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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MARIO ROA,

Respondent

Case. No. 77,612

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

INITIAL BRIEF OF THE PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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OF COUNSEL FOR THE STATE

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STATEMENT OF THE CASE AND FACTS

Roa was on probation for the near fatal beating of the teen-aged daughter of family friends when she found him burglarizing their home. She was left with permanent brain damage and the threat of future deterioration of brain function. R96-97.

Judge Coe had originally sentenced Roa to 55 years in prison, R46, but the Second District reversed and remanded for sentencning within the guiidelines because none of the reasons for departure were valid. Roa v. State, 512 So.2d 1091 (Fla. 2d DCA 1987) (copy attached). He violated probation by failing a urinalysis for marijuana and admitting to using it, R9, but the violation was handled by probation officers by placing him in a drug education program. R94.

In the second violation, he pled guilty to driving under the influence and driving with a suspended license. The affidavit of violation also charged possessing a firearm and carrying a concealed firearm, R12. In preparation for a hearing on the violation, detectives wrote a letter stating Roa had offered substantial assistance in drug investigations. R49. Again, there appears to have been no formal adjudication on the probation violation, although Roa did plead guilty to the two charges. At the hearing on the violation, Roa admitted possessing the firearm, claiming he needed it for protection after being shot during a neighborhood gun battle. R47-48.

In a third violation, Roa was charged with kidnapping,

carrying a concealed firearm, aggravated battery, and attempted murder. R44. Roa confronted Miss Brooks, his girlfriend, at a bar and took her to his car at gunpoint. A girlfriend of Brooks also got in the car, and, in a struggle, Roa's gun discharges and shoots out the windshield. Brooks' friend escaped, and Roa drove Brooks to a house. Brooks' mother comes to the house, and Roa points the gun at her. R44-45. However, the victims signed waivers of prosecution. R45. Brooks later said she waived prosecution because Roa was the father of her unborn child. R75. The trial judge converted Roa's probation to community control and modified the terms of supervision. R52-53. However, Judge Coe noted that he would "continue him on life, fifteen and five probation." R52. The reason for leniency was the letter from detectives regarding Roa's substantial assistance, written before the kidnapping incident. R51. Judge Coe specifically ordered that the kidnapping episode be documented, although he wasn't going to do anything about it at that time because of the leniency request from detectives. R51. Judge Coe stated he expected Roa to walk away from all confrontations, no matter how wrong the other person was, because "I am very worried about him killing someone." R52.

Finally, Roa stormed into the bottle club where his common law wife was entertaining another gentleman, and proceeded to yell at her, although he did not touch her. R75-76. He was, therefore, in a place where alcoholic beverages were served, at a time when he was supposed to be at home.

Judge Coe's departure order notes the severe trauma to the

young girl in the underlying burglary/aggravated battery case, the marijuana violation, the armed kidnapping, assault, and attempted murder of Brooks and her mother, and the appearance at the bottle club. Based on these four separate incidents, Judge Coe listed the following reasons for departure:

1. The defendant is not amenable to probation, because of the number of his violations of probation and community control.

2. The defendant is not amenable to probation because of the timing of these violations.

3. The defendant is extremely dangerous. R34.

The second district reversed, ruling, inter alia, that while multiple probation violations was a valid reason for departure, citing to its decision in Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), "Williams required at least two previous findings and sentences for violation of probation before the current violation before the court which permitted the upward departure [sic]." Roa v. State, 574 So.2d 1126, 1128 (Fla. 2d DCA 1991) (copy attached). The state seeks review in this court.

SUMMARY OF THE ARGUMENT

This Court's recent decision in Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), establishes new criteria for sentencing for multiple probation violations. A one-cell bump is permitted for each violation. In the instant case, there may be up to nine or more individual acts in violation of probation, permitting a nine-cell bump which places respondent in or above the life category, a sentence he is already serving. No remand should be necessary. On the other hand, if this court determines that some lesser number of bumps may be imposed, a remand is necessary to permit the trial court to enter a proper sentence.

ARGUMENT

ISSUE

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

The decision below relied on the lower court opinion of Williams v. State ,559 So.2d 680 (Fla. 2d DCA 1990). In the intervening period, this court has resolved the issue with its opinion in Williams v. State, 17 F.L.W. S81 (Fla. Feb. 7 1992). This court holds that the trial court is authorized to depart upwards by one cell for each violation of probation:

> It is entirely consistent to conclude that where there are multiple violations of probation, the sentence may be successively bumped to one higher cell for each violation. To hold otherwise might discourage judges from giving probationers a second or even a third chance. Moreover, a defendant who has been given two or more chances to stay out of jail may logically expect to be penalized for failing to take advantage of the opportunity.

17 F.L.W. at S82.

Williams raises the question of how violations are to be counted. Should the violator who commits several violations within a short period and is brought to court for a single proceeding for multiple violations be subject to only a one-cell bump, while his brother violater has the bad luck to commit his crimes serially, over a period of time, such that each is subjected to a separate violation proceeding justifying a separate bump up? The state

respectfully urges that it would be against public policy to encourage short intense crime sprees by limiting the bump-up rule to proceedings rather than individual acts in violation of probation.

If each separate act violating probation constitutes a "violation," then nine or more individual acts in violation of the order of probation may have actually occurred. R9 (admitted to using marijuana); R12-13 (DUI, NVDL, possession of a gun, possession of a concealed weapon, kidnapping, aggravated battery, attempted murder); R69 (being in an establishment selling liquor). A nine-cell bump up would place Roa in or beyond the life range, and would not require resentencing, as he already is subject to that sentence. In Williams, this court remanded for resentencing only because the sentence imposed was outside the permitted bump-up range.

The guidelines scoresheet at R31-32 shows a permitted range of up to 5½ years in state prison. Assuming that each proceeding wherein Roa was brought to court for probation or community control violations constituTed only one "violation" pursuant to Williams, then the four violation proceedings allow a four cell bump up from the 5½ year cell, or to a maximum of 17 years.

The tragedy of this case is that Roa's repeated violent episodes demonstrate a propensity which will ultimately result in the death of some innocent. It is unfortunate that the original sentence was reversed, considering the egregious trauma to the victim in the burglary/aggravated assault, and the possibility that

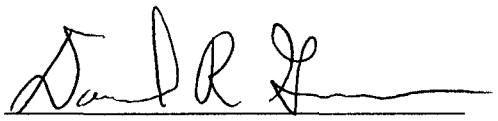
a valid reason for departure might well have been given had the court had the benefit of the further development of the departure law since the original sentence was imposed. Instead, the trial court is forced to attempt to fashion a remedy to protect society with the limited tools now available to him.

CONCLUSION

This court should quash the decision of the Second District and affirm the life sentence, or, alternatively, remand for a bump-up consistent with Williams.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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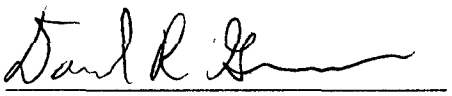
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Howard J. Shifke, Esq., 701 North Franklin Street, Tampa, Florida 33602, this date, March 5, 1992.



OF COUNSEL FOR APPELLEE

sequent adoption by the stepparent will not terminate any grandparental rights." Section 752.01 provides in part that courts may order grandparent visitation where one of the parents of the child is deceased. Although the grandparents in this case did not have an order providing for visitation rights at the time the adoption by the stepparent occurred, there was a motion for visitation pending since May, 1983, before the adoption became final. And in construing section 752.07 we cannot conceive that the legislature intended to permit grandparents to have visitation rights where a visitation order was entered prior to the adoption proceeding but not permit grandparents to file for such rights after the adoption procedure is completed.

We believe it is significant that the trial judge noted in the order now before us for review that "there is no compelling reason not to have grandparent visitation in [this] ... case. It is obvious that the grandparents love the child of their deceased daughter.... It appears that respondents ... have, by manipulation of the court system, ... successfully precluded the grandparents from having visitation with their grandchild." But for what the trial court characterized in this order as the appellees' "manipulation of the court system," apparently referring to the successful attempts of the appellees to hide from the grandparents, the appellees' petition for adoption, the trial court "would have awarded the grandparents visitation."

[5] Under the facts of this case, we believe that neither the legislative intent of chapter 752 nor notions of fairness would be served by affirming the order that dismissed the grandparents' motion for visitation rights. Rather, we believe that section 752.07 is designed to protect orders granting visitation rights under section 752.01 from the legal effects, if any, of a subsequent adoption by the stepparent. *See, e.g., Lee v. Kepler*, 197 So.2d 570 (Fla. 3d DCA 1967) (case decided before enactment of chapter 752, wherein the court held that adoption by stepparent vitiates court-ordered visitation rights of grandparent). Section 752.07 provides clearly that grandparental visitation rights cannot be terminated by a stepparent adoption. Further, we believe that the presence of a pre-existing order of visitation is not required to gain such rights. In order to avoid the successful invocation of the law to perpetrate an unfair result in this case, we reverse and remand for further proceedings consistent with this opinion.

CAMPBELL, A.C.J., and FRANK, J., and BOARDMAN, EDWARD F., (Ret.) J., concur.

WEST KEY NUMBER SYSTEM

Mario Emil ROA, Appellant,

v.

STATE of Florida, Appellee.

No. 86–171.

District Court of Appeal of Florida, Second District.

Sept. 16, 1987.

Defendant was convicted in the Circuit Court, Hillsborough County, Harry Lee Coe, III, J., of burglary, aggravated battery, and two counts of grand theft, and he appealed. The District Court of Appeal, Campbell, Acting C.J., held that departure from sentencing guidelines was not justified by stated grounds of serious nature of defendant's acts, pattern of excessive violence, fact that exceeding guidelines was necessary for protection of public, psychological trauma and pain suffered by victim, fact that guideline sentence would not allow adequate time for rehabilitation, and fact that defendant intended and attempted to kill victim.

Conviction affirmed; cause remanded for resentencing.

Criminal Law ⇐1208.1(3)

Departure from sentencing guidelines in sentencing defendant convicted of burglary, aggravated battery, and two counts of grand theft was not justified by stated grounds of serious nature of defendant's acts, pattern of excessive violence, fact that exceeding guidelines was necessary for protection of public, psychological trauma and pain suffered by victim, fact that guidelines sentence would not allow adequate time for rehabilitation, and fact that defendant intended and attempted to kill victim.

James Marion Moorman, Public Defender, and Robert F. Moeller, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Robert J. Krauss, Asst. Atty. Gen., Tampa, for appellee.

CAMPBELL, Acting Chief Judge.

Appellant, Mario Emil Roa, appeals his conviction and sentence for burglary, aggravated battery and two counts of grand theft. We affirm appellant's conviction as we find there was sufficient circumstantial evidence upon which the jury could base a conviction for grand theft and burglary. We also find that the state produced sufficient evidence to indicate that the victim suffered the "great bodily harm" necessary to sustain a conviction for aggravated battery pursuant to section 784.045(1), Fla. Stat. (1985).

We find merit, however, in appellant's contention that the trial court erred in departing from the sentencing guidelines on the following grounds: (1) The serious nature of appellant's acts; (2) a pattern of excessive violence; (3) that exceeding the guidelines was necessary for the protection of the public; (4) the psychological trauma and pain suffered by the victim; (5) that the guideline sentence would not allow adequate time for rehabilitation; and (6) that appellant intended and attempted to kill the victim.

Upon review of the record, we conclude that none of the reasons cited by the trial court are legally sufficient or factually supported by the record to justify exceeding the presumptive guideline sentence. *See State v. Mischler*, 488 So.2d 523 (Fla.1986).

We, therefore, affirm appellant's conviction and remand to the trial court for sentencing in accordance with the sentencing guidelines.

FRANK, J., and BOARDMAN, EDWARD F., (Ret.) J., concur.

Frederick FRIESON, Appellant,

v.

STATE of Florida, Appellee.

No. 86-668.

District Court of Appeal of Florida, Second District.

Sept. 16, 1987.

Defendant was convicted of sexual battery and robbery by the Circuit Court, Lee County, Thomas S. Reese, J., by jury verdict. Defendant appealed. The District Court of Appeal, Campbell, J., held that the trial court committed reversible error by admitting evidence concerning second sexual battery allegedly committed by defendant.

Reversed and remanded for new trial.

Criminal Law ⇐376, 1169.1(6)

The trial court committed reversible error, in prosecution for sexual battery and robbery, by admitting evidence of second sexual battery allegedly committed by defendant; only similarity between the two batteries was that they were both sexual batteries, and only purpose in admitting the evidence was to prove bad character and propensity to commit crime charged. West's F.S.A. § 90.404(2)(a).

James Marion Moor
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Defender, Bartow, for

Robert A. Butterwor
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CAMPBELL, Judge.

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uled closing with Nelson on August 28, 1987. Because they had entered into another contract, the Knights refused to close with Nelson and this litigation ensued.

It is established that "the vendor cannot take advantage of a delay in performance which he condoned or was a party to." *Forbes v. Babel,* 70 So.2d 371, 372 (Fla. 1953); *see also Jay Vee Realty Corp. v. Jaymar Acres, Inc.,* 436 So.2d 1053 (Fla. 4th DCA 1983). The delay in this case was caused by the serious title defect caused by the previous actions of the Knights.

[4] The failure to obtain timely financing did not constitute an automatic termination of the contract. Where a contract for the purchase and sale of real property provides that the seller may cancel the contract upon the occurrence of a default, the seller must communicate his intention to the buyer. *Richards v. Hasty,* 158 Fla. 459, 28 So.2d 876 (1947). That intention must be demonstrated to the buyer clearly and unequivocally. *Realty Securities Corp. v. Johnson,* 93 Fla. 46, 111 So. 532 (1927). There was no such clear and unequivocal communication here until after the Knights had breached their contract with Nelson by entering into a contract with another party.

[5] Even if the language of the contract could be construed as providing for automatic termination, however, the Knights waived any right that they had to require strict compliance. *See Zepfler v. Neandross,* 497 So.2d 901 (Fla. 4th DCA 1986).

Finding that the trial court correctly applied the applicable law, we affirm.

DELL, J., concurs.

ANSTEAD, J., concurs in part and dissents in part with opinion.

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

I concur with the majority that the record is without dispute that the sellers did not convey their intention to cancel the contract, a requirement conceded by both sides to be necessary before the contract could be terminated.

I disagree that the order as to the broker is any less conclusive on the issue of liability as is the order for the purchasers.

Mario ROA, Appellant,

v.

STATE of Florida, Appellee.

No. 90–01201.

District Court of Appeal of Florida, Second District.

Jan. 16, 1991.

Rehearing Denied Feb. 20, 1991.

Defendant's probation was revoked on grounds that he violated two conditions of community control, and he received sentence in excess of sentencing guidelines in the Circuit Court, Hillsborough County, Harry Lee Coe, III, J. Defendant appealed. The District Court of Appeal, Parker, J., held that: (1) evidence, although in substantial dispute, was sufficient for trial court to find that defendant did violate two conditions of community control justifying revocation of probation; (2) underlying reasons for probation violation were not sufficiently egregious to permit departure beyond one-cell bump permitted for any violation of community control; and (3) that defendant was extremely dangerous was not valid reason for upward departure in sentencing.

Affirmed in part; reversed in part and remanded.

1. Criminal Law ⇐982.9(5)

Evidence, although in substantial dispute, was sufficient to find that defendant violated two conditions of community control justifying revocation of his probation.

2. Criminal Law ⇐9

Leaving residence and entering tavern v egregious violations o to permit upward dep ing guidelines beyonc mitted for any violatic trol.

3. Criminal Law ⇐9

Record did not conclusion that upw sentencing guidelines defendant was not ar due to timing of com tions.

4. Criminal Law ⇐1

That defendant is is invalid reason for sentencing guidelines.

Howard J. Shifke, T

Robert A. Butterwo hassee, and David R. Gen., Tampa, for app

PARKER, Judge.

Mario Roa appeals cation of his probation trol and the trial cou ing the sentencing gu the revocation of prob control but reverse th

Roa's original sent aggravated battery, grand theft in the sec the sentencing guideli this court, we reverse directed the trial cou within the guidelines. 512 So.2d 1091 (Fla. resentencing, Roa rece in the guidelines of fo in state prison to be years' probation.

In April 1989, while probation officer filed lation of probation fo juana. No action w violation.

2. **Criminal Law** ⇐982.9(7)

Leaving residence without permission and entering tavern were not sufficiently egregious violations of community control to permit upward departure from sentencing guidelines beyond one-cell bump permitted for any violation of community control.

3. **Criminal Law** ⇐982.9(7)

Record did not support trial court's conclusion that upward departure from sentencing guidelines was justified because defendant was not amenable to probation due to timing of community control violations.

4. **Criminal Law** ⇐1289

That defendant is extremely dangerous is invalid reason for upward departure in sentencing guidelines.

Howard J. Shifke, Tampa, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David R. Gemmer, Asst. Atty. Gen., Tampa, for appellee.

PARKER, Judge.

Mario Roa appeals the trial court's revocation of his probation and community control and the trial court's sentence exceeding the sentencing guidelines. We affirm the revocation of probation and community control but reverse the departure sentence.

Roa's original sentences for burglary, aggravated battery, and two counts of grand theft in the second degree exceeded the sentencing guidelines. Upon appeal to this court, we reversed the sentences and directed the trial court to resentence Roa within the guidelines. *See Roa v. State*, 512 So.2d 1091 (Fla. 2d DCA 1987). On resentencing, Roa received a sentence within the guidelines of four and one-half years in state prison to be followed by fifteen years' probation.

In April 1989, while on probation, Roa's probation officer filed an affidavit for violation of probation for possession of marijuana. No action was taken upon that violation.

In September 1989, an affidavit for violation of probation was filed, alleging Roa violated the terms of his probation when he was arrested in April of 1989 for driving while under the influence and driving with a suspended driver's license. The September 1989 affidavit was amended in December of 1989 to include additional alleged violations of probation to the two earlier driving offenses. These new violations involved Roa's alleged commission of the crimes of possession of a firearm, carrying a concealed firearm, kidnapping, aggravated battery, and attempted murder, all of which allegedly occurred in November 1989.

At a hearing on December 28, 1989, on the amended affidavit for violation of probation, the assistant state attorney informed the trial court that the alleged victims of the November 1989 crimes alleged in the amended affidavit of violation had all signed waivers of prosecution. In addition, the assistant state attorney presented to the court a letter from two Tampa police detectives who requested that Roa be permitted to remain in a position to continue to work with the detectives on major drug cases. Thereafter, the trial court accepted Roa's admission to a violation of probation for possession of a firearm charge only and sentenced Roa to life probation, plus fifteen years' probation, plus two years' community control, all of which were to run concurrently.

[1] Thereafter, an affidavit was filed alleging that Roa violated two conditions of community control. The affidavit alleged that Roa had been in an establishment which served alcohol and away from his residence without permission, in violation of the conditions of his community control. These events allegedly occurred in February 1990. The trial court conducted a hearing on these community control violations. Although the testimony presented at this hearing was in substantial dispute, there was sufficient evidence, if believed by the trial court, to find that Roa did violate two conditions of community control. This court cannot substitute its judgment for that of the trial court regarding the credi-

bility of a witness. *Demps v. State*, 462 So.2d 1074 (Fla.1984).

[2] However, the departure sentence was error. The trial court listed three reasons for the upward departure from the sentencing guidelines. "1. The defendant is not amenable to probation because of the number of violations of probation and community control. 2. The defendant is not amenable to probation because of the timing of these violations. 3. The defendant is extremely dangerous."

As to the first departure reason, the underlying reasons for the violations, leaving his residence without permission and entering an establishment serving alcohol, are not sufficiently egregious to permit a departure beyond the one-cell "bump" permitted for any violation of community control. *See Wilson v. State*, 510 So.2d 1088 (Fla. 2d DCA 1987). Also, there have not been multiple violations of probation and community control. The trial court could not consider the April 1989 affidavit as a violation of probation because the state never pursued it. That leaves only one previously established violation of probation, and that was for the possession of a firearm violation listed in the amended affidavit filed in December 1989.

This court has upheld multiple violations of probation as a reason for an upward departure from the sentencing guidelines. *Williams v. State*, 559 So.2d 680 (Fla. 2d DCA 1990).[1] However, *Williams* required at least two previous findings and sentences for violation of probation before the current violation before the court which permitted the upward departure.

[3, 4] The second reason listed for departure, that the defendant is not amenable to probation because of the timing of the violations, is neither supported by the facts of this case nor the case law. *See Bradley v. State*, 558 So.2d 516 (Fla. 1st DCA 1990). *See also State v. Simpson*, 554 So.2d 506 (Fla.1989). Finally, the third reason listed for departure, that defendant is extremely dangerous, has been held invalid by this court. *Hair v. State*, 539 So.2d 23 (Fla. 2d DCA 1989).

We affirm the trial court's finding that Roa violated his community control. We reverse the sentence and remand for the court to sentence Roa within a range which permits no more than a one-cell "bump" above the recommended sentencing guidelines.

Affirmed in part; reversed in part; and remanded for a new sentencing hearing.

RYDER, A.C.J., and THREADGILL, J., concur.

1. This case is currently pending review before the Florida Supreme Court.

Pamela BOOKER, Appellant,

v.

ALLSTATE INSURANCE COMPANY, a foreign corporation, Appellee.

No. 90–00833.

District Court of Appeal of Florida, Second District.

Jan. 18, 1991.

Rehearing Denied Feb. 20, 1991.

Plaintiff sued for personal injury protection benefits under mother's automobile insurance policy. The Circuit Court, Sarasota County, Becky A. Titus, J., entered judgment for insurer following jury verdict. Insured appealed. The District Court of Appeal held that giving of instruction regarding insured's obligation to make claim for personal injury protection benefits, which had no relevance to issues tried in case, constituted reversible error.

Reversed and remanded.