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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,086

JOHN MOTEN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This is a criminal prosecution for multiple violations of probation. The defendant appeals the question certified by the Second District Court of Appeal:

> HAS THE SUPREME COURT IN REE V. STATE, 14 F.L.W. 565 (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 § 3.701(D)-(14), FLA. STAT. (1984)?

STATEMENT OF THE CASE AND FACTS

The defendant engaged in the following offenses and probation violations:

May 22, 1987 - defendant pled guilty to escape (87-4710). Sentenced to two years probation. (R. 11-12)

Feb 22, 1989 - defendant found to have violated probation by failing to report to his probation officer (87-4710). (R. 24-26) Sentence modified to three years probation.

Jun 28, 1989 - defendant pled guilty to delivery of cannabis. (89-7424) (R. 60-61) Sentenced to 18 months in prison with three consecutive years probation for violation of probation (89-7424) (R. 58).

Nov 8, 1989 - defendant pled guilty to violation

of probation by delivery of cannabis (R. 71). Sentenced to five years probation (89-7424) concurrent with five years probation (87-4710) consecutive with case 89-16803.

Jul 19, 1990 - defendant pled guilty to violation of probation by failing to report to probation officers (R. 75). Sentenced to five years in prison (87-4710) consecutive with five years in prison (89-7424)

The guidelines scoresheet for this last probations violation indicated a recommended sentence of 12-30 months in prison or community control. (R. 67-68) The permissible one cell bump would have place the Petitioner in the two and a half (2 1/2) to three (3) year incarceration range. The trial judge filed an order setting forth the defendant's repeated violations of probation as a reason for entering an upward departure sentence. (R. 79)

The defendant appealed the decision to the Second District Court of Appeal. After reviewing briefs by the defendant and the State said court affirmed the judgment and sentence of the trial court but certified the instant question as one of great public importance. Moten v. State, 16 F.L.W. D1492 (Fla. 2d DCA, May 31, 1991). The defendant filed a notice to invoke discretionary jurisdiction on June 5, 1991. On June 21, 1991, this Court handed down an order postponing its decision on jurisdiction and ordering the parties to file briefs on the merits. This brief follows.

POINT ON APPEAL

WHETHER THE TRIAL COURT MAY PROPERLY RELY ON THE DEFENDANT'S MULTIPLE PREVIOUS VIOLATIONS OF PROBATION AS A REASON FOR ENTERING AN UPWARD DEPARTURE SENTENCE ON SENTENCING FOR A SUBSEQUENT VIOLATION OF PROBATION? (RESTATED)

SUMMARY OF THE ARGUMENT

The commission of multiple violations of probation constitutes a valid reason for departing beyond the one cell bump provided in the guidelines when sentencing a defendant after a subsequent violation of probation. Nothing that this Court has stated in either Ree v. State, 565 So.2d 1329 (Fla. 1990), or Lambert v. State, 545 So.2d 838 (Fla. 1989), warrants receding from this rule. Moreover, prohibiting such departures can render the trial court, under some circumstances, unable to enforce compliance with probation.

ARGUMENT

MULTIPLE PROBATION VIOLATIONS CAN CONSTITUTE A VALID REASON FOR DEPARTING MORE THAN ONE CELL WHEN SENTENCING THE DEFENDANT FOR A SUBSEQUENT PROBATION VIOLATION.

In Adams v. State, 490 So.2d 53 (Fla. 1986), this Court affirmed the validity of relying on the defendant's multiple probation violations as a reason for departing from the guidelines when sentencing the defendant for a subsequent probation violation. Contrary to the defendant's contention and the Second District's concern, nothing in Ree v. State, 565 So.2d 1329 (Fla. 1990), or in Lambert v. State, 545 So.2d 838 (Fla. 1989), require this Court to recede from it ruling in Adams. As noted by the Third District in Irizarry v. State, 15 F.L.W. D1288, D1289 n. 2 (Fla. 3d DCA, May 8, 1990):

> In theory Adams is distinguishable from the situation addressed in Lambert and Ree. 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.

The facts in the instant case are very similar to those in Adams v. State, supra. Adams pled guilty to forgery and was put on probation. She violated probation twice and was put on community control. When she violated community control the trial judge departed based on the fact that the defendant had twice previously violated probation. This Court affirmed the decision

and reasoning of the trial court. In the instant case the defendant committed multiple probation violations. It was these prior violations and not the one subject of the present violation, which the trial judge considered a valid reason for departure.

In Ree this Court explained the three chief underpinnings of its decision in Lambert. First, that the guidelines do not permit a departure based on an offense from which the defendant may eventually be acquitted. This concern is not implicated in the instant case or more generally in the context of Adams cases. The defendant has already been convicted and has engaged in multiple previous probation violations that are not directly implicated in the current sentencing.

Second, Ree expressed concern about potential "double dipping" since the defendant is having his probation aggravated while the guidelines automatically aggravate for the additional offense constituting the violation. Again this concern is not implicated in the instant case or in Adams type actions. As referred to in Irizarry, the previous probation violations relied upon by the court in departing do not constitute part of the determination in the present case.

Finally, Ree declares that since violation of probation is not a substantive offense in Florida it is not a proper ground for departure under the policies of the guidelines. This

statement is unsupportable in the context of the instant case since a wide variety of reasons which are not necessarily a criminal offenses in Florida can serve as valid reasons for departure. Moreover, there are valid concerns for the ability of the Florida judiciary to enforce conditions of probation which warrant the conclusion urged by the State. This concern was eloquently expressed by Judge Sharp in his dissent to Niehenke v. State, 561 So.2d 1218 (Fla. 5th DCA 1990):

> 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 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 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.

It is clear from the reasoned tone of Judge Sharp's dissent that the ruling urged by the defendant would frustrate judicial effort and could have a chilling effect on the probation system. Probation is "[a]n act of grace and clemency which may be granted by the trial court to a seemingly deserving defendant whereby such defendant may escape the extreme rigors of the penalty imposed by law for the offense for which he stands convicted." Black's Law Dictionary p. 1082 (5th Ed. 1979) When this clemency is betrayed once, the law provides a single cell departure. However, when, as in the instant case, this clemency is betrayed repeatedly, the defendant seeks to leave the court with no remedy or recourse.

Left with no effective enforcement powers a trial judge would be inclined to abandon probation and community control as the proper remedies for a repeat technical violator. A judge would be forced to choose instead to add the violator to the swollen ranks of inmates in our overpopulated prison system. This is certainly not consistent with the policies underlying the probation system. Moreover, this is not necessary in view of the wide variety of policy based departure reasons which this Court has found to be consistent with our guideline sentencing system.

CONCLUSION

Based on the foregoing arguments and citations of authority the certified question below should be answered in the negative by affirming that this Court has not receded from its opinion in Adams v. State, 490 So.2d 53 (Fla. 1986).

Respectfully submitted,

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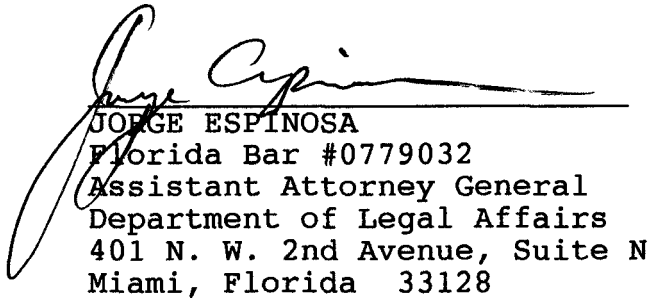

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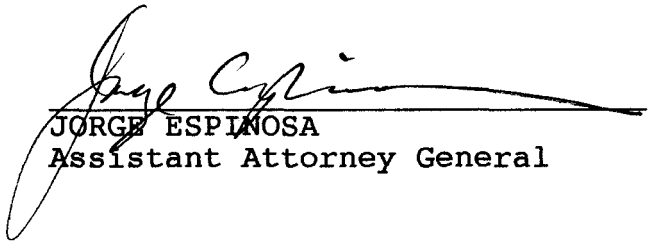
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to ROBERT D. ROSEN, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33830 on this 19th day of July, 1991.



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