IN THE SUPREME COURT OF FLORIDA

STEVEN PARMLEY, :

Petitioner, :

vs. : Case No. 79,154

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

STEPHEN KROSSCHELL
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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On May 16, 1985, the Hillsborough County state attorney charged the Petitioner, STEVEN PARMLEY, with having committed attempted armed robbery on April 26, 1985 (R9-10) On October 3, 1985, Parmley pleaded guilty to aggravated assault and received five years probation. (R24-25) On December 19, 1987, he was charged with having possessed cocaine on November 21, 1987. (R57-58) On February 22, 1988, he pleaded guilty, probation was revoked, and he received two years community control concurrent for all charges. (R60-61) He violated community control by having cocaine in his system, and, on May 19, 1988, his community control was enhanced to include a condition of one year in the county jail. (R62, 91-94) Community control was again revoked after cocaine was detected in his system, and, on February 9, 1989, the court sentenced him to two and a half years prison followed by two and a half years probation for aggravated assault and, for cocaine possession, five years probation consecutive to the prison time for the assault but concurrent to the probation. (R41-44, 66-67, 102-03) On October 18, 1989, he was charged with having violated his probation by failing to file written reports and pay costs of supervision. (R104) The court revoked probation on November 20, 1989, and sentenced him to two years community control concurrent for both counts. (R46-47, 68-69)

On January 9, 1990, he was charged with violating his community control for failing to return to the Probation and Restitution Center. (R113) On July 17, 1990, the court revoked

community control and sentenced him to two consecutive five year terms in prison. (R49-52, 70-74, 123) This sentence departed from the recommended sentencing range of twelve to thirty months in prison. (R99) The written reason for departure was the multiple violations of probation and community control. (R119)

On appeal, Parmley argued that the reason for departure was invalid, that he received insufficient credit for time served, and that the written judgments and other documents incorrectly listed the nature and degree of his prior crimes. In an opinion issued December 11, 1991, the district court rejected his first argument, remanded for an evidentiary hearing on the second argument, and agreed with his third argument. Parmley v. State, 16 F.L.W. D3072 (Fla. 2d DCA Dec. 11, 1991). He appealed to this Court on December 19, 1991. On January 8, 1992, this Court postponed a decision on jurisdiction and set a briefing schedule.

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. Accordingly, this court implicitly receded from an earlier case which held otherwise.

ARGUMENT

ISSUE

THIS COURT HAS ALREADY DECIDED THAT MULTIPLE VIOLATIONS OF PROBATION CANNOT BE USED AS A REASON TO DEPART FROM THE GUIDELINES.

The listed reason for departure from the guidelines was multiple violations of probation and community control. (R119) Because this reason related to the violation of probation, it could not be used as a reason to depart. Wesson v. State, 559 So.2d 1100 (Fla. 1990); Ree v. State, 565 So.2d 1329 (Fla. 1990); Lambert v. State, 545 So.2d 838 (Fla. 1989).

In its decision below, the second district relied on Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), which in turn relied on Adams v. State, 490 So.2d 53 (Fla. 1986), for the proposition that multiple revocations of probation are a valid reason for departure. Wesson, Ree, and Lambert, however, effectively receded from Adams, just as they receded from Pentaude v. State, 500 So.2d 526 (Fla. 1987). See Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989) (Ree overruled Adams); Irizarry v. State, 578 So.2d 711 (Fla. 3d DCA 1990) (same). Consequently, this reason for departure is no longer valid. Petitioner notes that Williams is pending review in this court (case no. 75,919), and he relies on the arguments made by the defendant in Williams.

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 entices judges to offer probation to defendants twice and thereby give them the rope to hang themselves.

This court should decide that this reason for departure was invalid and should therefore remand for sentencing within the guidelines. Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

CONCLUSION

Petitioner asks for resentencing.

APPENDIX

the Circuit Court for Polk County; Charles A. Davis, Jr., Judge. James Marion Moorman, Public Defender, and Tonja R. Vickers, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ron Napolitano, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the appellant's judgment and twenty-two year prison sentence for armed robbery. We strike the imposition of the three year mandatory sentence under section 775.087(2), Florida Statutes (1987) because there was no evidence of the appellant's actual possession of a firearm. *See Willingham v. State*, 541 So. 2d 1240 (Fla. 2d DCA 1989) *rev. denied* 548 So. 2d 663 (Fla. 1989). (SCHOONOVER, C.J., and HALL and THREADGILL, JJ., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Multiple violations of probation valid reason for departure—Question certified whether supreme court has receded from decision in which it held that, where defendant previously placed on probation has repeatedly violated the terms of his probation after having had his probation restored, a trial court may use the multiple violations of probation as a valid reason to support departure beyond the one-cell increase for violation of probation—Whether defendant was properly credited with gain time to be determined on remand—Scriveners' errors in the descriptions of defendant's convictions to be corrected

STEVEN PARMLEY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-02516. Opinion filed December 11, 1991. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, Bartow, and Stephen Krosschell, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Charles Corces, Jr., Assistant Attorney General, Tampa, for Appellee.

(THREADGILL, Judge.) Steven Parmley appeals a guidelines departure sentence on the following grounds: that multiple probation violations is not a valid reason for departure, that time served was not properly credited, and that the judgment contained scriveners' errors. We affirm Parmley's sentence, but remand for computation of time served and correction of scriveners' errors.

The appellant contends that the trial court erred in basing his departure sentence upon multiple violations of probation and community control and asks that we certify the question as we did in *Williams v. State*, 559 So.2d 680 (Fla. 2d DCA 1990). *Williams* upheld the departure but asked the supreme court for clarification as to whether *Ree v. State*, 565 So.2d 1329 (Fla. 1990) and *Lambert v. State*, 545 So.2d 838 (Fla. 1989), receded from *Adams v. State*, 490 So.2d 53 (Fla. 1986). *Adams* permitted departure beyond the one-cell bump-up on this basis. We therefore affirm the departure sentence and again certify the question certified in *Williams*.

The appellant also contends that he was deprived of full credit for time served because he was not credited with earned gain-time, to which he is entitled under *State v. Green*, 547 So.2d 925 (Fla. 1989). As the record on appeal contains no evidentiary findings on this issue, we remand for a determination as to the amount of gain-time due to the appellant under *Green*.

The appellant cites and the state concedes a number of scriveners' errors in the description of the appellant's convictions in case numbers 85-4297 and 87-15007. Therefore, we remand for the following corrections: 1) in case number 85-4297, the judgments entered on February 22, 1988, May 19, 1988, September 8, 1988, February 9, 1989, November 20, 1989, and July 17, 1990, should be corrected to show a conviction for aggravated assault, a third-degree felony, in violation of section 784.021,.Florida Statutes (1983); 2) in case number 87-15007, the judgments entered on February 9, 1989, November 20, 1989, July 17, 1990, should be corrected to show a conviction for possession of cocaine, a third-degree felony, in violation of section 893.13(1)(f), Florida Statutes (1987).

In conclusion, we affirm the appellant's departure sentence, remand for a determination of credit for time served and for the correction of scrivener's errors.

Affirmed. (SCHEB, A.C.J., and HALL, J., Concur.)

* * *

Civil procedure—Costs for travel, postage, photocopies, and telephone are nontaxable—Whether costs for service of process and court reporter fees are taxable unclear where costs were not itemized

NORTHBROOK LIFE INSURANCE COMPANY, Appellant/Cross-Appellee, v. MARY ELIZABETH CLARK, Appellee/Cross-Appellant. 2nd District. Case No. 91-00522. Opinion filed December 11, 1991. Appeal from the Circuit Court for Sarasota County; Peter A. Dubensky, Judge. John R. Bello, Jr. and Eliott R. Good of Chorpenning, Good, Gibbons & Cohn, Tampa, for Appellant/Cross-Appellee. Peter S. Branning, Susan J. Silverman of Peter S. Branning, P.A., Sarasota, for Appellee/Cross-Appellant.

(THREADGILL, Judge.) Northbrook Life Insurance Company appeals a judgment of attorney's fees and costs awarded to Mary Elizabeth Clark. Ms. Clark cross appeals the attorney's fee award contending she was entitled to a risk factor multiplier to enhance the amount of the fee.[1] We affirm the award of attorney's fees and reverse the award of costs.

The trial court awarded costs in the amount of $3,507.89. Northbrook contends that the costs for travel, postage, photocopies, and telephone are nontaxable. Clark concedes this item and agrees to a reduction of court costs from $3,507.89, to $1,969.50.

Northbrook also contests the taxation of costs for service of process and court reporter fees. On a motion to tax costs, the trial court should consider each item of cost and determine whether it should be allowed in whole or in part or disallowed. *See Allstate Insurance Company v. Jasiecki*, 549 So.2d 816 (Fla. 2d DCA 1989). Because Clark failed to itemize these costs, there was no way to determine whether they were all taxable.

We therefore reverse the judgment assessing costs and remand for further proceedings. We affirm the final judgment in all other respects.

Affirmed in part; reversed in part. (SCHEB, A.C.J., and HALL, J., Concur.)

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[1]This is the second appeal in this case. In the first appeal, we affirmed a final judgment in favor of Mrs. Clark. Northbrook Life Insurance Company v. Clark, 582 So.2d 1199 (Fla. 2d DCA 1991).

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Criminal law—Sentencing—Error to reclassify offense of attempted robbery with firearm to first degree felony based upon use of firearm where use of firearm was essential element of offense as charged

DARRYL WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-01142. Opinion filed December 11, 1991. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, and Wendy E. Friedberg, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) The appellant, Darryl Williams, challenges the judgments and sentences imposed upon him after he was found guilty by a jury of the crimes of attempted robbery with a firearm and aggravated battery with a firearm. We find no merit in the appellant's contentions concerning his trial and, accordingly, affirm the convictions. We do find, however, that the appellant was improperly sentenced and, therefore, remand for resentencing.

The appellant contends, and we agree, that the trial court erred in reclassifying the offense of attempted robbery with a firearm to a first degree felony in preparing the guidelines scoresheet. Before a court may reclassify a felony, it must be shown that a defendant is charged with a felony for which the use of a weapon or firearm is not an essential element, and the jury must make a factual finding that the defendant used a weapon or firearm. § 775.087(1), Fla. Stat. (1987); *Franklin v. State*, 541 So.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles Corces, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of January, 1992.

Respectfully submitted,

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