IN THE FLORIDA SUPREME COURT

76,609
Original

RANDY WILLIAMS,

Petitioner,

v.

CASE NO. 76,609

STATE OF FLORIDA,

Respondent.

ON REVIEW FROM THE FIRST
DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

OFFICE OF THE
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
301 SOUTH MONROE STREET
FOURTH FLOOR NORTH
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR #197890

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I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal, the defendant in the trial court, and will be referred to as petitioner in this brief. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A one volume transcript will be referred to as "T." Attached hereto as an appendix is the opinion of the lower tribunal, dated August 8, 1990.

II STATEMENT OF THE CASE AND FACTS

The history of the case is as follows:

On June 21, 1988, petitioner entered a plea of nolo contendere and was convicted of possession of cocaine with intent to sell (R 35). His sentencing guidelines scoresheet contained a total of 75 points, calculated by scoring the primary offense (65 points), one prior third degree felony (6 points), and four misdemeanors (4 points). It called for any nonstate prison sanction (R 36).

Petitioner was adjudicated guilty and given straight probation for 7 years (R 37-38; 40-41). On November 15, 1988, an affidavit of violation of probation was filed, alleging that petitioner had failed to pay cost of supervision and file monthly reports (R 42). An amended affidavit of violation was filed on February 15, 1989, which added the allegations that petitioner had done the following things to one Norma Shaw: threatened her; damaged her window; become verbally abusive; hit her; pulled a knife on her; and took $50 from her (R 50). It further alleged that petitioner had threatened to beat up James A. Henderson, and had hit him in the face. It further alleged that petitioner had hit Johnnie Jones (R 51).

On March 9, 1989, petitioner admitted the two technical violations, and his counsel stated that he had entered no contest pleas to some of the new charges concerning Norma Shaw in county court for a fine and time served (T 2-6). The state produced county court judgments to show that petitioner had

been convicted of battery on James J. Henderson and Johnnie Jones (T 7-8).

The state argued that petitioner had 15 scoreable misdemeanors, and had violated felony probation in a previous case on several occasions. The prosecutor argued that petitioner had an escalating pattern of criminal conduct from misdemeanors to the third degree felony of grand theft to the instant second degree felony drug offense, and asked for a departure sentence (T 10-12). Petitioner's counsel stated that his record was not escalating (T 13).

The trial court found that petitioner had violated several conditions of his probation (R 75). The court departed from the presumptive guidelines sentence of 2 1/2 to 2 3/2 years, and sentenced petitioner to 7 years incarceration (R 63-66; T 15). As reasons for departure, the court stated:

> 1. The Defendant's past history shows that he is not amenable to probation or other forms of rehabilitation based on the fact that he has previously been placed on probation or community control five (5) different times and on each of said occasions he violated same. Therefore, the court finds that an extended term of incarceration is necessary.
>
> 2. The Defendant's criminal history includes fifteen (15) misdemeanor convictions and one (1) prior third degree felony conviction. There is an escalating pattern to this criminal conduct as shown by his having committed several misdemeanor offenses which were followed by a third degree felony conviction (Grand Theft in the second degree) and then his conviction of the instant offense which is a felony of the second degree. (R 67).

In a timely appeal to the lower tribunal, petitioner argued that a departure greater than one cell was not permitted, and that the reasons for departure were invalid. The lower tribunal found the first reason invalid, because:

> before the trial court could initially impose probation in lieu of sentence, it necessarily had to find that Williams was not likely again to engage in a criminal course of conduct. §948.01(3), Fla. Stat. (1987). The first reason, therefore, is facially inconsistent with the finding the trial court necessarily made before placing Williams on probation. Having previously made this determination when imposing probation, we do not believe the trial court was authorized by the sentencing guidelines rules to thereafter base departure upon an opposite finding. Thus, we hold that the first reason is invalid. Appendix at 3.

As to the second reason, the lower tribunal approved it:

> A departure may be based upon an escalating pattern in the severity of the offenses, even though those offenses are strictly nonviolent. Kirby v. State, 533 [sic][1] So.2d 1290 (Fla. 1st DCA 1989), rev. denied 562 So.2d 346 (Fla. 1990). In light of the validity of one of the stated reasons, the departure sentence may be upheld notwithstanding the presence of the invalid reason, §921.001(5), Fla. Stat. (1987); Taylor v. State, 557 So.2d 952 (Fla. 1st DCA 1990), provided that the court was authorized to depart in excess of the one-cell increase now provided in the sentencing guidelines. Appendix at 3-4.

The lower tribunal distinguished this Court's decisions in

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[1]The proper citation to Kirby is 553 So.2d 1290.

Lambert v. State, 545 So.2d 838 (Fla. 1989), and Ree v. State, 15 FLW S395 (Fla. opin. on rehearing filed July 19, 1990), which generally limit sentencing on a probation violation to the next-higher cell. The lower tribunal narrowly read those decisions to apply only where departure in excess of one cell was based upon factors related to the violation of probation itself, and not upon other factors:

> Rather, the valid reason for departure related to Williams's record as it stood at the time he committed the offense for which he was being sentenced. Because the court could have validly departed from the guidelines on this ground at the time it placed Williams on probation, and because this ground does not relate to acts constituting the probation violations, we conclude that Ree and Lambert did not preclude the imposition of the departure sentence under review. Appendix at 5-6; footnote omitted.

The lower tribunal then certified the following lengthy question:

> AFTER A TRIAL JUDGE WITHHOLDS IMPOSITION OF SENTENCE AND PLACES A DEFENDANT ON PROBATION, AND THE DEFENDANT SUBSEQUENTLY VIOLATES THAT PROBATION, MAY THE JUDGE, UPON SENTENCING THE DEFENDANT FOR THE ORIGINAL OFFENSE, DEPART FROM THE PRESUMPTIVE GUIDELINES RANGE AND THE ONE-CELL INCREASE FOR VIOLATION OF PROBATION, AND IMPOSE AN APPROPRIATE SENTENCE WITHIN THE STATUTORY LIMIT BASED ON A REASON THAT WOULD HAVE SUPPORTED DEPARTURE HAD THE JUDGE INITIALLY SENTENCED THE DEFENDANT RATHER THAN PLACING HIM ON PROBATION? Appendix at 7-8.

On September 7, 1990, a timely notice of discretionary review was filed.

III SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the departure sentence entered in the instant case, and approved by the lower tribunal, is illegal. As recognized by this Court in its prior decisions, any departure sentence in excess of one cell on a violation of probation [VOP] is not permitted. The lower tribunal narrowed the holdings of these cases to approve the departure, based solely upon conduct which was in existence at the time petitioner was placed on probation.

This Court must rule once and for all that departures in excess of one cell on a VOP are unauthorized.

It makes no sense to refer back to conduct prior to the probationary period to justify departure beyond one cell, for the very reason that the lower tribunal struck reason number 1, i.e., that the defendant was a good candidate for probation at the time he received it.

Further, the approved reason is invalid, because petitioner did not have an escalating pattern of offenses at the time he was placed on probation. The legislature has defined "escalating pattern" as a progression from non-violent to violent crimes.

For any or all of these reasons, the lower tribunal's opinion must be quashed.

IV ARGUMENT

THE IMPOSITION OF A SENTENCE UPON ANY PROBATION VIOLATION IN EXCESS OF ONE CELL IS ILLEGAL; IN THE INSTANT CASE, THE DEPARTURE WAS IMPROPERLY BASED UPON FACTORS IN EXISTENCE AT THE TIME PETITIONER WAS PLACED ON PROBATION, AND SO HAVE NO BEARING ON THE DECISION TO DEPART; AND THE STATED REASON FOR DEPARTURE IS NOT SUPPORTED BY THE PRIOR RECORD OF PETITIONER.

The answer to the certified question must be a resounding NO, for several reasons. The First District in the instant case has erroneously interpreted this Court's plain decisions to the contrary, and has found nothing wrong with departing in excess of a one-cell bump up in a sentence imposed upon a probation violation, upon factors in existence when the probationary term was originally imposed.

Petitioner argues that anything beyond a one-cell increase is not permitted; in the alternative, even if it is permitted, it makes no sense to allow the judge to use as departure reasons conduct or factors which were in existence at the time he was originally placed on probation.

In the final alternative, petitioner argues that his record of four prior misdemeanors, one prior third degree felony, and the instant second degree felony drug offense does not demonstrate an escalating pattern.

In a line of cases commencing with Lambert, supra, and culminating with Ree, supra, this Court has held that ANY departure from the one-cell increase allowed by Fla. R. Crim. P. 3.701(d)(14) is unauthorized. In Lambert, this Court noted that the legislature had established the one-cell bump up as

the exclusive penalty for a probation violation[2], and any further departure was illegal, on the following reasoning:

> It [the legislature] has declined to create a separate offense [for a VOP] punishable with extended prison terms. If departure based upon probation violation were to be approved, the courts unilaterally would be designating probation violation as something other than what the legislature intended. ... Not only was he punished twice for the same conduct, he was punished greater than twice the presumptive sentence established by the legislature for that conduct. ... Such multicell departure based upon probation violation is contrary to the spirit and intent of the guidelines, which is to establish uniformity in sentencing. Departures are to be affirmatively discouraged.

545 So.2d at 841-42; emphasis added. The lower tribunal ignored this language and attempted to read Lambert too narrowly, limiting its holding only to departures which were based on the commission of new crimes, with or without conviction, while on probation. Everything this Court said in Lambert is even more applicable to the instant case, where petitioner was penalized for conduct which occurred prior to his being placed on probation.

While it is true that most of the cases decided by this court after Lambert involved departure for new crimes, usually

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[2]In a related issue now pending before this Court, the petitioners in Williams, et al. v. State, case number 75,919, have argued that any departure beyond one cell for repeated violations of probation is prohibited by Lambert, notwithstanding language to the contrary in Adams v. State, 490 So.2d 53 (Fla. 1986).

without a conviction, e.g., State v. Tuthill, 545 So.2d 850 (Fla. 1989); Bell v. State, 545 So.2d 861 (Fla. 1989); Eldridge v. State, 545 So.2d 1356 (Fla. 1989); Dewberry v. State, 546 So.2d 409 (Fla. 1989); Wesson v. State, 545 So.2d 851 (Fla. 1989); and Ree, supra, this Court cited Lambert with approval in Franklin v. State, 545 So.2d 851 (Fla. 1989), and stated unequivocally:

> no further increase or departure [beyond one cell on a VOP] is permitted for any reason.

545 So.2d at 853; emphasis added. Likewise, this Court in Ree, supra, cited Lambert, State v. Tuthill, and Franklin, and stated in equally clear language:

> We recently have held that any departure sentence for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines. ... Thus, the trial court erred in imposing any departure sentence greater than the one-cell upward increase permitted by Lambert.

15 FLW at S396. Thus, the lower tribunal's vain attempt to limit Lambert and Ree to their facts must fall in light of the plain language used by this Court and the policy reasons quoted above.[3]

In the alternative, even if this Court did not mean what it said in Lambert and Ree, petitioner submits that the lower

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[3]Curiously, two other panels of the First District have followed Lambert to the letter. Sellers v. State, 15 FLW D1785 (Fla. 1st DCA July 3, 1990) and Pennington v. State, 15 FLW D2163 (Fla. 1st DCA August 30, 1990).

tribunal erred in resurrecting petitioner's record as it stood at the time he was placed on probation and using it to find an escalating pattern at the time he violated his probation nine months later. This makes absolutely no sense. It must be remembered that the lower tribunal disapproved the first reason for departure, i.e., that petitioner was unamenable to probation, on the theory that this was inconsistent with the statute authorizing probation, which states:

> (3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him on probation.

Section 948.01(3), Florida Statutes. This theory is equally applicable to the second reason, i.e., that petitioner's prior record at the time he was placed on probation (four misdemeanors and one third degree felony grand theft), culminating in the second degree felony of drug possession, indicated that he was not likely to engage in criminal conduct, and so he should receive probation.

Yet, the lower tribunal turned this pre-existing record around and used it against petitioner, to justify departure beyond one cell on a VOP, nine months later, because

petitioner's record had escalated from four misdemeanors[4] to a nonviolent third degree felony to a nonviolent second degree felony drug possession, all before he was even placed on probation.

The fallacy of using a prior criminal record, which was in existence at the time of the original sentencing, to justify departure at a later VOP sentencing, was stated by the Third District in Colvin v. State, 549 So.2d 1137 (Fla. 3rd DCA 1989). There the defendant was convicted of attempted second degree murder for running over an acquaintance and then kicking him. He was placed on community control, followed by probation, which the court characterized as a downward departure [?] from the recommended range of community control or 12-30 months. He committed technical violations of community control, but committed no new crimes, and was sentenced beyond the one-cell allowable under the guidelines. One of the judge's two reasons for departure went back to the facts of the original offense:

> the particularly brutal manner in which the underlying crime had been committed, as well as the defendant's resistance to rehabilitation ... .

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[4]The sentencing judge referred to 15 misdemeanors, but on the original scoresheet only 4 appeared (R 36). As noted by the lower tribunal, Appendix at 6, note 2, another scoresheet was prepared for the VOP, which scored legal restraint and 15 misdemeanors (R 60), which it appears resulted from the misdemeanor counts which were the subject of the violation, and of which petitioner had been convicted in county court.

Id. The court framed the issue as follows, which is the same issue presented in the instant case:

> Regarding the upward departure sentence, while Lambert would allow only a one-cell "bump up" based upon factors solely related to violation of probation or community control, the State argues that the subsequent sentencing judge is entitled to, in effect, revisit the sentence originally imposed for the underlying crime by reweighing the factors that were, of necessity, presented to, and considered by, the original sentencing judge and to now upwardly depart based upon those same factors.

549 So.2d at 1138; emphasis in original. The Third District quickly disposed of the state's illogical argument on the constitutional ground that permitting the VOP judge to revisit the facts of the original crime would violate double jeopardy:

> Here, the original sentencing judge already considered the facts and circumstances of the underlying crime, applied his knowledge and experience, evaluated these facts and circumstances, and sentenced appellant as he saw fit. ... Accordingly, a subsequent judge may not now reconsider the same facts presented to the original sentencing judge, re-evaluate them, and now determine that, based upon those same facts, an upward departure sentence is proper. While the facts presented by the record before us reflect that appellant's brutality in committing the underlying crime would indeed appear to support an upward departure sentence, the subsequent sentencing judge is not free to do so after the original sentencing judge declined to do so after considering the same facts and circumstances.

Id., emphasis in original. The same is equally true in the instant case.

At the time petitioner was placed on probation, the judge knew from the sentencing guidelines scoresheet that petitioner had four prior misdemeanors and one prior third degree felony in his past. Although that scoresheet recommended probation, if the judge truly believed that petitioner was a dangerous criminal with a record so onerous as to be characterized as "an escalating pattern of criminal conduct," he should have departed originally and imposed some prison sentence as a departure at that time. But to allow that pre-existing prior record, which became no worse and no better while petitioner was on probation, to be dredged up nine months later, labeled as escalating pattern, and used to depart greater than one cell on the VOP, is unconscionable.

In the final alternative, petitioner will argue that even if this Court did not mean what it said in Lambert and Ree, and even if this Court sees nothing wrong with using the facts as they existed at the time of the original sentencing to justify departure on a later VOP sentence, his prior record of four misdemeanors, one grand theft, and one drug possession is not an "escalating pattern."

In Keys v. State, 500 So.2d 134 (Fla. 1986), the defendant started out with a conviction for breaking and entering, which was followed by convictions for aggravated assault, sexual battery, robbery, and aggravated battery. This Court affirmed the departure sentence:

> We find that this escalation from crimes against property to violent crimes against persons is a clear and convincing reason

> for departure and is supported by the facts of this case.

Id. at 136; emphasis added. Thus, this Court only approved escalating pattern as it applied to property crimes followed by crimes of violence. See also State v. VanHorn, 561 So.2d 584 (Fla. 1990), in which this Court approved an escalating pattern which went from disturbing the peace, burglary of a dwelling, and burglary of a dwelling with threats to burglary of a dwelling, assault, aggravated battery, and attempted sexual battery.

Petitioner had no crimes of violence at the time he was placed on probation; he had four misdemeanors, one third degree felony grand theft, and the instant possession of cocaine.

Notwithstanding the lower tribunal's decision in Kirby v. State, 553 So.2d 1290 (Fla. 1st DCA 1989), which held that escalating pattern may apply to one whose crimes never become violent, the legislature, in codifying this factor as a reason for departure, stated:

> (8) A trial court may impose a sentence outside the guidelines when credible facts proven by a preponderance of the evidence demonstrates [sic] that the defendant's prior record, including offenses for which adjudication was withheld, and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent to violent crimes or a progression of increasingly violent crimes.

Section 921.001(8), Florida Statutes; emphasis added.

Further, the overwhelming number of lower court opinions on the subject demonstrate that this reason for departure is limited to the progression from non-violent to violent crimes. See, e.g., Ramsey v. State, 562 So.2d 394 (Fla. 5th DCA 1990)(not escalating to go from non-violent misdemeanors to non-violent third degree felony of attempted burglary of a dwelling); San-Martin v. State, 562 So.2d 776 (Fla. 2nd DCA 1990)(escalating to go from crimes against property to arson, which is a crime of violence); Blair v. State, 559 So.2d 349 (Fla. 1st DCA 1990)(escalating to go from property crimes to escape, aggravated battery, and weapons charges, and then to armed robbery and first degree murder); Johnson v. State, 558 So.2d 1051 (Fla. 2nd DCA 1990)(escalating to go from burglary, aggravated assault, robbery, and soliciting prostitution to aggravated assault and shooting into a dwelling); Llabona v. State, 557 So.2d 66 (Fla. 3rd DCA 1990)(escalating to go from grand larceny and trafficking in cannabis to aggravated assault and burglary with an assault and with a firearm); Jackson v. State, 556 So.2d 813 (Fla. 5th DCA 1990)(not escalating to go from possession of paraphernalia and possession of drugs to possession of drugs); Lee v. State, 556 So.2d 482 (Fla. 2nd DCA 1990)(not escalating to go from petit theft and grand theft to grand theft); and White v. State, 548 So.2d 765 (Fla. 1st DCA 1989)(escalating to go from robbery and property crimes to armed robbery and battery).

Even other panels of the First District have accepted this position: Cox v. State, 508 So.2d 1318 (Fla. 1st DCA 1987)(not

escalating to go from two minor marijuana possessions to burglary of a dwelling, burglary of a structure, and grand theft); and Walker v. State, 555 So.2d 1221 (Fla. 1st DCA 1989)(not escalating to go from possession of cannabis with intent to sell, possession of cannabis, and possession and delivery of cannabis to trafficking in 83.1 grams of cocaine). See especially, Roache v. State, 547 So.2d 706,707 (Fla. 1st DCA 1989), in which the court noted that:

> escalation from crimes against property to violent crimes against persons [are] involved in the "typical case" approving escalating pattern of criminal activity as a reason for departure.

Thus, because petitioner's criminal record at the time he was placed on probation had not moved from non-violent to violent crimes, the lower tribunal was incorrect in finding an escalating pattern.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse the lower tribunal's decision, answer the certified question in the negative, and vacate the departure sentence.

Respectfully submitted,

OFFICE OF THE
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Assistant Public Defender
301 South Monroe Street
Fourth Floor North
Tallahassee, Florida 32301
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Initial Brief of Petitioner has been furnished by delivery to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, this 19 day of September, 1990.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER