

SUPREME COURT OF FLORIDA

ZEBBIE THOMPKINS,

Petitioner,

vs.

CASE NO. 77,694

SECOND DISTRICT NO. 90-00963

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

Petitioner, ZEBBIE THOMPSON, was on probation/community control in Hillsborough County, Florida for various offenses. [case no. 73-2183, Strong Arm Robbery (R-9); case no. 78-3924, Aggravated Battery (R-33); and case no. 88-282, Grand Theft third degree (R-58)]. On March 9, 1990, (misstated as March 9, 1989 at R-82), the trial court, after a revocation hearing, sentenced Petitioner to consecutive terms of imprisonment totalling thirty-five years. (R-90) Florida Sentencing Guidelines reflected a recommended sentence of two and one half to three and one half years imprisonment. (R 70-71) The trial court based the departure sentence upon multiple violations of probation. (R-86)

A timely Notice of Appeal was filed on March 14, 1990. (R-74)

The Second District Court of Appeal, in an opinion filed March 27, 1991, PER CURIAM AFFIRMED the departure sentence and certified to the Florida Supreme Court the question as one of great public importance.

A Notice to Invoke Discretionary Jurisdiction was filed on April 5, 1991 and subsequently granted. Petitioner's brief on the merits was ordered to be served on or before May 6, 1991.

STATEMENT OF THE FACTS

The pertinent facts for purposes of this appeal are as follows:

Petitioner while on probation/community control in case numbers 73-2183, 78-3924 and 88-282 was arrested and charged with burglary of a structure. A revocation hearing was held on February 22, 1990 and Petitioner was found in violation of his probation. The substantive offense, however, was nolle prossed. (R 93-123)

On March 9, 1990, the trial court departed the sentencing guideline range of two and one-half to three and one-half years and sentenced Petitioner to a total of thirty-five years imprisonment. The court found that due to numerous violations of probation, the guidelines did not apply and cited Ramirez v. State, 540 So.2d 902 (Fla. 2d DCA 1989).

SUMMARY OF THE ARGUMENT

Violation of probation is not a substantive offense in Florida and cannot be the vehicle for a departure under the basic policies of the sentencing guidelines. The legislature has addressed this issue and chosen to punish conduct underlying violation of probation by allowing a one-cell bump-up. The trial court and Second District Court of Appeal have erred by so narrowly interpreting the principle announced in Lambert v. State, 545 So.2d 838 (Fla. 1989) and Ree v. State, 565 So.2d 1329 (Fla. 1990).

Punishment for multiple violations of probation/community control must be limited to a one-cell bump-up of the sentencing guidelines.

ARGUMENT

WHETHER MULTIPLE VIOLATIONS OF PROBATION/COMMUNITY CONTROL CONSTITUTE A VALID BASIS FOR A DEPARTURE SENTENCE BEYOND THE ONE-CELL DEPARTURE PROVIDED IN THE SENTENCING GUIDELINES.

The trial court is given little latitude in departing from the guidelines when sentencing on violations of probation. If the Court determines that it is departing from the guidelines, it must set out sufficient reasons to support this departure. (Fla. R. Crim. P. 3.701 (d)(14)). The trial court determined that it would not be bound by the guidelines. Thus, the question here becomes one of whether the reason used by the Court to justify its decision was valid.

The trial court acknowledged during discussions on sentencing that this area of the law is unsettled as a result of the decision in Lambert v. State, 545 So.2d 838 (Fla. 1989) which appears to limit the trial court to a one-cell bump in violation cases unless the defendant is sentenced to the increased term for the new conduct after a finding of guilt. In this case, the trial court could not rely on the underlying criminal conduct alleged since the defendant never admitted to those charges and the State elected not to proceed on them. Instead the Court decided to exceed the guidelines based on the multiple violations of probation. While violations of probation can be used for a one-

cell increase in the sentence, the trial court cannot exceed this authorized amount. Lambert.

The trial court based the departure sentences on Ramirez v. State, 540 So.2d 902 (Fla. 2d DCA 1989). Unfortunately, this case was decided before the full impact of Lambert had been determined. The courts have now uniformly determined that Lambert limits the trial court to a one step increase. Lee v. State, 557 So.2d 677 (Fla. 2d DCA 1990); Harris v. State, 556 So.2d 768 (Fla. 2d DCA 1990). In Ricketson v. State, 558 So.2d 119 (Fla. 5th DCA 1990), the court was reviewing a departure sentence based on multiple violations. The Fifth District ruled that the trial court could not exceed the authorized one level increase, even though Ricketson had violated his probation and community control five times.

The Second District affirmed Per Curiam Petitioner's departure sentences based on the authority of Williams v. State, 568 So.2d 1276 (Fla. 2d DCA 1990) and Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), but certified the issue as one of great public importance in light of Ree v. State, 565 So.2d 1329 (Fla. 1990) and Lambert. In both Williams cases, the Second District failed to utilize the broad language of Ree, and held that repeated violations of probation is a valid reason for upward departure from the sentencing guidelines beyond the one-cell

increase for violation of probation.

Petitioner acknowledges that in Adams v. State, 490 So.2d 53 (Fla. 1986), a departure sentence was upheld where the reason given for departing from the recommended sentence was that the defendant was previously placed on probation and twice violated its terms. However, three years later in Lambert, without discussing Adams, the Court 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 bases 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 that factors related to violation of probation or community control cannot be used as grounds for departure.

In Ree, the Court explained the rationale for the holding in Lambert and further held that the trial court erred in imposing any departure sentence greater than the one-cell upward increase permitted by Lambert. While the Court never cited or discussed Adams, the language clearly implies that the Adams' exception to

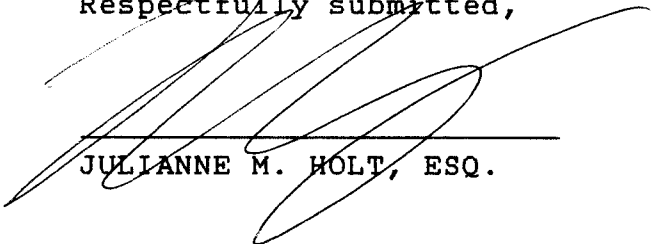
departing from the recommended sentence was eliminated.

Therefore, the trial court is limited to the one-cell upward increase for multiple violations of probation/community control.

CONCLUSION

Based upon the decisions of Lambert and its progeny, the departure sentences for the violations of probation/community control must be set aside and the matter returned to the trial court for resentencing within the guidelines.

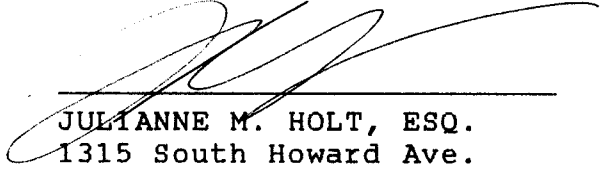
Respectfully submitted,



JULIANNE M. HOLT, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to the Attorney General's Office, 2002 N. Lois Ave., Suite 700, Tampa, Florida, 33607, on this 30th day of April 1991.



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