077

FILED
SID J. WHITE
JAN 17 1991
CLERK, SUPREME COURT
By ——— Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES MICHAEL WILLIAMS, :
Petitioner, :
vs. : Case No. 77220
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

MEGAN OLSON
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

ISSUE I

DOES A SECOND VIOLATION OF PROBATION CONSTITUTE A VALID BASIS FOR A DEPARTURE SENTENCE BEYOND THE ONE-CELL DEPARTURE PROVIDED IN THE SENTENCING GUIDELINES? 4

CONCLUSION 8

APPENDIX

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES	PAGE NO.
Adams v. State, 490 So.2d 53 (Fla. 1986)	4-6
Irizarry v. State, 15 F.L.W. D1288 (Fla. 2d DCA May 8, 1990)	4
Lambert v. State, 545 So.2d 8383 (Fla. 1989)	4-6
Maddox v. State, 553 So.2d 1380 (Fla. 1989)	4
Pentaude v. State, 500 So.2d 526 (Fla. 1987)	5
Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989)	4
Williams v. State, Case No. 87-2878 (Fla. 2d DCA April 27, 1990)	2, 4, 6

OTHER AUTHORITIES	
Fla. R. Crim. P. 3.701(d)(14)	5, 6

PRELIMINARY STATEMENT

Petitioner was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level, will be referred to by the Symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by informations with possession of a controlled substance and paraphernalia; burglary of a dwelling; and grand theft (R12-13). He entered guilty pleas to the offenses of possession of a controlled substance and burglary of a dwelling. He was placed on concurrent five year periods of probation (R14-17). Affidavits alleging the violation of probation were filed in 1978 and 1979. (Supplemental Record 4-5). The Petitioner's probation was reinstated in 19988 but ultimately a second affidavit of violation was filed (R23, 27). The Petitioner was once again found to be in violation of his probation. He had previously elected to be sentenced under the sentencing guidelines, and the presumptive guidelines range reflected a sentence of twelve to thirty months incarceration or community control (R10, 33). The trial court imposed an overall sentence of ten years incarceration (R10, 39-44). The basis for the departure was the multiple violations of probation by the Petitioner (R33).

The Second District Court of Appeals affirmed the departure sentence relying upon their decision in Williams v. State, Case No. 87-2878 (Fla. 2d DCA April 27, 1990) [15 F.L.W. D1147]. The court also certified the following questions previously certified in Williams, as one of great public importance:

> DOES A SECOND VIOLATION OF PROBATION CONSTITUTE A VALID BASIS FOR DEPARTURE SENTENCE BEYOND THE ONE-CELL DEPARTURE PROVIDED IN THE SENTENCING GUIDELINES?

SUMMARY OF THE ARGUMENT

The imposition of a departure sentence based upon prior violations of probation or community control by a defendant violates the spirit and intent of the sentencing guidelines. In such cases, a trial court should be precluded from imposing a sentence greater than the one-cell enhancement allowed under the sentencing guidelines.

ARGUMENT

ISSUE I

DOES A SECOND VIOLATION OF PROBATION CONSTITUTE A VALID BASIS FOR A DEPARTURE SENTENCE BEYOND THE ONE-CELL DEPARTURE PROVIDED IN THE SENTENCING GUIDELINES?

In the case of Williams v. State, Case No. 87-2878 (Fla. 2d DCA April 27, 1990) [15 F.L.W. D1147], the Second District Court of Appeal stated that multiple violations of probation were a valid reason for imposing a departure sentence in a violation of probation case. Although, in light of Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989) and Lambert v. State, 545 So.2d 8383 (Fla. 1989), the court certified the above-stated question as one of great public importance, it should also be noted that at least two other District Court of Appeals conflict directly with the Second District Court of Appeal on this issue. Maddox v. State, 553 So.2d 1380 (Fla. 1989); Irizarry v. State, 15 F.L.W. D1288 (Fla. 2d DCA May 8, 1990). Both the Fifth and the Third District Courts of Appeals have held that under such circumstances as those presently before the Court, multiple violations of probation were no longer a valid reason for a sentencing departure. The Second District Court of Appeal felt that the holding of Adams v. State, 490 So.2d 53 (Fla. 1986), which upheld departure sentences based upon repeated violations of probation, had not been invalidated by the recent Florida Supreme Court cases of Lambert and Ree, supra, whereas, the Fifth and Third District Courts of Appeal reasoned

that the recent Florida Supreme Court cases did in effect overrule the decision in Adams, supra.

This Court in Lambert v. State, 545 So.2d 8383 (Fla. 1989), discussed the policy reasons for the holding that factors related to a violation of probation or community control could not provide the basis for a departure sentence. This court also receded from the decision in Pentaude v. State, 500 So.2d 526 (Fla. 1987), to the degree it conflicted with Lambert, supra. The policy reasons espoused in Lambert, supra, requiring the recession from Pentaude, supra, are equally applicable to the holding of Adams v. State, 490 So.2d 3 (Fla. 1986). As noted in Lambert, a "...violation of probation is not itself an independent offense punishable by law in Florida... . 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." Id. at 841.

When a trial court judge imposes a departure sentence based upon repeated violations of probation or community control, he is in essence unilaterally creating a new substantive offense and affixing the penalty he deems appropriate for its violation. The purpose of Florida Rule of Criminal Procedure 3.701(d)(14), limiting the departure upon a violation of probation or community control to a one-cell increase, is to establish uniformity in sentencing a defendant upon a violation of probation. At the time a defendant is initially placed on probation or community control, the trial court judge, as well as the defendant, is aware of the

possible incarcerative sentence which may be imposed upon a violation of probation. If the defendant violates the probation or community control, the trial court judge determines whether to reinstate the defendant or to impose the applicable prison sentence. The defendant has previously failed to in some way, conform to the requirements of his probationary status, thus a judge's decision to reinstate him must, in all honesty, be made with the knowledge that the defendant may again violate his probation. A defendant should not face a sentence in excess of the applicable guidelines and potentially as great as the statutory maximum for the offense of conviction, because of the trial judge's ultimate decision. In other words, trial court judges should not be allowed to circumvent the basic policy of Florida Rule of Criminal Procedure 3.701(d)(14), limiting the sentences imposed in a violation of probation case to a one-cell increase, by stating that a defendant has repeatedly violated his probation and then impose a departure sentence. Thus, Adams v. State, 490 So.2d 53 (Fla. 1986) must have been overruled by Lambert, Otherwise, the effect of such a sentence in reality creates a new substantive offense where a defendant repeatedly violates his probation or community control, allowing for multicell sentencing departures based upon the violation of probation which in "contrary to the spirit and intent of the guidelines." Lambert, supra, at 842.

The decision of the Second District Court of Appeal in Williams, is erroneous as it fails to correctly apply the logic and legal reasoning employed in Lambert. Multiple violations of

probation or community control should not be considered as a valid basis for departure and thus the decision of the Second District Court of appeal must be reversed.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Second District Court of appeals decision in the Petitioners case should be reversed and the case remanded for resentencing within the guidelines.

APPENDIX

PAGE NO.

1. Second District Court of Appeal opinion issued December 28, 1990. A1

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES MICHAEL WILLIAMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 90-01254

Opinion filed December 28, 1990.

Appeal from the Circuit
Court for Lee County;
William J. Nelson, Judge.

James Marion Moorman,
Public Defender, and
Megan Olson,
Assistant Public Defender,
Bartow, for Appellant.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Wendy Buffington,
Assistant Attorney General,
Tampa, for Appellee.

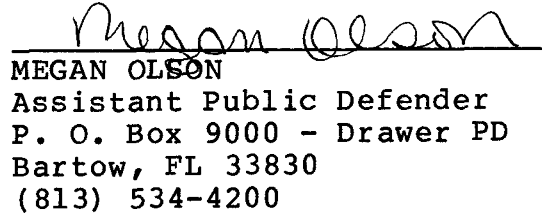
Received By
DEC 28 1990
Appellate Division
Public Defenders Office

PER CURIAM.

<u>CERTIFICATE OF SERVICE</u>

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 15th day of January, 1991.

Respectfully submitted,



JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

MEGAN OLSON
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

MO/tll