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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,284
DCA NO. 90-01832

MARCO MCPHERSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

ON APPLICATION FOR DISCRETIONARY JURISDICTION

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CONSUELO MAINGOT
Florida Bar # Pending
Assistant Attorney General

MICHAEL J. NEIMAND
Florida Bar #0239437
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

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INTRODUCTION

The Petitioner, Marco McPherson, was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Second District. The Respondent, The State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal.

STATEMENT OF THE CASE

The Respondent accepts the statement of the case put forth by the Petitioner as substantially correct.

QUESTION PRESENTED

HAS THE SUPREME COURT IN REE V. STATE, 565 SO.2d 1329 (Fla. 1990), 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 A TRIAL COURT MAY USE MULTIPLE VIOLATIONS OF PROBATION AS A VALID REASON TO SUPPORT A DEPARTURE SENTENCE BEYOND THE ONE CELL BUMP ALLOWED FOR VIOLATION OF PROBATION UNDER SECTION 3.701(d)(14), FLORIDA STATUTES (1984), WHERE A DEFENDANT, PREVIOUSLY PLACED ON PROBATION, HAS REPEATEDLY VIOLATED THE TERMS OF HIS PROBATION AFTER HAVING HAD HIS PROBATION RESTORED?

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal correctly followed the rule in Adams v. State which has not been overruled or substantially modified by subsequent Supreme Court decisions in Lambert v. State and Ree v. State.

Thus, multiple violations of probation remains a valid reason for departure beyond the one-cell bump provided for in the guidelines when sentencing a defendant after a violation of probation.

ARGUMENT

HAS THE SUPREME COURT IN REE V. STATE, 565 So.2d 1329 (Fla. 1990), 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 A TRIAL COURT MAY USE MULTIPLE VIOLATIONS OF PROBATION AS A VALID REASON TO SUPPORT A DEPARTURE SENTENCE BEYOND THE ONE CELL BUMP ALLOWED FOR VIOLATION OF PROBATION UNDER SECTION 3.701(d)(14), FLORIDA STATUTES (1984), WHERE A DEFENDANT, PREVIOUSLY PLACED ON PROBATION, HAS REPEATEDLY VIOLATED THE TERMS OF HIS PROBATION AFTER HAVING HAD HIS PROBATION RESTORED?

The Petitioner contends that the Second District Court of Appeal, in conflict with this Court and sister courts of appeal, is incorrectly permitting trial courts to use multiple violations of probation as a valid reason to support an upward departure of the sentencing guidelines beyond the one-cell bump allowed for violation of probation.

The Second District Court of Appeal has certified to this Court the question of whether the practice of using multiple violations of probation is a valid reason for an upward departure from the guidelines pursuant to the following question presently pending before this Court in William, et al., v. State, Case No. 75,919:

> Has the Supreme Court in Ree v. State, 565 So.2d 1329 (Fla. 1990), 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 Rule 3.710(d)(14), Florida Rules of Criminal Procedure?

It is the State's position that multiple violations of probation or community control continues to be a valid reason for an upward departure from the sentencing guidelines as pronounced by this Court in Adams v. State, 409 So.2d 53 (Fla. 1986), and further, that this Court has not receded from Adams by its holding in Lambert v. State, 545 So.2d 838, 842 (1989) or Ree v. State, 565 So.2d 1329 (Fla. 1990).

In Adams the facts were set forth in the opinion as follows:

> Adams pled guilty to forgery and uttering a forgery, for which she received a term of probation. She then violated that probation and the trial court again placed her on probation, extending the term and giving her a 364-day sentence of imprisonment as a condition of probation, but reduced that to time served. When Adams again violated probation, she received twenty-four months of community control.

Upon violation of her community control the trial court sentenced Adams to two consecutive four-year terms of imprisonment, reasoning that:

> [The] Defendant was previously placed on probation and has twice been found to have violated the terms of her probation.

This Court determined that the trial court correctly gave a single valid reason for departure, that is, that multiple probation violations can support a departure of more than one cell. Adams at 54; Riggins v. State, 477 So.2d 663 (Fla. 5th DCA 1985).

The Second District Court of Appeal's decision in McPherson v. State, 16 F.L.W. D1769, (July 5, 1991) does not conflict with this Court's decision in either Lambert or Ree. Moreover, in McPherson, the court below specifically and correctly relied upon the decision in Adams for its reason for departure in the sentencing of McPherson.

McPherson was convicted of resisting an officer with violence; two counts of battery on a law enforcement officer; trespass; and criminal mischief. His recommended guidelines sentence was any non-state prison sanction. He was sentenced to two years probation on the first three counts and to six months probation on the other two. After completing his probation on the two misdemeanors, but before completing his probation on the other three, McPherson violated his probation by failing to abide by the terms and conditions of his probation. The trial court then sentenced him to thirty months in jail and two and one half years probation on all three counts to be served concurrently.

While serving the probationary period on these counts, McPherson was convicted of forgery and uttering a forged instrument. As to these new substantive crimes the guidelines scoresheet, including points for legal restraint and prior convictions, scored out to community control or 12 to 30 months incarceration. The trial court revoked McPherson's probation for the second time on the three counts of resisting and battery, sentencing him to two years of community control on each count to be served concurrently. On the new substantive crimes, forgery and uttering, the trial court sentenced McPherson to two years of community control on each count to be served concurrently to each other and concurrently to the other three offenses.

Less than two months later, McPherson violated the terms and conditions of his community control. He had violated his probation three times on the resisting and battery convictions and once on the forgery and uttering convictions. The trial court then departed from the guidelines and sentenced McPherson to five years imprisonment on each count; the first three to be served concurrently to each other and consecutively to the other two counts which were being served concurrently to each other. The trial court specifically relied upon this Court's holding in Adams giving multiple violations of probation as the single reason for departure beyond the one-cell bump.

In both Adams and McPherson the sole reason for departure was multiple violations of probation. This is not true of Lambert and its progeny. In Lambert the defendant was on probation on charges of aggravated battery and aggravated assault. His guidelines range was twelve to thirty months. While on probation Lambert struck his girlfriend with a knife or a fork and threatened to kill her. He also struck one of her sons with the same object.

The issue in Lambert was whether factors related to the violation of probation or community control could be used as grounds for departing from the sentencing guidelines. This Court held that they could not because the factors used by the court below as the reasons for the upward departure were related to the substantive offense which violated his probation. The lower court reasoned that the new substantive offense was particularly violent; it was executed with a weapon; it was a stabbing that left scars; and it involved a minor child as well as the victim, and for these reasons departed from the guidelines sentence as to the violation of probation. Thus Lambert precludes use of the facts of the substantive offense as grounds for an upward departure in a violation of probation case. Lambert at 839. It does not, however, preclude a departure sentence in a probation violation case based upon repeated violations of probation.

This Court in Lambert also addressed the issue of whether a departure may be valid if the underlying reasons for violation of probation or community control constitute more than a minor infraction and are sufficiently egregious as to warrant a departure within the statutory maximum even if the defendant has not been "convicted" of the crimes which caused the violation. Lambert at 840. In Lambert and other cases this Court has said that if new offenses constituting a probation violation are to be used as grounds for departure when sentencing for the original offense, a prior conviction on the new offenses is required. Since this was not the case in Lambert, where the charges on the new substantive offense were dropped, that factor was held invalid.

But, even where a conviction on the new offense is obtained prior to sentencing on the original offense, this Court said that it is impermissible double-dipping to add status points for "legal restraint" and, at the same time, depart based upon probation violation. This Court further reasoned that violation of probation is not itself an independent offense punishable by law in Florida. Lambert at 841. This constituted a rejection of the concept of sentencing over and above the one-cell bump allowed on the original offense where additional status points were accounted for in the sentencing guidelines on the new offense.

Lambert was subsequently interpreted by this Court in Franklin v. State, 545 So.2d 851 (Fla. 1989), to proscribe any departure sentence upon a defendant being sentenced after violation of probation other than the one-cell bump provided for in Rule 3.701(d)(14), Fla.R.Crim.P. Since Franklin, Lambert has come to stand for a per se one-cell bump rule in sentencing after violation of probation.

Later, in deciding Ree v. State this Court extended its decision in Lambert when it stated that "any departure for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines." Bear in mind, in both cases the Court was wrestling with the concept of "double-dipping." Ree v. State, 565 So.2d 1329, 1331 (Fla. 1990) citing Lambert at 842.

In Ree this Court observed that the trial court, when sentencing the defendant for violating his probation, imposed the maximum sentence on each of the three counts of the original offense and pronounced the sentences to be served consecutively. Ree at n. 1 and 2 pg. 1330. Cumulatively the maximum sentences represented a six-cell departure from the guidelines sentence on any one of the counts. It is not contested that the trial court could have sentenced the defendant on each count to the presumptive sentence plus a one-cell bump to be served consecutively. Such a sentence could have exceeded the

presumptive sentence including a one-cell bump. However, it does not appear to be this mathematical exercise which offended this Court, rather, it was the trial court's written reasons for its significant departure. These reasons involved factors related to the repugnant effects and egregiousness of the new substantive offense that violated Ree's probation. This Court had already rejected those reasons for an upward departure in Lambert and based its opinion in Ree on the same analysis, stating that:

> The rationale for our holding in Lambert is first, that the guidelines do not permit departure based on an 'offense' of which the defendant may eventually be acquitted.. . Second, even if the defendant has been convicted of the offense, departure is equally impermissible because it constitutes double-dipping. The trial court is imposing a departure sentence for probation violation; simultaneously, the guidelines automatically aggravate the sentence for the separate offense that constituted the violation.

Ree at 1331.

However, when the reason for departure after violation of probation or community control is not based on the commission of a new substantive offense or on the nature of the new substantive offense, then the concerns of Lambert are not implicated. Such is the case in Adams and McPherson.

The State agrees that no defendant should be punished twice for the same crime, nor should one crime be used to twice punish

him. The State further contends that the underlying reasoning of this Court in rejecting upward departures for violations of probation specifically precludes departures where a defendant is effectively twice punished for one crime. That is not the case in McPherson, nor in other cases in which the trial court has departed upwards on the basis of multiple violations of probation alone.

Even in the cases cited by the Petitioner as conflicting decisions of sister courts of appeal, the reasons for departure followed the rule in Lambert and its progeny, not the rule in Adams. The Fifth District in Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989), reversed the trial court because it gave five reasons for departure relating to factors of the new substantive crime which violated the probation. The trial court stated that the defendant's violation of probation was "serious, egregious and substantial not merely technical." Maddox at 1380-1381. Not only were the factors related to the new substantive crime, but the trial court used the very wording proscribed by Lambert.

Paradoxically, in Irizarry v. State, 578 So.2d 711 (Fla. 3d DCA 1990), the Third District concurred with the rule in Adams but found it not to apply because the trial court sentenced Irizarry on the new substantive offense as well as the violation of probation. The Third District reasoned that in sentencing on

the new substantive offense, departure is allowable so long as the grounds for departure are not based on factors already weighed in arriving at the presumptive sentence. Irizarry at 712-713.

Moreover, in Williams v. State, 566 So.2d 299 (Fla. 1st DCA 1990), the First District limited its reading of Lambert to "applying only to cases where the factors on which the departure sentence is based relate to the acts or episode constituting the violation of probation or community control." The First District found that the broad language of Ree goes beyond Lambert, which Ree purports to rely on, and then certified the following question to this Court:

> AFTER A TRIAL JUDGE WITHHOLDS IMPOSITION OF SENTENCE AND PLACES A DEFENDANT ON PROBATION, AND THE DEFENDANT SUBSEQUENTLY VIOLATES THAT PROBATION, MAY THE JUDGE, UPON SENTENCING THE DEFENDANT FOR THE ORIGINAL OFFENSE, DEPART FROM THE PRESUMPTIVE GUIDELINES RANGE AND THE ONE-CELL INCREASE FOR VIOLATION OF PROBATION, AND IMPOSE AN APPROPRIATE SENTENCE WITHIN THE STATUTORY LIMIT BASED ON A REASON THAT WOULD HAVE SUPPORTED DEPARTURE HAD THE JUDGE INITIALLY SENTENCED THE DEFENDANT RATHER THAN PLACING HIM ON PROBATION?

This Court answered the above question in the affirmative and approved the decision of the First District in an opinion rendered May 30, 1991. Williams v. State, 581 So.2d 144 (Fla. 1991). In this case the Court approved escalating criminal

behavior as a valid basis for departure when sentencing for violation of probation.

Clearly, this Court recognizes that multiple violations of probation constitute a valid reason for departure beyond the one-cell increase in cases where the departure sentence is not based upon factors related to a new substantive offense.

Considerable judicial analysis has focused on this issue. For example, Judge Harris in his specially concurring opinion in Johnson v. State, 557 So.2d 203 (Fla. 5th DCA 1990) points out that Franklin clearly states that a departure from the guidelines should never be permitted in a violation case, but that Lambert, upon which the Franklin decision is based, is not so clear. Judge Harris observed that the factors related to the new substantive crime could not be the basis for departure, but that:

> There is no indication that the Lambert court ever considered the propriety of authorizing departure for noncriminal conduct when such authority is necessary to encourage compliance with probation or community control. Johnson at 206.

Judge Sharp's dissent in Niehenke v. State, 561 So.2d 1218 (Fla. 5th DCA 1990), is another example of judicial analysis of this issue which focuses with insight on the efficacy of using multiple violations of probation to depart upwards in sentencing. There is no suggestion that Lambert, Franklin or Ree fail on the issue of double dipping or double punishment for one crime. But

there is considerable reluctance to accept that those cases proscribe any use of multiple violations of probation as a reason for upward departure beyond the one-cell bump allowed for violation of probation. Judge Sharp stated:

> 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. This is an area drastically in need of clarification.

Niehenke v. State at 1219.

The Third District Court of Appeal in a footnote to its opinion in Irizarry perceptively analyzed the issue:

> In theory *Adams* is distinguishable from the situation addressed by *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*. In view of the fact that Rule 3.701(d)(14) textually permits departure, and in view of the facts of the cases just cited, there is at least a theoretical basis on which *Adams* may have continuing validity.

Irizarry F. 2 at 713.

Pursuant to this Court's opinion in Adams, multiple violations of probation should continue to be a valid reason for a departure greater than the one-cell bump-up provided for in the Rules of Criminal Procedure. The concerns addressed in Lambert, i.e., the necessity of conviction and an avoidance of double-dipping, are not implicated when a court departs based on a defendant's multiple prior violations of probation or when the instant violation is technical and not substantive. If Lambert is construed to apply a per se rule of a one-cell bump, the trial court's discretion in imposing an appropriate sentence will be unduly restricted. The per se rule announced in Franklin and Ree is nowhere to be found in Lambert, upon which they rely.

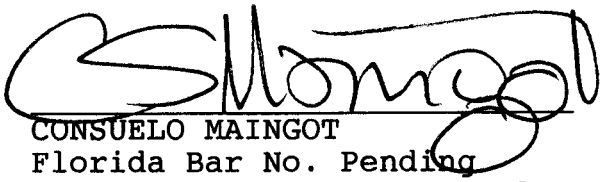
The issue as certified to this Court should be resolved by affirmation of the rule in Adams and limitation of the rule in Lambert and its progeny to factors related to the new substantive offense. To rule otherwise, and to overrule Adams would be to severely restrict trial court discretion in sentencing. Such a restriction was not contemplated by the legislature when it promulgated Rule 3.701 of the Florida Rules of Criminal Procedure.

CONCLUSION

WHEREFORE, based on the foregoing arguments and citations of authority the State asks this Honorable Court to affirm the decision of the Second District Court of Appeal and answer the certified question in the negative dismissing the petition for review with prejudice.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



CONSUELO MAINGOT
Florida Bar No. Pending
Assistant Attorney General

Amy R Ginsberg for

MICHAEL J. NEIMAND
Florida Bar #0239437
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
P.O. Box 013241
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to ROBERT D. ROSEN, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33830 on this 20th day of September, 1991.

Amy R. Ginsberg for
MICHAEL J. NEIMAND
Assistant Attorney General