IN THE SUPREME COURT OF FLORIDA

RUSSELL AMBLER MAGUIRE,

Petitioner,

vs. Case No.: 78,849

STATE OF FLORIDA,

Respondent.
_____/

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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SUMMARY OF ARGUMENT

Under Lambert v. State, 545 So.2d 838 (Fla. 1989), two or more violations of probation are not a valid reason for a departure beyond the one-cell bump provided in the Sentencing Guidelines when sentencing a defendant after violation of probation.

ARGUMENT

Adams v. State is not viable precedent for departing beyond a one-cell bump up due to a second violation of probation.

In its Answer Brief, the State contends that under Adams v. State, 490 So.2d 53 (Fla. 1986), two violations of probation are a valid reason for an upward sentencing departure beyond the one-cell bump authorized by the guidelines. However, Adams does not appear to have survived Lambert v. State, 545 So.2d 838 (Fla. 1989), Ree v. State, 565 So.2d 1329 (Fla. 1990) and progeny. Indeed, the First, Third, and Fifth District Court of appeals have questioned and criticized Adams.

In Adams v. State, the Supreme Court ruled that two violations of probation are valid reasons for departing from the Sentencing Guidelines. Adams, 490 So.2d at 54. In a footnote, the Supreme Court explained that the Fifth District Court of Appeals had approved multiple probation violations to support a departure of more than one cell from the Sentencing Guidelines. Adams, 490 So.2d at 54 n.2.

Three years later, in Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989), the Court of Appeals for the Fifth District ruled that Lambert and progeny had eliminated the Adams exception. The court explained that:

> "We hold that under Ree two violations of probation as to the same offense do not justify a departure sentence and that the one-cell increase permitted by the Sentencing Guidelines for a sentence following a violation of probation is the exclusive applicable sentencing factor relating to the effect of a prior violation,

> or violations, of probation and that no aspect or detail of that probation violation is permissible as a reason for 'any departure sentence.'"

Maddox, 553 So.2d at 1381.

In Irizarry v. State, 578 So.2d 711 (Fla. 3d DCA 1990), the Court of Appeals for the Third District similarly noted its doubts as to the continuing validity of Adams in view of Ree and Lambert. Finally, in Maxwell v. State, 576 So.2d 367 (Fla. 1st DCA 1991), the Court of Appeals for the First District explained that it was exceedingly difficult to attribute any surviving vitality to the Adams decision after Lambert. Maxwell, 576 So.2d at 370. The court proceeded to state that after Ree, there is simply no basis for according any continued validity to Adams[1]. Maxwell, 576 So.2d at 371. In fact, the state admits as much when it conceeds that Franklin v. State, 545 So.2d 851 (Fla. 1989), interpreted Lambert to stand for a "per se one-cell bump rule in sentencing after violation of supervision." (Respondent's Answer Brief at p.4.)

The State argues that if this Court rules that two violations of probation are not valid grounds for departure beyond a one-cell bump up under the Sentencing Guidelines, the courts will be frustrated in the administration of justice. In Lambert, the Supreme Court noted that the legislature had addressed the issue of whether a second violation of probation was an independent offense

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[1] The Court of Appeals for the Second District has continued to apply Adams and has certified the issue of Adams' validity in light of Lambert. See, McPherson v. State, 581 So.2d 1006 (Fla. 1991).

punishable at law in Florida, and had answered the question negatively. The Supreme Court emphasized that: "The legislature has...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. Petitioner respectfully submits that the proper forum to resolve the lower courts' frustration is the legislature, as pointed out in Lambert.

CONCLUSION

The State argues that Adams is viable authority for holding that two violations of probation permit sentencing beyond the one-cell bump-up allowed by the guidelines. However, three years after Adams, Lambert ruled that the second violation of probation is not reason for departure beyond the one-cell increase. As a result, Adams' validity is doubtful. In fact, this Court recently affirmed Lambert in Johnson v. State, 585 So.2d 272 (Fla. 1991). In view of Lambert's clear mandate, Petitioner respectfully requests this Honorable Court remand this cause for a new sentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing as been furnished by U.S. Mail to MICHELE TAYLOR, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 27 day of December, 1991.

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