IN THE FLORIDA SUPREME COURT

RANDY WILLIAMS,

Petitioner,

v. CASE NO. 76,609

STATE OF FLORIDA,

Respondent.

_____/

ON REVIEW FROM THE FIRST
DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON MERITS

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STATEMENT OF THE CASE AND FACTS

Appellee is in substantial agreement with appellant's statement of the case and facts with the following additions and exceptions:

1. In his Statement of the Case and Facts, Petitioner states: "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." (Brief of Petitioner on the Merits at 4). In fact, Petitioner framed his Issue below thusly: "Whether the Reasons For Departure are Valid and Supported by the Record." (Initial Brief of Appellant at 4). The only references to the one cell increase for probation violation were in the last two paragraphs of the brief:

> If the scoresheet was wrong in both instances, the fifteen points difference would place appellant in the category of any non-state prison sanction, which is where he scored originally. Using the one cell enhancement allowed by Rule 3.701(d)(4) the proper sentence would fall in the range of community control or 12-30 months incarceration. See Form 3.988.
>
> The sentence should be vacated and remanded with directions to recalculate the scoresheet and impose a sentence that does not depart from the guidelines, although allowing the one cell increase authorized by Rule 3.701(d)(11). New reasons for departure should not be permitted. Shull v. Duggar, 515 So.2d 748 (Fla. 1987).

(Initial Brief of Appellant at 6, 7).

2. Lambert v. State, 545 So.2d 838 (Fla. 1989) was decided June 15, 1989. The Initial Brief of Appellant was filed in the First District Court of Appeals on August 28, 1989. (Initial Brief of Appellant at 9). The original opinion in Ree v. State, 14 F.L.W. 565 (Fla, November 16, 1989) opin. on. reh. 15 F.L.W. S395 (July 19, 1990), was filed November 16, 1989.

SUMMARY OF ARGUMENT

The First District Court of Appeal correctly upheld imposition of a departure sentence after Petitioner violated his probation because the reason for departure was unrelated to the reasons for revoking probation. This Court in Lambert v. State, 545 So.2d 838 (Fla. 1989) indicated that departure after violation could not exceed the one-cell enhancement authorized by Fla.R.Crim.P. 3.701, for reasons relating to the impropriety of using offenses both to depart and as a basis for new sentencing. The reasoning of Lambert did not support this Court's subsequent, over-broad statement in Ree v. State, 15 F.L.W. S395 (Fla. July 20, 1990) that Lambert prohibited any enhancement beyond one cell. Consequently, neither the reasoning of Lambert nor the language of Ree should control this case. This Court should recede from its expansive language in Ree and uphold the sentence imposed.

ARGUMENT

ISSUE

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?

Appellant was adjudicated guilty pursuant to a plea of nolo contendere to possession of cocaine with intent to deliver. (R 37-38). Sentence was withheld and probation imposed for a period of seven years by order dated June 24, 1988. (R 40-41). On March 9, 1989, after Petitioner had violated his probation, the judge imposed sentence for the original crime. (R 65-68). That sentence was a departure sentence of more than one guidelines cell, and was supported by the following reasons:

> 1. The Defendant's past criminal 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.
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> 2. The Defendant's prior 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 Williams v. state, 15 F.L.W. D2072 (Fla. 1st DCA August 8, 1990), the First District found the first reason invalid, but upheld the second. Additionally, although Petitioner had not raised the issue, the First District discussed the propriety of departing from sentencing guidelines following revocation of probation in light of this Court's holdings in Lambert v. State, 545 So.2d 838 (Fla. 1989) and Ree v. State 15 F.L.W. S395 (Fla. July 20, 1990).

In Lambert, which was decided on June 15, 1989, (three months after the sentencing in this case) this Court reversed its prior holding in State v. Pentaud, 500 So.2d 526 (Fla. 1987). Pentaud had expressly held that "where an offense constituting violation of probation is sufficiently egregious, Florida Rule of Criminal Procedure 3.701(d)(14) cannot be read as limiting departure to a single cell." Lambert, supra, at 840. In reversing itself, the Lambert Court said that the underlying reasons for a probation revocation could not be used as a reason for departure because: 1) the sentencing guidelines do not permit departure based on an "offense" of which the violator may

ultimately be acquitted; 2) if the violator were convicted of the offense which is the basis for revocation "double dipping" would result because the departure would be joined by an enhanced guidelines score on the new conviction; and, 3) violation of probation is not a substantive offense in and of itself.

Having engaged, in Lambert, in a lengthy analysis of the above summarized rationale for overturning the established law of Pentaud, this Court, in Ree, with a single stroke, significantly expanded the scope of its ruling, saying, "[w]e recently have held that any departure sentence for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines." Ree, supra, at S396. (citations omitted) (emphasis in original). This broad statement is unsupported by the abbreviated analysis of the Lambert decision which immediately follows it in Ree, suggesting that the expansion of the Lambert holding was unintentional.[1]

Wisely, the First District recognized that while in Ree the facts of Ree would support a holding consistent with Lambert, the sweeping statement recited above was not supported by the facts or reasoning of that case. Consequently, because the reasoning of Lambert did not apply to the facts of the instant case, the First District refused to apply it, notwithstanding the expansive

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[1] To be fair, it must be said that the absence of logic in applying Lambert outside its factual scenario is probably the reason for Petitioner's failure to argue it below.

language of Ree. In so doing, the Court followed a rule the logic of which is compelling: when a sentence is withheld by placing the offender on probation, the trial court, in the event of a violation, may impose any sentence which it could lawfully impose at the outset. To do otherwise would irrationally place a probation violator in a better position than a defendant facing his initial sentencing.

Petitioner's cavil against being penalized "for conduct which occurred prior to his being placed on probation" (Brief of Petitioner on the Merits at 8) is meritless. By definition, an escalating pattern of criminal conduct must look to matters outside the crime for which the defendant is being sentenced. Moreover, the State, while disagreeing with Lambert, recognizes that a proper reading of its holding requires that departure not be based on offenses occurring after probation is imposed.

This case differs from Colvin v. State, 549 So.2d 1137 (Fla. 3rd DCA 1989) cited by Petitioner, because Colvin was initially sentenced to community control, while no sentence was originally imposed here. As the First District observed, "the trial court was not resentencing Williams when it imposed the sentence at issue; rather, it was imposing a sentence for the first time." Williams, supra, at D2073 (emphasis in original). It must also be noted that the scoresheet presented at sentencing contained eleven more misdemeanors than did the scoresheet provided when probation was imposed. (R 36, 60). Thus the pattern evident at

sentencing may not have been apparent to the judge when he initially imposed probation.[2]

With respect to the substance of the departure reason, appellant erroneously argues that his criminal history consisted of "only" a third degree felony (grand theft) and fifteen misdemeanors, making his possession of cocaine not the type of escalation which would be susceptible to departure based on an escalating pattern of criminal behavior.

After his fifteen misdemeanors and third degree felony, appellant plead nolo contendere to a second degree felony, possession of cocaine with intent to sell, and received probation on June 24, 1988. (R 40-41). Unlike the defendant in Roache v. State, 524 So.2d 706 (Fla. 1st DCA 1989) there does not appear to be any decrease in the severity of appellant's overall criminal history.

Criminal conduct need not escalate from nonviolent to violent in order to form a basis for departure. Kirby v. State, 553 So.2d 1290 (Fla. 1st DCA 1989), Rev. den. 562 So.2d 346 (Fla. 1990). Respondent submits that in enacting sec. 921.001(8) codifying use of an escalating pattern of offenses based on

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[2] The First District made clear in its opinion that Petitioner's failure to object precluded appellate review of any possible scoresheet error and that such error, if it existed, could have as easily been on the scoresheet used in imposing probation as in that used at sentencing after probation was violated. Williams, supra, at D2073, fn 2.

credible facts and a preponderance of the evidence as a valid reason for departure evidences an intent is demonstrated by the legislature to include not only the examples expressed in the statute (escalation from nonviolent to violent offenses and escalation from violent to more violent offenses) but also the logical concomitant, escalation from less serious to more serious nonviolent crimes.

That intent should be respected, and the sentence imposed here upheld.

CONCLUSION

Wherefore, in view of the foregoing argument and citation to authority, appellee respectfully asks this Honorable Court to affirm the judgment and sentence appealed here from.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via U. S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 2nd day of October, 1990.

VIRLINDIA DOSS
Assistant Attorney General