

TABLE OF CONTENTS

TABLE OF CITATIONS.....ii

INTRODUCTION.....1

COMBINED STATEMENT OF THE CASE AND FACTS.....1

QUESTION PRESENTED.....3

SUMMARY OF THE ARGUMENT.....4

ARGUMENT.....5

THE TRIAL COURT DID NOT ERR IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE WHERE MULTIPLE VIOLATIONS OF PROBATION AND COMMUNITY CONTROL OCCURRED AND WHERE THE SUPREME COURT DECISIONS IN REE V. STATE, 565 So.2d 1329 (Fla. 1990), AND LAMBERT V. STATE, 545 So.2d 838 (Fla. 1989), HAVE NOT 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).....5

CONCLUSION.....15

CERTIFICATE OF SERVICE.....16

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
Adams v. State, 490 So.2d 53 (Fla. 2d DCA 1986).....	2, 4-8, 11-14
Franklin v. State, 545 So.2d 851 (Fla. 1989).....	10
Irizarry v. State, 578 So.2d 711 (Fla. 3d DCA 1990).....	12-13
Lambert v. State, 545 So.2d 838 (1989).....	4-16
Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989).....	12
Ree v. State, 565 So.2d 1329 (Fla. 1990).....	4-7, 10-11, 13
Riggins v. State, 477 So.2d 663 (Fla. 5th DCA 1985).....	7
Taylor v. State, Case No. 90-01219 (October 2, 1991).....	7-8, 12
William, et al., v. State, Case No. 75,919.....	5
Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990).....	2, 7
 <u>OTHER AUTHORITIES</u>	
Rule 3.701(d)(14) Fla.R.Crim.P.....	10
Sec. 893.13(1)(3) (1985).....	1

INTRODUCTION

The Petitioner, Wallace Mirral Taylor, 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.

COMBINED STATEMENT OF THE CASE AND FACTS

An information was filed against the Defendant on January 7, 1987, charging violations of sec. 893.13(1)(3) (1985). (R. 7) The Defendant pled guilty and was adjudicated to eighteen months probation, drug evaluation, and treatment if necessary. (R. 9, 14). The recommended sentence according to the scoresheet was any nonstate prison sanction. (R. 13)

On September 29, 1987, an Affidavit of Violation of Probation was filed alleging that the Defendant failed to: (1) submit monthly written reports to his probation officer; (2) pay his costs of supervision amounting to \$30.00 per month; (3) report to his probation office and, finally; (4) obtain drug evaluation and treatment. (R. 16) The Defendant was found to have materially violated the aforementioned conditions. The court entered an Order revoking the Defendant's probation on October 6, 1988. (R. 25) As a result the court placed the Defendant on two years community control. (R. 26)

On September 8, 1989, the Defendant was alleged to have violated his community control in a material respect by: (1) driving with a suspended or revoked license (2) failing to pay a traffic citation, and (3) traveling away from his approved residence without the permission of his community control officer. (R. 28) The court accordingly placed the Defendant in community control for one year with specified residency in county jail for a work release program. (R. 31, 39) The following January, 1990 another affidavit was filed alleging further violations of community control. (R. 40)

The court revoked the Defendant's community control and sentenced the Defendant in March, 1990 to five years. (R. 48) The court explained as its reasons for departure were due to the multiple violations. The court relied on Adams v. State, 490 So.2d 53 (Fla. 2d DCA 1986). (R. 50)

The Defendant filed a Motion to Set Aside the Sentence arguing that the sentence exceeded the guidelines range. (R. 53) The court entered an Order Denying the Motion to Set Aside the Sentence. (R. 60; App. 1) An appeal was timely filed.

The Second District Court of Appeal subsequently affirmed petitioner's judgment and sentence on the basis of Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990) (en banc).

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 adhered to the principles set forth in the seminal case of Adams v. State. The principles set forth in Adams have not been overruled or substantially modified by subsequent Supreme Court decisions in Lambert v. State and Ree v. State.

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

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE WHERE MULTIPLE VIOLATIONS OF PROBATION AND COMMUNITY CONTROL OCCURRED AND WHERE THE SUPREME COURT DECISIONS IN REE V. STATE, 565 So.2d 1329 (Fla. 1990), AND LAMBERT V. STATE, 545 So.2d 838 (Fla. 1989), HAVE NOT 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).

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, 490 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 Taylor v. State, Case No. 90-01219, (October 2, 1991) does not conflict with this Court's decision in either Lambert or Ree. Further, in Taylor the court specifically and correctly relied upon its decision in Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990) (en banc) which recognized the Adams holding.

Taylor, the Petitioner at bar, was originally convicted of possession of cocaine and, after entering a plea of guilty, was placed on 18 months of probation. Taylor subsequently violated his probation by failing to submit monthly written reports, paying costs of supervision, reporting to his probation officer and, finally, obtaining drug evaluation and treatment. The trial court found he materially violated his probationary conditions so Taylor was sentenced to two years of community control. Taylor then materially breached his commitment to community control. In finding Taylor in violation of community control the court then placed him in community control for one year with a specified residency in county jail. Taylor again took advantage of his situation by violating the aforementioned program wherein the

court sentenced him to five years. The trial court specifically relied on Adams giving multiple violations of probation as a single reason for departing beyond the one-cell bump.

In Adams, as in Taylor, 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 pp. 1130. 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.

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 Taylor, 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.

Further, the Irizarry court in a footnote to its opinion perceptively distinguished Adams from Lambert and Ree, stating:

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 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 points and authority the State requests this Honorable Court affirm the decision of the Second District Court of Appeal and answer the certified question in the negative thereby dismissing the petition with prejudice.

Respectfully submitted,

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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 DEBORAH K. BRUECKHEIMER, Assistant Public Defender, Office of the Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33830 on this 11 day of December, 1991.

Leslie Schreiber

LESLIE SCHREIBER
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