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IN THE SUPREME COURT OF FLORIDA

RUSSELL AMBLER MAGUIRE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

Supreme Court No.: 78-849

Appeal No: 90-03222

CRC 84-3845 CFANO
Division "C"

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant will be referred to as "MAGUIRE" or "Appellant". Appellee will be referred to as "STATE" or "Appellee". The record will be referred to as "R".

STATEMENT OF THE CASE

On April 24, 1984, MAGUIRE was charged by information with the offense of handling and fondling a child under the age of 14 years (R. 261). On April 28, 1986, he pled no contest (R. 265). He was placed on probation for a 10 year term by Judge James Case (R. 265).

On February 12, 1988, an affidavit on violation of community control was filed. After an evidentiary hearing, the court determined MAGUIRE had violated his community control. Judge Claire Luten revoked the probation and sentenced MAGUIRE to a 15 year sentence, in the Department of Corrections, to 30 months incarceration with credit for time served, and the remaining 12-1/2 years to be served on probation (R. 274). The order entered by Judge Luten on July 15, 1988, forbids MAGUIRE from having unsupervised contact with minor children (R. 276).

On May 7, 1990, an affidavit alleging that MAGUIRE had violated his probation by having contact with children was filed (R. 289). An evidentiary hearing on the violation of probation took place on October 5th and October 12th, 1990. On October 12, 1990, the presiding Judge, Charles Carrere, entered a Final Judgment on Violation of Probation (R. 326). The Judge sentenced MAGUIRE to nine years in the Department of Corrections, with credit for time previously served (R. 328). Upon MAGUIRE's release from incarceration, he would be placed on three years probation (R. 328). One of the conditions of probation was that MAGUIRE have no contact or communication whatsoever with minor children (R. 328).

MAGUIRE appealed to the Second District Court of Appeals on two grounds. First, the condition of probation is unconstitutionally vague. Second, the judge departed from the guidelines in sentencing MAGUIRE.

On September 27, 1991, the Court of Appeals filed an opinion finding that the vagueness issue had no merit. Moreover, the court found the judge did not depart impermissibly from the guidelines. The court proceeded to certify the following matter to the Supreme Court as a question of great public importance:

> Does a second violation of probation constitute a valid basis for a departure sentence beyond the one-cell departure provided in the sentencing guidelines?

MAGUIRE timely filed a notice of appeal to the Supreme Court of Florida.

STATEMENT OF FACTS

On April 24, 1984, MAGUIRE was charged by information with the offense of handling and fondling a child under the age of 14 years (R. 261). On April 28, 1986, he pled no contest (R. 265). He was placed on probation for a 10 year term by Judge James Case (R. 265).

On February 12, 1988, an affidavit on violation of community control was filed. After an evidentiary hearing, the court determined MAGUIRE had violated his community control. Judge Claire Luten revoked the probation and sentenced MAGUIRE to a 15 year sentence, in the Department of Corrections to be served as follows: 30 months incarceration with credit for time served, and the remaining 12-1/2 years to be served on probation (R. 274). The order entered by Judge Luten on July 15, 1988, forbids MAGUIRE from having unsupervised contact with minor children (R. 276).

On May 7, 1990, an affidavit alleging that MAGUIRE had violated his probation by having contact with children was filed (R. 289). An evidentiary hearing before Judge Carrere on the violation of probation took place on October 5th and October 12th, 1990.

At the hearing, there was testimony that MAGUIRE had a brief conversation with minor children in the parking lot of a grocery store. There was also contradictory testimony on the meaning of "contact."

On October 12, 1990, Judge Carrere filed a Final Judgment on the Violation of Probation (R. 326). The Judge sentenced MAGUIRE

to 9 years in the Department of Corrections, with credit for time previously served (R. 328). Upon MAGUIRE's release from incarceration, he would be placed on three years probation (R. 328). The Judge also enumerated three special conditions of probation:

(a) No contact or communication whatsoever with minor children;
(b) No consumption of alcoholic beverages while on probation;

(c) No communication or contact with the Wallace family or their residential or business premises (R. 328).

The Judge listed two reasons for his sentencing departure:

(1) This is a second violation of defendant's probation.

(2) Conduct of defendant during his probation, together with his testimony and the testimony of other witnesses during the proceedings on October 5, 1990, convinced the court that further repetitions of contact and communications with children would occur if incarceration was not required and imposed (R. 327).

MAGUIRE appealed to the Court of Appeals for the Second District which affirmed the lower court's decision. However, the appellate court certified the issue of violation of probation to the Supreme Court as a matter of great public importance. MAGUIRE timely filed a Notice of Appeal in the Supreme Court.

SUMMARY OF ARGUMENT

Fla. R. Crim. P. 3.701(d)(14) provides that:

> 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 (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure. (emphasis added)

In Lambert v. State, 545 So.2d 838 (Fla. 1989), the Supreme Court ruled that under sentencing guidelines, any departure sentence for probation violation is impermissible if it exceeds the statutory one-cell increase.

In the instant matter, Judge Carreres declined to follow Lambert and departed from the one cell enhancement by sentencing MAGUIRE to 9 years in the Department of Corrections, with credit for time previously served (R. 328). The Judge's failure to apply the controlling principles of Lambert is error requiring a new sentencing.

I. THE COURT COMMITTED ERROR IN DECLINING TO FOLLOW LAMBERT.

A. Introduction.

In his final judgment on violation of probation, Judge Carrere sentenced MAGUIRE to 9 years in the Department of Corrections, with credit for time previously served (R. 328). The Judge declined to follow the controlling authority of Lambert v. State, 545 So.2d 838 (Fla. 1989), and departed from the one-cell bump-up guideline permissible under Fla. R. Crim. P. 3.701(d)(14). The Judge's failure to follow Lambert is error requiring a new sentencing.

B. Poore and Lambert Are The Controlling Authorities.

One of the guiding decisions for sentencing is Poore v. State, 531 So.2d 161 (Fla. 1988). In Poore, Justice Barkett explains that a trial judge in his initial sentencing consideration has five basic alternatives. Of those considerations, the one that applies to this case, is number 2: "a true split sentence, consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion." Judge Luten sentenced MAGUIRE on July 15, 1988, to 15 years in the Department of Corrections, to serve 30 months with credit for time served, and the remainder of 12-1/2 years to be served on probation, a true split sentence (R. 194).

The Poore court held that under this circumstance, a trial judge is limited to merely recommitting the defendant to the balance of the present term of incarceration upon a violation of probation. However, as the court explained:

. . .In sentencing a defendant to

> incarceration followed by probation, the court is limited only by the guidelines and the statutory maximum in punishing a defendant after a violation of probation. Poore, 531 So.2d at 164.

The court stressed that the cumulative incarceration imposed after a violation of probation will always be subject to any limitation imposed by the sentencing guidelines. The court specifically rejected "any suggestion" that the guidelines do not limit the cumulative prison term of any split sentence upon a violation of probation. Poore, 531 So.2d at 165.

Since Poore, the Supreme Court has affirmed its position and delineated specifically the sentencing parameters controlling the instant case. In Lambert, the court said that it is improper to depart more than one cell from the applicable sentencing guideline range for a revocation of probation imposed as a part of a true split sentence.

In Lambert, appellant was placed on community control for a period of one and a half years after pleading nolo contendere to charges of aggravated battery and aggravated assault. He was subsequently charged with violating community control. The court adjudicated him guilty and sentenced him to serve concurrent 15 and 5 year sentences. Under Florida Rule of Criminal Procedure 3.701(d)(14), the guidelines range were 12 to 13 months, including the one-cell increase for violation of community control. The court listed 10 reasons for departure from the sentencing guidelines, such as the defendant was on community control when he committed the new substantive offenses, and that the violations

were violent in nature.

The District Court affirmed the departure sentence, and certified the following question:

> Where a trial judge finds that the underlying reason for violation of community control constitute more than a minor infraction and are sufficiently egregious, may he depart from the presumptive guidelines range and impose an appropriate sentence within the statutory limit, even though the defendant has not been "convicted" of the crimes which the trial judge concluded constituted a violation of his community control?

Lambert, 545 So.2d at 840

The Supreme Court answered the question negatively. The Court reasoned that a second violation of probation is not itself an independent offense punishable at law in Florida. "The legislature had addressed this issue, and chosen to punish conduct underlying violation of probation by revocation of probation, conviction and sentencing for the new offense, addition of status points when sentencing for the new offense, and a one-cell bump-up when sentencing for the original offense." Lambert, 545 So.2d at 841. As a result, if departures based upon probation violations were to be approved, the courts unilaterally would be designating probation violations as something other than what the legislature intended. Id.

The Court concluded that Lambert was impermissibly sentenced outside the guidelines under which he received a 12-1/2 year departure for the original offenses based upon conduct for which there was no conviction. The court ruled that "factors related to violation of probation or community control cannot be used as

grounds for departure." Lambert, 545 So.2d at 842.

The Supreme Court has repeatedly cited Lambert approvingly. See, Ree v. State, 565 So.2d 1329 (Fla. 1990); State v. Tuthill, 545 So.2d 850 (Fla. 1989); and Franklin v. State, 545 So.2d 851 (Fla. 1989). Particularly instructive is Franklin, wherein Justice Barkett, the author of Poore, explained the precise sentence appropriate in the instant case:

> Upon the violation of probation after incarceration (pursuant to a true split sentence) the judge may then resentence the defendant to any period of time not exceeding the remaining balance of the withheld or suspended portion of the original sentence provided that the total period of incarceration, including time already served, may not exceed the one-cell upward increase permitted by Florida Rule of Criminal Procedure 3.701(d)14.

Franklin, 545 So.2d at 852.

Recently, in Johnson v. State, 585 So.2d 272 (Fla. 1991), the Supreme Court of Florida affirmed Lambert. The court dismissed the State's claim that under State v. Pentaude, 500 So.2d 526 (Fla. 1987), the trial court is allowed to depart from sentencing guidelines if the noncriminal probation violations are not minor and sufficiently egregious. Instead, the court clarified that Lambert fully overruled Pentaude. As a result, the court effectively rejected any argument that Pentaude is viable precedent for a trial judge's departure from sentencing guidelines in violation of probation cases.

C. Williams and Moten conflict with Lambert.

Despite the clear mandate of Lambert and Johnson the Court of

Appeals for the Second District has ruled that a second violation of probation constitutes valid basis for departure beyond the one cell bump-up provided in the sentencing guidelines. In Moten v. State, 579 So.2d 916 (Fla. 2d DCA 1991) and Williams v. State, 568 So.2d 1276 (Fla. 2d DCA 1990), the Second District certified the issue to the Supreme Court. Appellant respectfully submits the Moten and Williams line of cases are wrong because they conflict with Lambert and Johnson and Fla. R. Crim. P. 3.701(d)(14).

D. Sentencing Under Lambert.

MAGUIRE was originally sentenced to 15 years in the State prison system, 12-1/2 months suspended with 2-1/2 years to be served incarcerated (R. 274). Under Lambert, his present sentencing guideline, including the permitted one cell enhancement is 2-1/2 to 3-1/2 years of incarceration. MAGUIRE is entitled by law to full credit for the 2-1/2 years sentence previously imposed, plus the benefit of any credit for time presently served. Green v. State, 547 So.2d 925 (Fla. 1989). Pursuant to these principles, MAGUIRE respectfully requests this Court remand this matter to the trial court for sentencing consistent with Lambert.

CONCLUSION

The sentence which Judge Luten imposed is a true split sentence. Under Lambert, any departure sentence for violation of probation is impermissible if it exceeds the one cell increase allowed by the sentencing guidelines. Judge Carrere erred in sentencing MAGUIRE outside the one cell enhancement in contravention of Lambert. Consequently, Appellant respectfully

requests this Honorable Court remand this cause to the lower tribunal for a new sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to JAMES T. RUSSELL, State Attorney, P. O. Box 528, Clearwater, FL 33518, the Office of ROBERT BUTTERWORTH, Attorney General, Park Trammel Building, 1313 Tampa Street, Suite 804, Tampa, Fl 33602 and MICHELE TAYLOR, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607, this 22nd day of November, 1991.

Margie Fraley for
AUBREY O. DICUS, JR.

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