IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 15 1991
CLERK, SUPREME COURT
By
Chief Deputy Clerk

HECTOR TRINIDAD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 77,579

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

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TOPICAL INDEX TO BRIEF

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PRELIMINARY STATEMENT

Petitioners were the Appellants in the Second District Court of Appeal and the defendants in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The records on appeal, which were 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

On October 1, 1987, the State Attorney for the Twentieth Judicial Circuit for Lee County, Florida, filed an information charging the Appellant, HECTOR TRINIDAD, with aggravated child abuse, allegedly occurring between August and September 1987 in violation of section 827.03, Florida Statutes (1984) (R13).

The Appellant entered a plea of guilty to the charge and was placed on two years of community control followed by thirteen years of probation on January 29, 1988 (R18-21). An affidavit alleging the violation of community control was filed on October 10, 1988 (R24). The Appellant's probation was revoked and he was sentenced to a term of three years incarceration followed by ten years of probation (R28-29).

A second affidavit alleging the violation of the Appellant's probation was filed on September 28, 1989 (R34). A revocation hearing was held on December 12, 1989, and the Appellant was sentenced to a term of eight years incarceration with credit for time served (R2-10). The Appellant's applicable guidelines range was 2 1/2 - 3 1/2 years incarceration. The trial court's oral and written reason for the departure sentence imposed over the Appellant's objection, was his multiple violations of probation (R7-10).

Notice of Appeal was timely filed on January 9, 1990 (R41). On appeal the only issue of merit argued by the Petitioners was the invalidity of the departure sentence beyond the one-cell enhancement allowed under Florida Rule of Criminal Procedure

3.710(D)(14) for a violation of probation or community control. In Williams, the Second District Court of Appeal affirmed the sentence imposed by the trial court on the grounds that the recent Florida Supreme Court cases of Franklin v. State, 545 So.2d 851 (Fla. 1989) and Lambert v. State, 545 So.2d 838 (Fla. 1989), did not affect the trial court's right to impose a departure sentence in cases of multiple violations of probations or community control. In reaching this decision the Second District Court of Appeal relied on the case of Adams v. State, 490 So.2d 53 (Fla. 1986) which approved the departure sentences based upon multiple violations of probation. On February 22, 1991, the Second District Court of Appeal issued a per curiam affirmed opinion referring to the case of Williams v. State, 449 So.2d 610 (Fla. 2d DCA 1990).

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

HAS THE SUPREME COURT IN Ree v. State, 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 Florida Rule of Criminal Procedure 3.701(D)(14)?

In the case of Williams v. State, 15 F.L.W. D912 (Fla. 2d DCA April 4, 1990), 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 and Lambert, supra, 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. 3d 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 838 (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 53 (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. As 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 bay 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, 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

is "contrary to the spirit and intent of the guidelines." Lambert, supra, at 842.

The decision of the Second District Court of Appeal in Williams, and the consolidated cases is erroneous as they fail 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 decisions 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 Petitioner's case should be reversed and the case remanded 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

HECTOR TRINIDAD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 90-00192

Opinion filed February 22, 1991.

Appeal from the Circuit Court for Lee County; James R. Thompson, Judge.

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

Robert A. Butterworth, Attorney General, Tallahassee, and Donna A. Provonsha, Assistant Attorney General, Tampa, for Appellee.

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PER CURIAM.

Affirmed. See Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990).

SCHOONOVER, C.J., and PARKER and PATTERSON, JJ., Concur.

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any event be a new trial, we do not reach the defendant's fourth amendment issues. Instead, those issues should be raised in the trial court on remand.

We conclude that defendant's remaining point on appeal is without merit.

Reversed and remanded for new trial.

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Stephen T. SIAS, Appellant,

v.

The STATE of Florida, Appellee.

No. 89-841.

District Court of Appeal of Florida, Third District.

April 3, 1990.

An Appeal from the Circuit Court for Dade County; Arthur I. Snyder, Judge.

Stephen T. Sias, in pro. per.

Robert A. Butterworth, Atty. Gen., and Jacqueline M. Valdespino, Asst. Atty. Gen., for appellee.

Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.

PER CURIAM.

Affirmed. *La Marca v. State*, 547 So.2d 350 (Fla. 3d DCA 1989); *Sias v. State*, 455 So.2d 1341 (Fla. 3d DCA 1984).

Dennis WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 87-01981.

District Court of Appeal of Florida, Second District.

April 4, 1990.

Following revocation of probation, defendant received upward departure sentence for conviction for grand theft in second degree, in the Circuit Court, Hillsborough County, Robert Bonanno, J., and defendant appealed. The District Court of Appeal, Hall, J., held that: (1) remand was necessary for entry of corrected guidelines scoresheet indicating trial court's intention to depart from guidelines and written order stating reasons for departure, and (2) repeated violation of probation would be valid reason for upward departure from sentencing guidelines range beyond the one-cell increase for violation of probation.

Affirmed in part; reversed and remanded in part; question certified.

Schoonover, J., filed opinion concurring in part and dissenting in part in which Campbell, C.J., and Lehan and Parker, JJ., concurred.

1. Criminal Law ⇐1181.5(8)

Remand was necessary for entry of corrected sentencing guidelines scoresheet indicating trial court's intention to upwardly depart from guidelines and written order stating reasons for departure, where no written reasons for departure were given in space provided on scoresheet other than scoresheet's notation of "3rd violation," and section of scoresheet for preparer to indicate whether guidelines sentence or departure sentence was imposed was marked as guidelines sentence.

2. Criminal Law ⇐982.9(7)

Repeated violation of probation is valid reason for upward departure from sentencing guidelines beyond the one-cell increase

for violation of probation. West's F.S.A. RCrP Rule 3.701, subd. d, par. 14.

3. Criminal Law ⇐982.9(7)

Upward departure from sentencing guidelines for conduct underlying violation of probation is not permissible.

James Marion Moorman, Public Defender, and Megan Olson, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and William I. Munsey, Jr., Asst. Atty. Gen., Tampa, for appellee.

EN BANC

HALL, Judge.

Dennis Williams appeals from his judgment and sentence for grand theft following revocation of his probation. He argues that the trial court erred in departing from the sentencing guidelines on the basis of factors relating to his probation violation.

In 1985, the appellant was originally placed on two-years' probation for grand theft, second degree. The record reflects that he violated probation in 1986 by failing to pay costs, by failing to perform community service, and by committing battery upon his wife. The court adjudicated him guilty of violating probation and restored him to probation for a three-year period. In 1987, the appellant was again charged with violation of probation upon being arrested for aggravated battery on his estranged wife and armed burglary of his wife's home. The trial court found the appellant to be in violation of probation and stated that the violations were sufficient "to revoke him and to disregard the guidelines since it's his third violation." The court sentenced the appellant to five years in prison, a departure from the presumptive guidelines range of community control, or twelve to thirty months' incarceration, including the one-cell increase for violation of probation.

[1-3] The sentencing guidelines scoresheet shows the presumptive sentence to be any nonstate prison sanction and includes a notation, "3rd violation"; however, no written reasons for departure were given in the space provided. Further, in the section where the scoresheet preparer was to indicate whether a guidelines sentence or a departure sentence was imposed, the former was clearly marked.

Since it is unclear from the scoresheet on what grounds the trial court intended to rely in imposing a departure sentence, we must remand for entry of a corrected scoresheet indicating the trial court's intention to depart and a written order stating reasons for departure. In doing so, we note that although repeated violation of probation is a valid reason for departure, *Adams v. State*, 490 So.2d 53 (Fla.1986), departure for conduct underlying the violation of probation is not punishable by an extended prison term. *Lambert v. State*, 545 So.2d 838 (Fla.1989).

Accordingly, we affirm the trial court's order revoking the appellant's probation, but reverse and remand for proceedings consistent with this opinion.

However, in light of the recent decisions of *Ree v. State*, 14 F.L.W. 565 (Fla. Nov. 16, 1989), and *Lambert v. State*, 545 So.2d 838 (Fla.1989), we certify to the Florida Supreme Court the following question as being one of great public importance:

HAS THE SUPREME COURT IN *REE V. STATE*, 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 SECTION 3.701(D)(14), FLORIDA STATUTES (1984)?

SCHEB, RYDER, DANAHY, FRANK, THREADGILL, PATTERSON and ALTENBERND, JJ., concur.

SCHOONOVER, J., concurs in part and dissents in part.

CAMPBELL, C.J., and LEHAN and PARKER, JJ., concur with SCHOONOVER, J.

SCHOONOVER, Judge, concurring in part and dissenting in part.

I agree that this matter must be reversed and remanded for resentencing. I also agree that the question set forth in the majority opinion should be certified as a question of great public importance. However, since I concur with our sister court's interpretation of *Ree v. State*, 14 F.L.W. 565 (Fla. Nov. 16, 1989), and *Lambert v. State*, 545 So.2d 838 (Fla.1989), in *Wright v. State*, 554 So.2d 554 (Fla. 5th DCA 1989), and *Maddox v. State*, 553 So.2d 1380 (Fla. 5th DCA 1989), I would hold that multiple violations of probation may no longer be considered a valid reason for departure.

I acknowledge that the supreme court in *Adams v. State*, 490 So.2d 53 (Fla.1986), upheld a departure sentence where the reason given for departing from the recommended sentence was that the defendant was previously placed on probation and twice violated the terms of her probation.

Later, however, without discussing *Adams*, the supreme court in *Lambert* stated:

> [V]iolation of probation is not itself an independent offense punishable at law in Florida. The legislature has addressed this issue and chosen to punish conduct underlying violation of probation by revocation of probation, conviction and sentencing for the new offenses, addition of status points when sentencing for the new offense, and a one-cell bump-up when sentencing for the original offense. It has declined to create a separate offense 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.

Lambert, 545 So.2d at 841.

The court concluded by holding that factors related to violation of probation or community control cannot be used as grounds for departure.

In *Ree*, the court stated that in *Lambert* they held that any departure sentence for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines and that violation of probation cannot be the vehicle for a departure under the basic policies of the guidelines.

In *Wright*, the Fifth District Court of Appeal interpreted *Lambert* as specifically prohibiting the trial court from considering the fact that a defendant has twice violated probation as a valid reason for departing from the guidelines. In *Maddox*, the same court held that under *Ree*, two violations of probation as to the same offense do not justify a departure sentence. The court stated the one cell increase permitted by the sentencing guidelines for a sentence following a violation of probation is the exclusive applicable sentencing factor relating to the effect of a prior violation, or violations, of probation and that no aspect or detail of that probation violation is permissible as a reason for any departure sentence. The court also read the language in *Ree* to mean that the *Adams* exception to departing from a guidelines recommended sentence was eliminated even though the *Ree* opinion does not cite or discuss *Adams*.

I would, therefore, remand for resentencing within the presumptive guidelines, including the one cell increase for violation of probation.

WEST KEY NUMBER SYSTEM

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Donna A. Provonsha, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 11th day of July, 1991.

Respectfully submitted,

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