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SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

v. CASE NO. 77,612

MARIO ROA,

RESPONDENT.
_____/

ON APPEAL FROM THE SECOND DISTRICT
COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent would add the following additional facts.

Prior to the violation of probation involved in this case, Respondent was found in violation of his probation once, only. (R. 50-52). On the instant violation of probation, the Second District Court of Appeal found none of the written reasons for a departure sentence to be valid and the court remanded for resentencing. (Roa v. State, 574 So.2d 1126 (Fla. 2nd DCA 1991).

Contrary to Petitioner's assertion, on April 12, 1991, Respondent was resentenced to 4-1/2 years Florida State Prison to be followed by five years probation. (See attached Appendix "A"). Respondent is on probation at this time and is not serving a life sentence.

SUMMARY OF THE ARGUMENT

The instant violation of probation was the second instance of a violation of probation. In the first violation of probation, Respondent was reinstated on community control and probation. On the instant violation, Respondent was sentenced to life imprisonment, followed by fifteen years, followed by five years.

The Second District Court of Appeal reversed the departure sentence and remanded for resentencing that permitted a one-cell bump. Based on the Court's Williams decision, on the above-outlined facts, it appears that a two-cell bump would have been permitted.

The trial court, however, elected to not bump any cells at the resentencing and gave Respondent a top of guidelines 4-1/2 year sentence of imprisonment to be followed by five years of probation. Respondent has served the prison term and is on probation.

Therefore, this Court should rule that although a two-cell bump would have been permitted at Respondent's resentencing, the Second District Court of Appeal's decision is correct in all other respects and Respondent should not again be resentenced.

ARGUMENT

WHETHER THE TRIAL COURT SHOULD BE AFFIRMED AND THE DISTRICT COURT OPINION QUASHED, OR THE CASE SHOULD BE REMANDED FOR RESENTENCING PURSUANT TO THIS COURT'S RECENT DECISION IN WILLIAMS v. STATE, 17 F.L.W. S81 (FLA. FEB. 7, 1992)

The trial court resentenced Respondent to a guidelines sentence with no bump ups in cells upon the mandate of the appellate court which permitted a one-cell bump up. This Court should correct the appellate court's decision because Williams would permit a two-cell bump up. Respondent has served the incarceration portion of his resentence and if this Court rules that resentencing is necessary, it should not include any bump ups in cells; Respondent feels resentencing is unnecessary.

Although Petitioner would like to think that multiple violations would be every separate violation listed in an affidavit (even those never pursued by the State), this Court has noted otherwise:

> The use of the term 'multiple probation violations' in this opinion refers to successive violations which follow the reinstatement or modification of probation rather than the violation of several conditions of a single probation order.

Williams v. State, 17 F.L.W. S81, 82 fn.3 (Fla. Feb. 7, 1992).

A review of the facts of this case show that Respondent had his probation revoked and reinstated and modified once only prior to the instant probation revocation. Under Williams, a two-cell bump up would be permitted upon resentencing.

The Second District Court of Appeal found that none of the reasons for Respondent's guideline departure sentence were valid

and it remanded for resentencing permitting a one-cell bump up from Respondent's guideline range. Roa v. State, 574 So.2d 1126, 1128 (Fla. 2nd DCA 1991).

At the resentencing hearing on April 12, 1991, the trial court resentenced Respondent, whose guideline range was 3-1/2 - 4-1/2 years Florida State Prison, to 4-1/2 years Florida State Prison to be followed by five years probation. (See attached Appendix "A"). The trial court applied the law in effect at the time of Respondent's resentencing and elected to not resentence Respondent to a one-cell bump up from the guidelines range.

Respondent asserts that any resentencing at this juncture would not change the sentence he currently is serving. At resentencing, the trial court knew it could bump up one cell and elected not to bump up the sentence at all.

Since the trial court elected to not bump up the sentence, Respondent asserts that the trial court should not be permitted to resentence Respondent again with the option to bump up the sentence by two cells.

Accordingly, this Court should approve the district court decision with the one correction that at resentencing a two-cell bump would have been permitted. Since the resentencing has taken place already with no bump ups, any further resentencing would unfairly prejudice Respondent.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should approve the district court decision with the exception that a two-cell bump would have been permitted at Respondent's resentencing; remand for another resentencing should not take place.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David R. Gemmer, Esquire, Assistant Attorney General, 2002 N. Lois Avenue, Seventh Floor, Tampa, Florida 33607, by United States Mail, postage pre-paid, this 26th day of March, 1992.

HOWARD J. SHUFKE

SUPREME COURT OF FLORIDA

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A P P E N D I X

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APPENDIX "A"

APRIL 12, 1991 RESENTENCE