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IN THE SUPREME COURT OF FLORIDA

WALLACE MIRRAL TAYLOR,	:	
Petitioner,	:	
vs.	:	Case No. 78,800
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On January 7, 1987, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Appellant, WALLACE TAYLOR, with possession of cocaine in violation of section 893.13(1)(e), Florida Statutes (1985), allegedly occurring on December 3, 1986 (R7, 8). On March 20, 1987, Mr. Taylor entered a plea of guilty to the charge and was placed on 18 months of probation on March 25, 1987 (R9-15). Mr. Taylor's probation was violated on October 6, 1988; and he was placed on 2 years of community control (R21-26). This community control was violated on October 18, 1989; and Mr. Taylor was placed on 1 year of community control (R30-39). On March 9, 1990, Mr. Taylor pled guilty to having violated his community control (R85, 87). Although the guidelines recommended nonstate prison sanctions with a one-cell bump up to community control or 12 to 30 months prison (R50, 51), the trial court--over objection--exceeded the guidelines and sentenced Mr. Taylor to 5 years of prison. The reason for this departure was the multiple violations of probation and community control (R50, 60-66, 69-96). Mr. Taylor timely filed his Notice of Appeal on April 9, 1990 (R54).

On October 2, 1991, the Second District Court of Appeal upheld Mr. Taylor's sentences based on the Second District Court of Appeal's prior decisions finding multiple violations of probation and/or community control was a valid reason for a guidelines departure.

SUMMARY OF THE ARGUMENT

This court has already decided in previous cases that multiple violations of probation are not a valid reason for departure from the guidelines. In addition, this Court has held that trial courts cannot depart from the guidelines in a probation or community control violation case.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE?

The trial court sentenced Mr. Taylor's to 5 years imprisonment for the possession of cocaine charge he had been on community control for. The guidelines recommended nonstate sanctions with a one-cell bump to community control or 12 to 30 months prison. The trial court justified its upward departure because of the multiple violations of probation and community control (R50, 51, 60-66, 69-96). The Second District Court of Appeal affirmed the sentence based on its decision in Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990). The Second District Court of Appeal in Williams did note, however, that this Court's recent line of cases may be in conflict and certified the following question:

> Has the Supreme Court in Ree v. State,[1] 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 section 3.701(d)(14), Florida Statutes (1984)?

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[1]The new citation for Ree based on a motion for rehearing is 565 So.2d 1329 (Fla. 1990).

This question was certified in 16 cases and is presently pending before this Court in Williams, et al., v. State, Case No. 75,919; and Fernandez v. State, Case No. 76, 525.

The Second District Court of Appeal's present policy of allowing for departures on violation of probation or community control cases has been rejected by this Court in Ree and Lambert. It has also been rejected by two other district courts of appeal in Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989); and Irizarry v. State, 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990). The Fifth and Third District Courts of Appeal held that multiple violations of probation were no longer valid reasons for a guidelines departure. This Court's holding on the subject as set forth in Ree and Lambert is that "any departure sentence for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines." Lambert, 545 So.2d at 842; Ree, 565 So.2d at 1331.

The policy argument in favor of upholding multiple violations of probation as a reason to depart is presumably that probationers who are given a second chance warrant more punishment than those who have had only one chance. This argument is unsound, because the amount of mercy shown initially does not logically correlate with the amount of punishment imposed later when the mercy is withdrawn. Twice as much mercy does not logically justify twice as much punishment. The guidelines already provide for a one-cell increase in the recommended sentence for a violation of probation. If a court concludes that a first violation is not so

egregious that it warrants incarceration, then it is incoherent to say that this same non-egregious violation could warrant increasing the sentence to the statutory maximum when the court determines the amount of punishment to impose on a second violation. Such a rule would entice judges to offer probation to defendants twice and thereby give them the rope to hang themselves.

CONCLUSION

Mr. Taylor asks for resentencing within the guidelines.

APPENDIX

PAGE NO.

1. Copy of Second District Court of Appeal Opinion issued October 2, 1991. A1

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WALLACE MIRRAL TAYLOR,)
Appellant,)
v.) Case No. 90-01219
STATE OF FLORIDA,)
Appellee.)

Opinion filed October 2, 1991.

Appeal from the Circuit Court
for Hillsborough County; Manuel
Menendez, Jr., Judge.

James Marion Moorman, Public
Defender, and Deborah K.
Brueckheimer, Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Leslie
Schreiber, Assistant Attorney
General, Miami, for Appellee.

Received By
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Appellate Division
Public Defenders Office

PER CURIAM.

We affirm the appellant's judgment and sentence on the basis
of Williams v. State, 559 So. 2d 680 (Fla. 2d DCA 1990) (en

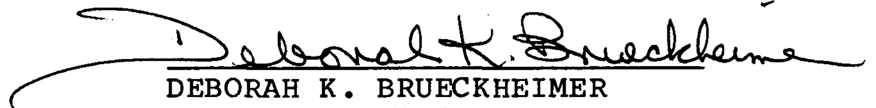
banc), and certify to the Florida Supreme Court the same question that we certified in Williams as being one of great public importance. We further certify that our decision in Williams is in direct conflict with Maxwell v. State, 576 So. 2d 367 (Fla. 1st DCA 1991).

DANAHY, A.C.J., and FRANK and PARKER, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Leslie Schreiber, 401 N.W. 2nd Avenue N-921, Miami, FL 33128, (305) 377-5441, on this 5th day of November, 1991.

Respectfully submitted,



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