IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,699

SABRINA MICHELLE MAXWELL,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Maxwell accepts the State's presentation of the case and facts in its brief on the merits.

SUMMARY OF THE ARGUMENT

The question presented here is whether multiple violations of probation can form the basis for departing not only from the recommended guideline sentence but also from the one cell bump-up provided by rule 3.701(d)(14) Fla. R. Crim. P. The answer is no, and that conclusion becomes readily apparent by setting this court's rulings in Lambert v. State, 545 So.2d 842 (Fla. 1989) and Ree v. State, 565 So.2d 1329 (Fla. 1990) in their historical context. That is, Rule 3.701(d)(14) was a compromise reached by those who favored retaining the original guideline language and those who favored allowing a trial court unlimited discretion to depart from the recommended guideline sentence upon a defendant's violating one or more of the conditions of his probation. (d)(14) gives trial courts the unfettered discretion to bump a defendant who has violated his probation up one cell without giving any reason, yet the increase is only one cell.

This court has read any ambiguity Rule 3.701 might have in favor of the defendant, and in particular Lambert and Ree had held that the trial court can go no further than the one cell increase for any violation of probation. The reasons the court used for violating the defendant's probation cannot justify a multi-cell departure whether the defendant one or several conditions of his probation. Conduct which has not resulted in a conviction cannot justify a departure if the defendant violated only one condition, so there is no reason to hold that

several violations can somehow justify what one could not. Likewise, if the conduct which gave rise to the violation of probation resulted in a conviction it cannot justify a guideline sentence departure because it would amount to a "double-dipping."

Most persuasive, however, is this court's reasoning that because the legislature has not created a crime of violation of probation, the courts cannot do so. That is, courts lack the jurisdiction to enhance a sentence for conduct which the legislature has not declared illegal. If courts have no power to depart from the guideline sentence for one probation violation, it has no authority to do so for multiple violations.

The real problem posed by multiple probation violations, however, is not legal but emotional. What is a trial court to do with a probationer who has shown such extensive contempt for the judicial system? Multi-cell departures are not the solution for several reasons. First, the trial court does not, as it did in this case, have to repeatedly return the defendant to probation. With the one cell bump-up authorized by Rule 3.701(d)(14) it can revoke probation and sentence her to at least some time in prison. Second, if the conduct which led to the violation of probation was conduct which resulted in convictions, they can be used in calculating a new and presumably harsher scoresheet. Thus, the court is no longer limited in what it can do with defendants who have committed

several violations of their probation. By prohibiting multi-cell departures when the defendant has committed several violations this court will reaffirm its commitment to the sentencing uniformity.

ARGUMENT

ISSUE PRESENTED

WHETHER MULTIPLE VIOLATION OF PROBATION ARE A SUFFICIENT REASON TO JUSTIFY MORE THAN A ONE CELL DEPARTURE FROM THE RECOMMENDED GUIDELINE SENTENCE.

This case presents the issue of whether a trial court can exceed the one-cell "bump-up" authorized by Rule 3.701(d)(14) because the defendant had multiple violations of her probation or community control. That this is an issue at all arises from language in this court's opinion in Adams v. State, 490 So.2d 53 (Fla. 1986) and subsequent holdings of this court in other cases dealing with sentencing guideline departures. Lambert v. State, 545 So.2d 842 (Fla. 1989); Ree v. State, 565 So.2d 1329 (Fla. 1990). Based upon the rationale of Lambert and Ree two District Courts have held that a trial court cannot exceed guideline sentence departure more than one cell because the defendant has multiple violations of her probation. Maddox v. State, 553 So.2d 1380, 1381 (Fla. 5th DCA 1989); Teer v. State, 557 So.2d 911 (Fla. 1st DCA 1990). The Second District, on the other hand, has relied upon Adams to hold to the contrary, and it has rejected the holdings of Lambert and Ree as limiting sentencing discretion to depart when the defendant has violated her probation several times. Williams v. State, 568 So.2d 1276

(Fla. 2d DCA 1990).[1] Thus, not only must this court decided whether multiple violations of a defendant's conditions of probation can justify more than a one cell departure, it must also consider the continuing viability of Adams as it applies to this issue. Placing the issue presented by this case in an historical perspective may help this court see better how to resolve it.

A. AN HISTORICAL PERSPECTIVE

The underlying and fundamental purpose for adopting the sentencing guidelines in 1983 was to establish uniformity in sentencing. "The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision making process." Rule 3.701(b) Fla. R. Crim. P. A necessary corollary to that axiom was that sentencing departures should be rare, extraordinary events, and affirmatively discouraged. Hendrix v. State, 475 So.2d 1218, 1220 (Fla. 1985). There is, after all, little uniformity when every other sentence is a departure from the recommended punishment.

The original rules applied to probationers, of course, but it soon became evident that those standards needed some modification when applied to persons who had violated their

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[1]This court accepted jurisdiction in that case, and oral arguments were heard on March 7, 1991. As of the date this brief was submitted, this court had not filed any opinion in that case.

probation or their community control. That is, it was entirely possible that a defendant who had violated one, two, or several conditions of his probation could, when given a guideline sentence, receive nothing more than probation again. A court could do nothing more than return the probationer to probation even though he had violated several conditions of his probation. The argument in favor of this result was simply that if the violations were not serious enough to justify a higher guideline sentencing score or a sentencing departure, then probation was a still the appropriate punishment. Trial courts, on the other hand, justifiably felt some frustration at their inability to "get the attention" of those defendants who had repeatedly violated their probation.

To resolve this problem, a compromise was reached by creating Rule 3.701(d)(14) Fla. R. Crim. P.

> 14. Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guideline range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

The rule gave sentencing courts additional sentencing discretion but only a limited amount. Sentencing uniformity remained of fundamental importance, so trial courts were not allowed to give any statutorily authorized sentence to a probationer when it violated his probation. On the other hand, trial courts needed the option of sentencing guilty defendants

to a term of prison to maintain the effectiveness of probation and community control as a punishment option. Evidently this compromise has proven satisfactory because it has not been revised and the legislature has not amended Section 921.001, Florida Statutes (1989) to modify this rule. It has not chosen to do so even though it has modified sentencing review in several respects since the adoption of Rule 3.701(d)(14).[2]

B. THIS COURT'S TREATMENT OF THE ISSUE

This court's initial consideration of whether multiple violations of probation could be the basis for a departure sentence came in Adams. It arose in a rather peculiar way because the court disposed of the case by refusing to accept jurisdiction. Explaining why it had refused to review the case, the court merely said it saw nothing wrong with the trial court departing from the recommended guideline sentence because Adams had violated his probation two times.

The court directly addressed the meaning of (d)(14) in State v. Pentaude, 500 So.2d 526 (Fla. 1987). Referring to that rule, this court said:

> By no means, however, does the rule even purport to completely limit the trial court's discretion in sentencing when compelling clear and convincing reason call for departure beyond the next cell. The

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[2]For example, the extent of departure is no longer reviewable; the level of proof required to establish a departure reason has been reduced; and excessive physical or emotional trauma can justify departure. Section 921.001(5) Florida Statutes (1989).

> trial judge has discretion to so depart based upon the character of the violation, the number of conditions violated, the number of times he has been place on probation, the length of time he has been on probation before violating the terms and conditions, and any other factor material or relevant to the defendant's character.

Id. at 528.

This court, however, receded from that language in Lambert v. State, 545 So.2d 838 (Fla. 1989). Although it had not mentioned (d)(14) in its opinion, Justice Overton, in his dissent, recognized the limiting impact Lambert would have on the court's interpretation of that rule in Pentaude. The majority justified its result in Lambert by analyzing the nature of probation violations as they related to guideline sentencing. First, if the conduct used to violate a defendant's probation was criminal in nature but no conviction had resulted because of it then it could not justify a departure. Rule 3.701(d)(11) prohibited using conduct which had not resulted in a conviction to justify a departure sentence.

Likewise, even if a conviction had been obtained, the result would be the same. "To add status points due to legal restraint and to simultaneously depart based upon probation violation constitutes double-dipping." Id. at 841.

The second reason for reaching the result in Lambert, however, was more fundamental. "[V]iolation of probation is not itself an independent offense punishable at 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. That is, courts exceed their jurisdiction when they use probation violations to justify a departure sentence. It does so because the legislature has not created a crime called "violation of probation" with extended prison terms. That it could have done so is evident by the way it has enhanced the sentences of habitual felons and those who use guns when they commit crimes.

A unanimous court confirmed the Lambert holding in Ree v. State, 565 So.2d 1329 (Fla. 1990) when it said "We recently have held that any departure sentence for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines." Id. at 1331. (emphasis in opinion.) (d)(14) thus means what it says and no more, and the rule of lenity, Section 775.012(1), Florida Statutes (1989), prohibits the broader interpretation given to it by the Adams court. See, Lambert, at 841. Nevertheless, because this court had not explicitly overruled Adams, at least one court used it to justify a departure sentence for multiple probation violations, Williams, supra while the First and Fifth Districts have reached the contrary result.[3]

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[3]To date, the Third and Fourth Districts have not ruled on this issue.

C. MULTIPLE VIOLATIONS

The Lambert justifications apply equally well when the defendant, as Maxwell had done in this case, violated several conditions of her probation and had done so more than once. Most of her violations were non criminal: testing positive for use of cocaine, failing to comply with instructions, failing to remain confined to her residence, failing to pay restitution, failing to pay court costs, and failing to submit to urinalysis. Whether there was only one violation or a dozen, however, should make no difference in justifying a departure sentence because none of them were criminal violations. Under Rule 3.701(d)(11) Fla. R. Crim. P. the court could not justify a sentencing departure using them. Section 775.021(1), Florida Statutes (1989).

Now, this does not mean the court could have done nothing to "get the attention" of Maxwell. Under the compromise reached in creating Rule 3.701(d)(14), the court, without giving any reason at all, could have given her the harshest prison sentence available in the next higher guideline cell. It simply could not use those non-criminal violations to depart further.

Maxwell also violated her probation by issuing worthless checks, and if we assume she passed several checks and was convicted on each one, the court still could not use those convictions to depart from her new guideline sentence. Double-dipping occurs regardless of the number of new

convictions that Maxwell acquired and under Lambert is prohibited.

Perhaps the most compelling argument against allowing for sentencing departures is the jurisdictional one articulated in Lambert and Ree. If courts of this state do not have the power to make one violation of probation a criminal offense then how does it acquire that power when the defendant has committed several violations?

The State, however, has a potent emotional argument. How else can a trial court punish a defendant who has repeatedly flouted his contempt for the judicial system by violating the conditions of his probation? Shouldn't the court be able to "slam-dunk" such defendants with heavy sentences? No, for several reasons.

First, if the violations have resulted in a new conviction, the defendant is going to get a guideline score which will reflect those additional convictions. In addition, the court can bump him up one more cell just for violating his probation. So, the defendant is being punished for those violations which have resulted in criminal convictions.

Second, there is nothing requiring the court to repeatedly give a defendant another chance at probation. In this case, when Maxwell violated her probation the first time by passing bad checks the court could have revoked her probation, and, using the one cell bump-up, have sentenced her to some prison time.

In this case, the court chose not to do so, and if the violations were not serious enough to revoke Maxwell's probation the first, second, or third time, they should not in some way accumulate to not only justify finally violating her probation but exceeding the sentencing guideline range with the one-cell bump-up.

Finally, if multiple reasons can justify multi-cell departures then the fundamental justification for the guidelines-sentencing uniformity-will have been significantly eroded, at least in cases involving probation violations. Accepting that rationale, could lead to the following scenario. Two men in the same cell at Florida State Prison are talking about what got them there. As they tell their tales, they learn to their amazement that they were both originally placed on probation for committing grand theft of an automobile. Inmate Jones, however, failed to pay his costs of supervision for six months (six violations of his conditions of probation) for which the court departed from the recommended sentence and ordered he serve fifteen years in prison. Inmate Smith likewise had received a departure sentence, but the court ordered he spend only five years in prison because he was suspected, but not convicted, of murdering six people. What uniformity was preserved by properly placing them on probation has certainly been destroyed by the almost arbitrary departure sentences allowed when the court revoked these two men's probation. The sentencing disparity may evaporate, however,

because the Department of Corrections will have to award these two inmates more gain time to alleviate the prison overcrowding caused by trial court's routinely giving departure sentences when they revoke a defendant's probation. Departure sentences for probation revocations, instead of being a rarity and affirmatively discouraged, will become routine.

To avoid this scenario, this court should explicitly overrule Adams and affirm this case in order to maintain uniformity in sentencing and minimize departure. Affirming this case will reaffirm this court's commitment to these sentencing guideline goals.

CONCLUSION

Based upon the arguments presented here, Sabrina Maxwell respectfully asks this honorable court to affirm the First District Court of Appeal's decision in her case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Charles Faircloth, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Respondent, SABRINA MICHELLE MAXWELL, Park House Community Correctional Center, 1126 East Park Avenue, Tallahassee, Florida 32301, on this 27th day of May, 1991.

DAVID A. DAVIS