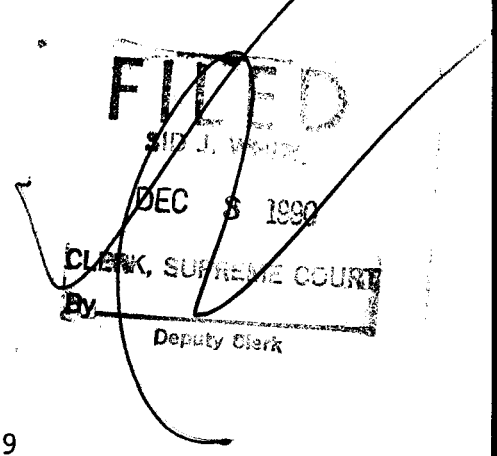
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 76,689
5DCA NO. 89-1037

RANDY ARNETTE,

Respondent.

_____/

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

It was never the intention of the legislature that there be no legal consequence for violation of community control by a defendant sentenced as a youthful offender. Upon violation of community control, the youthful offender becomes subject to section 948.06(1), Florida Statute and can be sentenced up to the statutory maximum. In this case, the statutory maximum for armed burglary is life imprisonment. After preparing written reasons for departure, that was the sentenced imposed by the sentencing judge.

The 1985 amendment to the youthful offender statute does not limit punishment for violations occurring prior to its effective date.

Lambert is inapplicable because valid reasons for departure existed besides the acts constituting the violation of community control.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SENTENCING RESPONDENT TO LIFE IMPRISONMENT FOR THE 1979 ARMED BURGLARY AFTER REVOKING HIS COMMUNITY CONTROL AS A YOUTHFUL OFFENDER FOR A 1984 SEXUAL BATTERY.

Respondent suggests that the intent of the legislature in enacting the Florida Youthful Offender Act, Chapter 78-84 Laws of Florida, was to limit the punishment of youthful offenders to a period of not more than six years. He argues that the 1985 amendment to that law was designed to clarify that intent. Chapter 85-288, Laws of Florida. The legislative intent was set out in Section 2 of Chapter 78-84. The legislation was designed to keep younger offenders separated from older and more experienced criminals during their confinement and to offer a sentencing alternative for juvenile offenders.

It was never the intention of the legislature that there should be no sanction for the violation of community control by a youthful offender who has already served the incarcerative portion of his youthful offender sentence. The idea of the program was to give the young offender an opportunity to pay his debt and demonstrate his ability to return to society without having been hardened by his contact with older, more hardened criminals.

It should be remembered that the 1980 amendment to the statute gave the sentencing judge discretion in determining who should be treated as a youthful offender. Chapter 80-321, Laws of Florida. The 1985 amendment limiting imprisonment of youthful

offenders to not more than six years indicated a legislative intent that, if the trial court found that the defendant was an appropriate candidate for this special treatment, then this six year limitation on his incarceration would likewise be appropriate. At the time of Respondent's case, the sentencing judge had no discretion and was bound to sentence Respondent as a youthful offender since he fit the statutory criteria. It cannot be said that the intent of the legislature in 1985 relating to the consequences for violation of community control by a defendant specifically designated by the trial court for treatment as a youthful offender was the same as the legislative intent in 1978, when the language of the statute left the trial court no discretion in determining who would be an appropriate candidate for youthful offender treatment.

Respondent pled guilty to a first degree felony, burglary of a dwelling while armed. At the time of the commission of that offense, his classification as a youthful offender was mandatory. Florida Statute § 958.04(2)(1978). By the time of Respondent's conviction in 1981, the legislature had amended the law to give the sentencing judge some discretion as to who would be an appropriate candidate for youthful offender treatment. Chapter 80-321, Section 1, Laws of Florida. See Daniels v. State, 435 So.2d 951 (Fla. 1st DCA 1983).

Respondent was fifteen years old when he committed the armed burglary and false imprisonment in 1979. On April 9, 1980, three months prior to his sixteenth birthday, pursuant to a plea agreement, he was sentenced for those crimes to fifteen years

imprisonment for the burglary and a concurrent five year sentence for the false imprisonment. That sentence was amended May 15, 1981, to four years incarceration for the burglary and three years concurrent for the false imprisonment to be followed by two years in a community control program to comply with the mandatory requirement of the Youthful Offender Statute as it existed at the time of the offense, despite the fact that it was contrary to the plea agreement. (Appendices VII-XI).

In February, 1984, during the community control portion of the amended sentence, Respondent committed another false imprisonment and a sexual battery. By those acts, Respondent demonstrated that the goals of his treatment as a youthful offender had not been met. He now suggests that, in enacting Chapter 78-84, Laws of Florida, the legislature intended that there should be no sanction for violation of the community control portion of a youthful offender sentence. That result would be ludicrous. The legislature intended to give the youthful offender a second chance, not carte blanche to act as he wished while on community control. Florida Statute § 958.14 (1978) states that a violation of community control shall subject the youthful offender to the provisions of Florida Statute § 948.06(1), which would subject that offender to "...any sentence which might originally have been imposed...". The maximum sentence for armed burglary was life imprisonment and that is the sentence which the trial court imposed after Respondent's violation, after setting forth written reasons for a departure sentence. That was what the legislature intended, not continued

leniency for an offender who has demonstrated that his treatment as a youthful offender was unsuccessful.

Respondent suggested in his brief on the merits that in Brooks v. State, 478 So.2d 1052 (Fla. 1985), this Court approved the decisions of the Fourth and Fifth District Courts in Clem v. State, 462 So.2d 1134 (Fla. 4th DCA 1984) and Spurlock v. State, 449 So.2d 973 (Fla. 5th DCA 1985), review denied, 466 So.2d 212 (Fla. 1985). Those decisions were mentioned only in connection with this Court's determination in Brooks that the Circuit Court had jurisdiction to revoke community control rather than the Parole and Probation Commission. The certified question relating to the length of the sentence upon revocation of community control was simply answered affirmatively without elaboration and the lack of clarification in the answer to that certified question has compounded the resulting confusion relating to this matter.

As Petitioner pointed out in its initial brief, Greene v. State, 398 So.2d 1011 (Fla. 1st DCA 1981), review dismissed, 406 So.2d 1118 (Fla. 1981), caused the initial confusion when the District Court failed to make clear the question that it was certifying to the Supreme Court. Brooks added to that confusion. Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988), approved, 545 So.2d 851 (Fla. 1989) further complicated matters approving a 15 year sentence for violation of probation by a youthful offender. See Hamilton v. State, 553 So.2d 387 (Fla. 4th DCA 1989).

The next problem is the effect of the 1985 amendment to Florida Statute § 958.14, Chapter 85-288 § 24, Laws of Florida, (effective July 1, 1985) on Respondent's case. He violated his community control by the sexual battery in 1984, but his VOP hearing was postponed until after his trial on the substantive charges forming the bases for the violation. He was convicted after jury trial of those offenses and sentenced to life imprisonment in February, 1985. In March, 1986, Respondent's community control was officially revoked and, in imposing a life sentence for the 1979 armed burglary, the Court entered written reasons for departure from the guidelines among which were his escalating pattern of violent criminal conduct, his non-amenability to rehabilitation and psychological and emotional trauma to his victim.

Respondent suggests that he is entitled to the benefit of the six year limitation provided by the 1985 amendment, even if he could legally have been sentenced to the statutory maximum prior to July 1, 1985, as a limitation on previously authorized punishment, citing Watson v. State, 528 So.2d 101 (Fla. 1st DCA 1988) and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

Buckle v. State, 528 So.2d 1285 (Fla. 2d DCA 1988) indicates to the contrary that the amendment is applicable to violations of probation occurring after its effective date. The events constituting the violation of Respondent's community control occurred almost a year and one half prior to the effective date of the amendment. The change in the law did not result in an

enhancement of the possible penalties for the 1984 violations and did not violate the ex post facto prohibition as discussed in Weaver, supra.

Respondent's final claim is that he was entitled to be sentenced under the guidelines after the probation violation, citing Lambert v. State, 545 So.2d 838 (Fla. 1989). He was originally sentenced to fifteen years imprisonment pursuant to a negotiated plea. Respondent pled guilty to burglary of a dwelling while armed and agreed to a cap of fifteen years imprisonment on that charge with a concurrent five year sentence for false imprisonment. The charges of sexual battery and robbery with a deadly weapon were nolle prosequi. (Appendix XII). In 1981, the Youthful Offender Act was deemed to have been mandatorily applicable in his case and he was resentenced pursuant to it. The negotiated plea to a maximum of fifteen years incarceration would have constituted a valid reason for departure under the present case law. Smith v. State, 530 So.2d 304 (Fla. 1988); Quaterman v. State, 527 So.2d 1380 (Fla. 1988).

In any event, the sentencing judge provided written reasons for departure from the guidelines in sentencing Respondent to life imprisonment after the revocation of community control for the 1979 armed burglary. While it is true that those reasons included the fact that Respondent's convictions for the 1984 sexual battery and false imprisonment demonstrated an escalating pattern of violent criminal conduct, they also included the psychological and emotional trauma to his victim, a woman of seventy eight years of age in poor health. See State v.

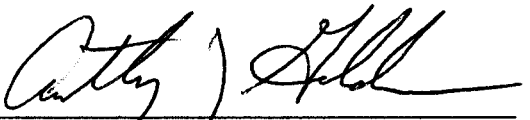
Rousseau, 509 So.2d 281 (Fla. 1987). Either the negotiated plea or the psychological trauma would constitute a valid reason for departure notwithstanding Lambert.

CONCLUSION

Based on the arguments and authorities presented above, Respondent respectfully requests that this court answer the question certified by the District Court of Appeal in the affirmative by holding that "resentencing" for violations of community control occurring prior to the 1985 amendment to the Youthful Offender Act is limited only by the maximum statutory period for the offense involved as is implicit from this Court's opinion in Brooks v. State, 478 So.2d 1052 (Fla. 1985) and, based on that answer, the decision of the District Court of Appeal vacating Respondent's life sentence for Burglary and five years incarceration for False Imprisonment should be reversed and the sentences imposed by the trial court should be approved and reinstated.

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 Petitioner's Reply Brief has been mailed to Michael S. Becker, Esquire, Attorney for Respondent, at the Office of the Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 29th day of November, 1990.

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Assistant Attorney General

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