this Court has held that trial courts cannot depart from the guidelines in a probation or community control violation case.

ARGUMENT

ISSUE

WHETHER A TRIAL COURT CAN DEPART FROM THE GUIDELINES IN A PROBATION OR COMMUNITY CONTROL VIOLATION CASE?

From the facts of this case it is readily apparent that the Second District Court of Appeal is allowing trial courts to depart from guideline sentences -- if written reasons are given -- on violation of probation and community control cases. It is doing so under the justification that several violations are a reason for a departure. This Court has held, however, that multiple violations of probation and/or community control cannot be used as a reason to depart from the guidelines. In addition, this Court has held that trial courts cannot depart from the guidelines in a probation or community control violation case. In several cases the Second District Court of Appeal certified this practice to this Court with the following question:

> Has the Supreme Court in Ree v. State,[1] 14 F.L.W. 565 (Fla. Nov. 16, 1989), and Lambert v. State, 545 So.2d 838 (Fla. 1989), receded from the holding in Adams v. State, 490 So.2d 53 (Fla. 1986), in which it found that where a defendant previously placed on probation, has repeatedly violated the terms of his probation after having had his probation restored, that a trial court may use the multiple violations of probation as a valid reason to support a departure sentence beyond the one cell bump for violation of probation under § 3.701(D)-(14), Fla. Stat. (1984)?

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[1] The new citation for Ree based on a motion for rehearing is 565 So.2d 1329 (Fla. 1990).

This question was certified in 16 cases and is presently pending before this Court in Williams, et al., v. State, Case No. 75,919.

The Second District Court of Appeal did not mention Williams in Mr. Fernandez's opinion. The Second District Court of Appeal merely cited to case law that allows a trial court to depart from the guidelines upon remand for resentencing if it did not realize it was not departing when it initially imposed the sentence. That point of law is not the issue here. The issue is that the Second District Court of Appeal is allowing for departures on violation of probation or community control cases. This policy has been rejected by this Court in Ree, supra, and Lambert, supra. It has also been rejected by two other district courts of appeal in Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989); and Irizarry v. State, 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990). The Fifth and Third District Courts of Appeal held that multiple violations of probation were no longer valid reasons for a guidelines departure. This Court's holding on the subject as set forth in Ree and Lambert is that "any departure sentence for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines." Lambert, 545 So.2d at 842; Ree, 565 So.2d at 1331.

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 gives them the rope to hang themselves.

CONCLUSION

Fernandez asks for resentencing within the guidelines.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PEDRO FERNANDEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 87-01824

Opinion filed July 25, 1990.

Appeal from the Circuit Court for Hillsborough County; Robert H. Bonanno, Acting Circuit Judge.

James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph R. Bryant, Assistant Attorney General, Tampa, for Appellee.

HALL, Judge.

The appellant Pedro Fernandez challenges the sentences he received after he was found to have violated conditions of probation and community control in three cases in which he was convicted of various drug offenses. We agree with the appellant

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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 5th day of February, 1991.

Respectfully submitted,

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