Supreme Court of Florida

WEDNESDAY, AUGUST 7, 1991

HECTOR TRINIDAD

Petitioner,

vs. Case No. 77,579

STATE OF FLORIDA

Respondent.

* * * * * * * * * * * * * *

Respondent's Motion to Adopt Brief of Williams, et al. v. State, Case No. 75,919 is granted. The motion and brief as been filed with the Court.

A TRUE COPY

TEST:

Sid J. White
Clerk Supreme Court

BDM
c: Ron Napolitano, Esquire
Megan Olson, Esquire

W00A

IN THE SUPREME COURT
STATE OF FLORIDA

HECTOR TRINIDAD,

Petitioner,

v. Case No.77,579

STATE OF FLORIDA,

Respondent.

_____/

MOTION TO ADOPT BRIEF

COMES NOW the Respondent, State of Florida, by and through the undersigned Assistant Attorney General, and files this his Motion to Adopt Brief pursuant to Rule 3.900, Fla. R. App. Pro (1990). As Grounds therefore Respondent would allege and show that:

1. The issue in this case is identical with that in case of Williams et.al v State, No. 75,1919 (Fla., oral argument held March 7, 1991). This Court's decision is pending.

2. The initial brief of the Petitioner on the merits in this case is practically verbatim with that of the Petitioner's initial brief in Williams et. al. v State, supra.

3. Respondent requests this Court's permission to adopt the argument set forth in Respondent's merit brief in the case of Williams et. al v State, supra. (Copies of which are attached here to and made a part hereof).

4. This issue has been thoroughly briefed by both Petitioner and Respondent in the prior case cited.

5. It would serve no useful judicial purpose and would, to the contrary, be a waste of judicial time and resources to require Respondent to file a separate independent brief under these factual circumstances.

Wherefore, Respondent respectfully requests this Honorable Court grant its Motion to Adopt Respondent's Merit Brief in the case of Williams et.al v. State, No. 75,919 for the reasons stated in this motion.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Megan Olson, Assistant Public Defender, Polk County Courthouse, P.O. Box

813-534-4200

9000 - Drawer PD, Bartow, Florida 33830 this 30 day of July, 1991.

Lee Mastelano

OF COUNSEL FOR APPELLEE

IN THE SUPREME COURT
STATE OF FLORIDA

DENNIS WILLIAMS, et al.,

Petitioner,

vs. Case No. 75,919

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MERITS BRIEF OF RESPONDENT ON CERTIFIED QUESTION

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SUMMARY OF ARGUMENT

The holding in Adams, that multiple violations of probation is a valid reason for upward departure from the sentencing guidelines has not been overruled or receded from by this Court's recent decision in Ree and Lambert.

As a matter of policy, defendants who repeatedly defy the trial court's grant of leniency should be treated more harshly than those who do not, particularly in light of the fact that multiplicity or frequency of violations of supervision is not taken into account by the guidelines.

Probation is a matter of grace. Dennis Williams' probation has been revoked. This multi-bite of the "apple" establishes unusual circumstances for the trial court to make a sentencing determination. At this point, under this Court's holdings, it is now appropriate for the imposition of the unpronounced sentence beyond the guidelines range.

CERTIFIED QUESTION

HAS THE SUPREME COURT IN REE V. STATE, 14 F.L.W. 565, _____ SO.2D _____ (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)?

I. PROCEDURAL HISTORY

The certified question before this Court comes from an en banc decision. Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990) (en banc). Dennis Williams was originally placed on probation for grand theft. Regretfully, in 1986 he violated probation by failing to pay costs; failure to perform community service; and, physical spouse abuse. He was found guilty by the trial court of the violations of probations; and, his probationary term was continued for three years. One year later, Dennis Williams is charged with breaking into his estranged wife's residence and with aggravated battery of Mrs. Williams.

The trial court found Dennis Williams to be in violation of his probation; revoked his probation; and, disregarded the sentencing guidelines because it was Dennis Williams' third violation.[1] The recommended range [including the one-cell increase

[1] It should be noted that of the sixteen cases consolidated in this petition, only some involve the commission of new substantive offenses during the term of probation or community control. However, the common thread which binds these cases under the

for violation of probation] is 12-30 months incarceration. The sentence is 5-years and/or 60 months incarceration.

The Second District has found that the written reasons given are incomplete. The court below has affirmed the trial court determination of the violation of probation; but, reversed and remanded for clarification of "3rd violation". In other words, the revocation is affirmed; but, there is an open question as to the reasons for departure.

The Second District is struck by this Court's holding in Ree v. State, ____ So.2d ____, 14 F.L.W. S565 (Fla. No. 71,424; Opinion filed November 16, 1989)(Rehearing filed November 28, 1989 and pending). Although Ree is not final, its projected holding suggests that when it and Lambert v. State, 545 So.2d 838 (Fla. 1989) are read in tandem, this Court has in fact receded from its holding in Adams v. State, 490 So.2d 53 (Fla. 1986) which holds that where a probationer has repeatedly violated the terms of his probation after having his probation restored, a valid reason exists to establish reasons for an upward departure beyond a one-cell bump.

II. HISTORICAL BACKGROUND

No area of Florida law has been subject to the litigation the "guidelines" has invited in our states courts. At bar, Ree is not yet final; but, it is the nexus of the certified question.

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certified question is that all involve two or more prior violations of supervisory custody.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 at 2775 (1972), Justice Marshall, in the invalidation of capital punishment, compared and contrasted punishment in the United States. By the 18th century crimes became less theocratic and more secular. There were fewer capital crimes in the colonies than existed in England; and, Justice Marshall suggests that there was a scarcity of labor in the Colonies. In the Furman case, Justice Brennan points out that there are four interrelated principles which enable a Court to determine whether a punishment complies with federal constitutional requirements: (1) The punishment must no be so severe as to be degrading to the dignity of human beings; (2) the government must not arbitrarily inflict a severe punishment; (3) a severe punishment must be accepted by popular sentiment; and, (4) a punishment is excessive if it is unnecessary and serves no valid legislative purpose. Under this, the most liberal view of punishment, the trial court has certainly not violated Petitioner's federal constitutional rights.

Obviously, each state has wide latitude in fixing the punishment for state crime. See, Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018 (1971). Prior to Florida's sentencing guidelines, each state judge was vested with wise discretion in the difficult task of determining the appropriate punishment in the countless variety of situations that appear. However, uniformity is now the goal in sentencing; and, proportionality, in Florida, exists now only for capital cases.

III. CASE AT BAR

It is important to recognize that probation does not constitute a sentence. See, Addison v. State, 452 So.2d 955, 956 (Fla. 2d DCA 1984). The trial court has the discretion as to whether or not to withhold adjudication of guilt. Sanchez v. State, 541 So.2d 1140 (Fla. 1989). Probation is appropriate to impose along with community control. Skeens v. State, 556 So.2d 1113 (Fla. 1990); but, the term of probation must never exceed the maximum sentence provided by law. Meckel v. State, 556 So.2d 1240 (Fla. 5th DCA 1990).

Under Rule 3.701, Fla.R.Crim.Pr., probation is a matter falling with a category of "...a dispositive order upon conviction." So it follow that both downward and upward departures from the recommended guidelines range require valid written reason for justification.

At bar, there has been behavior [aggravated spouse abuse] to trigger a revocation of probation. Procedurally, the trial court has followed the teachings of State v. Amico, 525 So.2d 515 (Fla. 4th DCA 1988) by providing Dennis Williams with a new scoresheet. Under Rule 3.701(d)(14), Fla.R.Crim.Pr., the sentencing guidelines commission indicates that the sentence imposed after revocation of probation may be included with the original cell of the guidelines range or may be increased to the next highest guideline range without requiring a reason for the departure from the guidelines.

However, the guidelines themselves do not limit the sentence to a one-cell bump, nor do they prohibit departures in violation

cases if valid reasons for departure do exist.

For example, multiple violation of supervision as a valid reason for an upward sentencing departure pursuant to this Court's opinion in Adams v. State, supra, remains a valid reason for departure and has not been affected by this Court's recent holding in Lambert, supra. Lambert held that factors relating to violation of probation or community control cannot be used as grounds for departure. In so holding, Lambert addressed two issues:

> (1) When a new offense has been committed which constitutes a probation violation, must there be a conviction for this new offense before it can be used as a reason for departure on sentencing for the original offense? YES. Lambert at 841.
>
> (2) Even where there is a conviction for the new offense which constitutes a probation violation on the original offense, is it appropriate to use this conviction to depart in sentencing the defendant for the original offense? NO. Lambert at 841.

When the reason for departure after violation of supervision is not based on the commission of a new substantive offense or the nature of this new substantive offense, then the concerns of Lambert, necessity of conviction and double-dipping, are not implicated. Multiple violations of supervision, as approved in Adams, is such a reason.[2]

However, Lambert was subsequently interpreted by this Court in Franklin v. State, 545 So.2d 851 (Fla. 1989), to proscribe any

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[2] Timing of violations, pursuant to this Court's opinion in Williams v. State, 504 So.2d 392 (Fla. 1987), is another reason to which the same analysis applies and which should remain unaffected by Lambert.

departure sentence upon a defendant being sentenced after violation of supervision other than the one-cell upward bump provided in Rule 3.701(d)(14), Fla.R.Crim.Pr. Since Franklin, Lambert has come to stand for a per se one cell bump rule in sentencing after violation of supervision. As pointed out by Judge Harris in his specially concurring opinion in Johnson v. State, 15 F.L.W. 515 (Fla. 5th DCA February 22, 1990), though Franklin, relying on Lambert, makes it clear that a departure from the guidelines should never be permitted in a violation case, Lambert is not so clear. Judge Harris continues:

> In Lambert the certified question and the Court's discussion involved whether the trial court could depart from the guideline range in a community control sentence when the violation constituted a substantive crime for which the defendant had not been convicted. The court held that it would be improper to depart on the basis of criminal conduct where no conviction had occurred because of the provisions of Rule 3.701(d)11, Florida Rules of Criminal Procedure. The court also held that it would be improper to depart on the basis of criminal conduct even after conviction because of the problems of the single scoresheet and the addition of status points under legal restraint. Following the analysis, the Court stated:
>
> > Accordingly, we hold that factors related to violations of probation or community control cannot be used as grounds for departure. To the extent that this conflicts with our earlier decision in Pentaude, we recede from our decision there. Lambert, 545 So.2d at 842.
>
> I urge that the logical interpretation of Lambert is that it recedes from Pentaude only to the extent that the trial judge may not depart in a violation case based upon new criminal conduct whether or not there has been

> a conviction. There is no indication that the Lambert court ever considered the propriety of authorizing departure for noncriminal conduct violation when such authority is necessary to encourage compliance with probation or community control.
>
> In our case the number of violations (twelve alleged), the timing of the violations (seven months after release from prison) and other factors material or relevant to defendant's character (violation of the provision not to carry a firearm while on probation for an offense involving a firearm, and refusing to participate in drug counseling) would seem appropriate for departure under Pentaude.

Johnson v. State, 15 F.L.W. at 516. See also Judge Sharp's dissent in Niehenke v. State, 15 F.L.W. 1017 (Fla. 5th DCA April 19, 1990):

> Despite the language in Franklin and Lambert, (citations omitted), which appears to flatly prohibit a trial judge from using a defendant's violation of probation as a reason to impose a departure sentence (beyond the allowed one cell bump-up), I think the facts of this case are distinguishable. In Lambert, the defendants had violated their probations (respectively) by committing new criminal substantive offenses, and the trial judges imposed departure sentences because the probation violation was substantive and egregious, although the defendant had not then been convicted of the new criminal conduct.
>
> Here we have the problem of the multiple probation violator for whom there is no longer any consequence or remedy for further probation violations. Niehenke had already served all of the time permitted under the sentencing guidelines (including the one-cell bump-up). His multiple probation violations were based on "technical" reasons: supervision, and failure to pay a fine. No later substantive criminal offense are involved here, and thus no possibility of double dipping.
>
> As the trial judge put it at the sentencing hearing:

> And that if the Court of Appeals wants to tell me that I can't do this (impose a departure sentence beyond the one cell increase), then I will ask the probation department not bother with coming back with violations of probation for people who have served a maximum they can serve under the guidelines, because we have been told that we can't do anything to them then. They're free spirits at that point, and can do whatever they please. Complete immunity. Because that would be the effect of the ruling otherwise.
>
> Although violation of probation is not an independent offense punishable at law in Florida surely neither the Florida Supreme Court nor the legislature, by adopting the guidelines, intended to abolish it as a practical matter. Yet if multiple probation violators are confined to the one-cell bump-up, that is precisely what has happened. The trial courts will have lost any power to enforce conditions of probation. This is an area drastically in need of clarification.

Niehenke at 1017, 1018.

Finally, see also, Irizarry v. State, 15 F.L.W. 1288 (Fla. 3d DCA May 8, 1990), where the Third District noted that, in theory, Adams is distinguishable from the situation addressed by Lambert and Ree. The court noted that in Adams the reasons for departure involved earlier probation violations unrelated to those under consideration at sentencing. The double counting problem addressed in Lambert and Ree does not appear to exist in Adams. In view of the fact that Rule 3.701(d)(14) textually permits departure, and in view of the facts of the cases just cited, there is a theoretical basis on which Adams may have continuing validity.

CONCLUSION

In summation, pursuant to this Court's opinion in Adams, multiple violations of supervision should continue to be a valid reason for departure of greater than the one cell bump provided for in the Rules of Criminal Procedure. The concerns addressed in Lambert, necessity of conviction and double-dipping, are not implicated when a court departs based on a defendant's multiple prior violations of supervision or when the instant violation is technical and not substantive.

The scoresheet does not allow the inclusion of the number or timing of violations of probation or community control. If Lambert is construed to apply a per se rule of one cell bump, the trial court's discretion in imposing an appropriate sentence will be unduly restricted. The rule announced in Franklin is nowhere to be found in Lambert upon which it relies.

WHEREFORE, based on the above reasons and authorities, the State asks this Court to answer the certified question in the negative.

Respectfully submitted,

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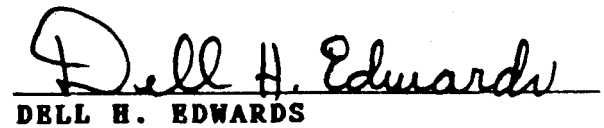

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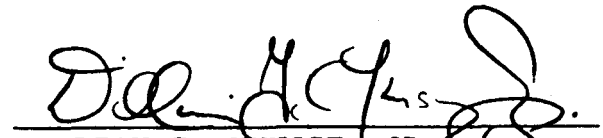

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to MEGAN OLSON, ESQ., Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33830 this 21st day of June, 1990.

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OF COUNSEL FOR RESPONDENT