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IN THE SUPREME COURT OF FLORIDA

WILLIAM C. SNEAD,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 80,067

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SOPHIA EHRINGER
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

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STATE OF FLORIDA,
Respondent.

STATEMENT OF THE CASE AND FACTS

Petitioner William c. Snead appealed to the District Court of Appeal, Fifth District, following his sentence of seven years incarceration as a habitual offender, imposed on a violation of probation. On appeal, Snead argued that the trial court erred in imposing a sentence as a habitual offender, pursuant to Florida Statutes § 775.084 (1989), on a sentence for a violation of probation, where the State never sought to classify Snead as a habitual offender when he was originally sentenced to five years probation for possession of cocaine. The district court in its opinion affirmed the sentence, expressly acknowledging conflict with Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), rev. denied, 560 So. 2d 235 (Fla. 1990); Snead v. State, 598 So. 2d 316 (Fla. 5th 1992) (Appendix A).

Snead was charged by information in circuit court case number 89-5406 with one count of possession of cocaine, and one count of resisting arrest with violence (R4). Both offenses were alleged to have occurred on August 3, 1989, in Volusia County

(R4). On March 15, 1990, Snead entered a plea of nolo contendere to the charge of possession of cocaine, and as part of the plea agreement the State nolle prossed the second count of the information (R5-6, 11).[1] The trial court adjudicated Snead guilty of the offense, and sentenced him to five years supervised probation (R7-8, 9-10).

Snead began successfully serving his probationary sentence, but on June 3, 1991, an amended affidavit of violation of probation was filed (R15-16). The affidavit alleged that Snead violated various conditions of his probation (R15-16). A written order of revocation of probation was filed on October 25, 1991 (R48).

After having been found guilty of the violation of probation, a sentencing hearing was held on October 10, 1991, before the Honorable Gayle Graziano (R52-58). The State filed notice of its intent to sentence Snead as a habitual offender on July 26, 1991, almost two months after the amended affidavit charging Snead with violating his probation was filed (R17). During the sentencing proceedings, the State entered into evidence certified copies of two prior Florida felony convictions, and a certificate from the governor showing that Snead had not been pardoned on either of the offenses (R24-32,

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[1] The Fifth District's opinion in Snead, states, "The plea bargain contemplated a guidelines sentence, but noted the judge could depart upward to a maximum of five years by giving valid written reasons. Nothing was said about the consequences of violating probation and the kind of sentence that might then be imposed." The plea hearing, however, is not included in the record on appeal.

52-53). The date of one of the prior convictions fell within five years of the date of the instant offense (R24-32, 52-53).

Snead's trial counsel objected to the enhancement of Snead's sentence as a habitual offender on a sentence imposed for a violation of probation (R53). The objection was overruled, and the trial court found Snead to be a habitual offender and entered a written order pursuant to this ruling (R54, 39-40). A written judgment was filed reflecting Snead's conviction of possession of cocaine in circuit court case number 89-5406 (R33-34)[2].

Snead's recommended sentence according to his original guidelines scoresheet was for any nonstate prison sanction (R14). Fla. R. Crim. P. 3.988(g) (1989). The employment of the one cell level bump for the violation of probation would have raised his recommended sentence to community control or twelve to thirty months incarceration, with a permitted range of up to three and one half years incarceration. Fla. R. Crim. P. 3.701(d)(14) & 3.988(g) (1989). The trial court did not follow the guidelines recommendation, and instead sentenced Snead to seven years incarceration as a habitual offender with credit for time served (R58, 35-36).

On appeal, Snead argued that the trial court erred in sentencing him as a habitual offender upon revocation of his probation, where the State did not filed its notice of intent to

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[2] Snead had been previously adjudicated guilty of possession in this case when he was placed on probation. The written judgement filed incorrectly indicates that Snead was tried and found guilty of the offense, where he had originally pled no contest to the charge in 89-5406.

seek enhanced penalties until after Snead was charged with violating conditions of his probation. Snead cited Scott, supra, and Lambert v. State, 545 So. 2d 838 (Fla. 1989), in support of this argument.

Snead additionally argued that the trial court's reliance on Williams v. State, 581 So. 2d 144 (Fla. 1991), in granting the State's motion to sentence him as habitual offender, was misplaced. This argument was based on the fact that Williams, supra, dealt with the propriety of a departure from a guidelines sentence in sentencing upon a violation of probation, where the reasons for the departure sentence existed prior to a defendant being placed on probation originally. A habitual offender classification is not grounds for departure from the guidelines, and therefore Snead argued that Williams should not have been relied upon for authorizing the habitual offender sentence imposed in the instant case.

Snead further argued that as opposed to Williams, supra, the State in the case sub judice, did not seek habitual offender penalties until after Snead was adjudicated guilty of the crime charged, and placed on probation. Therefore, a sentence under the habitual offender statute was not contemplated when Snead was originally placed on probation, and could not be imposed upon revocation of that probation.

The district court rejected these arguments, citing Williams, supra, and Poore v. State, 531 So. 2d 161 (Fla. 1988), for the proposition that the trial court was free on a violation

of probation to impose any sentence it might have originally imposed. The district court's opinion contended that the trial court's freedom to impose such a sentence pursuant to Williams, supra, "should include inter alia the imposition of a habitual offender sentence." Snead, 598 So. 2d at 318.

The district court expressly acknowledged conflict with the Fourth District Court of Appeal's decision in Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), rev. denied, 560 So. 2d 235 (Fla. 1990). Snead v. State, 598 So. 2d at 318.

A notice to invoke discretionary review was timely filed in the District Court on June 19, 1992. Jurisdiction was accepted by this Honorable Court by an order dated September 28, 1992.

SUMMARY OF THE ARGUMENT

Petitioner respectfully requests that this Honorable Court reverse the opinion of the District Court of Appeal, Fifth District, in the instant case. The opinion expressly and directly conflicts with cases of this Court and other district courts. The Fourth District Court of Appeal in Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), rev. denied 560 So. 2d 235 (1990), disapproved of sentencing a defendant to an enhanced term under the habitual offender statute upon a violation of probation. The Fifth District Court of Appeal in Snead v. State, 598 So. 2d 316 (Fla. 5th DCA 1992), affirmed Petitioner Snead's habitual offender sentence which was imposed after Snead began serving his term of probation.

The district court reasoned that the habitual offender sentence was one which could have been imposed originally, and cited Williams v. State, 581 So. 2d 144 (Fla. 1991), in support of its decision. Snead, however, could not have been originally subject to the statute where the State did not file a notice or seek enhancement until after Snead was charged with violating his probation. Moreover, Snead's plea agreement d d not contemplate a habitual offender sentence. The district court's opinion permits an overly expansive application of Williams, where Williams only dealt with a departure sentence, and not a habitual offender sentence. The opinion also conflicts with the parameters set forth by the legislature in classifying and sentencing defendants under the habitual offender statute.

ARGUMENT

THE FIFTH DISTRICT COURT'S DECISION IN SNEAD v. STATE, 598 SO. 2D 316 (Fla. 5th DCA 1992), SHOULD BE REVERSED WITH DIRECTIONS TO VACATE SNEAD'S HABITUAL OFFENDER SENTENCE WHERE THE STATE DID NOT SEEK THE ENHANCED PENALTIES UNDER THE HABITUAL OFFENDER STATUTE UNTIL AFTER SNEAD WAS CHARGED WITH A VIOLATION OF PROBATION.

The decision of the Fifth District Court of Appeal expressly and directly conflicts with Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), rev. denied, 560 So. 2d 235 (Fla. 1990), and should be reversed.

The issue raised in Snead's appeal to the district court was squarely raised by the Fourth District Court of Appeal in Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), rev. denied. 560 So. 2d 235 (1990). The opinion provided in part;

> We doubt that the legislature ever intended that a person could be placed on probation and then, years later, if the probation failed, be subjected to the provisions of the habitual offender statute. In fact, the findings required to order probation are precisely opposite to the findings required to invoke the habitual offender statute. The purpose of habitualization is to protect society against habitual offenders. Probation, on the other hand, may only be imposed if it appears to the court that the defendant is not likely again to engage in a criminal course of conduct and the welfare of society do not require that the defendant presently suffer the penalty imposed by law.

Scott, 550 So. 2d at 112. The court in Scott, supra, found that the this Court's ruling in Lambert v. State, 545 So. 2d 838 (Fla. 1989), compelled a reversal of the defendant's habitual offender

sentence imposed on a sentence for a violation of probation. [3] The district court in Snead, however, upheld the habitual offender sentence which was imposed after Snead was charged with violating his probation, even though the State did not seek the enhanced penalties prior to Snead's plea agreement or prior to Snead being placed on probation. Petitioner Snead requests that this Honorable Court follow the reasoning set forth in Scott, supra, and quash the Fifth District Court of Appeal's decision in Snead v. State, 598 So. 2d 316 (Fla. 5th DCA 1992).

The Fifth District Court of Appeal in Snead, supra based its finding on Williams v. State, 581 So. 2d 144 (Fla. 1991), which held that the existence of an escalating pattern of criminal conduct at the original sentencing (wherein a defendant was placed on probation) was a proper basis for a departure sentence for a violation of the defendant's probation. The decision provided, "In Williams, as in this case, the court was imposing a sentence using facts in existence prior to the violation of probation." Snead, 598 So. 2d at 317.

The district court's opinion did not resolve or even address the fact that the habitual offender sentence may not have been an option the trial court could have considered originally,

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[3] Petitioner recognizes that the holding in Lambert, supra, has been limited by Williams v. State, 594 So. 2d 273 (Fla. 1992), wherein this Court ruled that multiple violations of probation may authorize a sentencing court to impose corresponding multiple cell increases in a defendant's guideline sentence. This, however, is a separate issue than imposing a habitual offender classification after a defendant has been found in violation of conditions of probation.

because the State never filed its notice, or sought an enhanced penalty until after the affidavit of violation was filed. The trial court was not imposing a sentence "using facts in existence prior to the violation of probation" because Snead could not have been classified as a habitual offender at the original sentencing hearing. The original affidavit of violation of probation was filed on October 3, 1990 (R12-13). The notice of the State's intent to seek enhanced penalties was filed July 26, 1991, approximately one year and three months after Appellant was adjudicated guilty and sentenced on the charge of possession, and ten months after Snead was charged with violating his probation (R17). An amendment to the affidavit was filed June 3, 1991 (R15-16).

Florida Statute § 775.084(3)(b) (1989), provides:

> (b) Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence to as to allow the preparation of a submission on behalf of the defendant (emphasis added).

In Inmon V. State, 383 So. 2d 1103, 1104 (Fla. 2d DCA 1980), this section was interpreted "to mean that the State shall serve notice on the defendant either before he enters a plea of guilty or nolo contendere, *or,* in the event he enters a plea of not guilty and submits to trial, prior to the imposition of sentence." The State in the instant case, however, never served Snead or his counsel with a notice of intent to seek enhanced penalties until after Snead had served one quarter of his probationary sentence.

Regardless, the district court found that the habitual offender sentence was authorized upon Snead violating his probation with the justification that this was a sentence which could have originally been imposed. Snead, 398 So. 2d at 318. This reasoning is clearly flawed, because the habitual offender sentence was not an option when Snead was first placed on probation. The State never served Snead with the notice required by Florida Statutes § 775.084(3)(b), and therefore the trial court at the original sentencing hearing would not have been authorized to impose a habitual offender sentence. Lack of any notice, written or otherwise, as required by this section is a violation of due process. Massey v. State, 589 So. 2d 336, 337 (Fla. 5th DCA 1991) (the district court found that actual notice was sufficient under the statute, noting that lack of any notice was a due process violation). Furthermore, if no advance written notice is served, a habitual offender sentence is deemed illegal. Edwards v. State, 576 So. 2d 441 (Fla. 4th DCA 1991); Nunziata v. State, 561 So. 2d 1330 (Fla. 5th DCA 1990) (failure of state to served defendant with any written notice of enhanced penalties renders the habitual offender sentence illegal; lack of harm to the defendant is not the test); Sweat v. State, 570 So. 2d 1111 (Fla. 5th DCA 1990) (failure to serve advance notice constitutes reversible error; defendant need not demonstrate harm); Grubbs v. State, 412 So. 2d 27 (Fla. 2d DCA 1982). Therefore, as opposed to the situation which arose in Williams, supra, the trial court here was not imposing a habitual offender sentence

which could have been imposed at the time Snead was placed on probation.

Moreover, Snead was not informed, or notified pursuant to the statutory requirements, of the possibility of a habitual offender sentence prior to entering into his original plea agreement with the State to enter a plea to the offense for which Snead was placed on probation. When his plea was entered, Snead's guidelines scoresheet indicated a recommended sentence of any nonstate prison sanction (R14). With a point total of 59, "any nonstate prison sanction" such as probation was the maximum sentence allowable under the rules, even if Snead was sentenced under the top of the permitted range. Fla. R. Crim. P. 3.988(g) (1989). The trial court sentenced Snead to five years probation for possession of cocaine following the guidelines recommendation, which was the longest period of time he could be placed on probation for the third degree felony offense. § 774.082((3)(d) (1989).

The written plea agreement signed by Snead, his trial counsel, and the prosecutor, provided that Snead understood that his sentence would "be imposed under the Sentencing Guidelines" (R6). Nowhere on the plea agreement is there a reference to the possibility of Snead being sentenced as a habitual offender (R5-6). Snead never bargained for an enhanced sentence when he agreed to plea nolo contendere to possession of cocaine and was placed on probation, and therefore the imposition of a seven year habitual offender sentence upon a violation of this probation is

unquestionably illegal. See McCray v. State, 578 So. 2d 875 (Fla. 2d DCA 1991) (imposition of an enhanced sentence under the habitual offender statute, if the defendant was unaware of the possibility of enhancement prior to entering the plea of nolo contendere was error; defendant entitled to new sentencing hearing or should be permitted to withdraw his plea).

The district court also failed to address Snead's argument that Williams, supra, should not have been relied upon for authorizing the sentence imposed in the instant case, because it dealt with a departure from the guidelines, and not a habitual offender classification. This argument was based on the well established rule that a habitual offender classification is not grounds for departure from the guidelines. Whitehead v. State, 498 So. 2d 863 (Fla. 1986); Mooney v. State, 516 So. 2d 333 (Fla. 1st DCA 1987).

The Fifth District Court of Appeal instead found that upon the revocation of probation "the trial court is free to impose any sentence it might have originally imposed, that should include inter alia the imposition of a habitual offender sentence. See Williams.... Accordingly, we affirm Snead's sentence but we note conflict with State v. Scott." Snead, 598 So. 2d 318. Williams, supra, sanctioned the use of a pattern of criminality for a departure sentence on a violation of probation, where the pattern was proven to exist prior to the defendant being originally placed on probation. Williams, 581 So. 2d at 146. The district court's leap in logic from the trial court's

ability to impose a departure sentence under Williams, as authority for the proposition that Williams supports the imposition of a habitual offender sentence upon a violation of probation where this enhancement was never sought before, should not be upheld. Enhancement pursuant to the provisions of the habitual offender statute, and a departure based on valid written reasons are two separate and distinct sentencing provisions. The district court's opinion in Snead, supra, cannot stand where it advocates such an overly expansive interpretation of this Court's opinion in Williams, supra.

Florida Rule of Criminal Procedure 3.701(d)(11), expresses that, "Departures form the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors which reasonably justify aggravating or mitigating the sentence." Departures from the guidelines are to be the exception, rather than the rule, and are to be used where these extraordinary or "aggravating" circumstances exist. Where a defendant has prior convictions, the sentencing court may not automatically depart from the guidelines. In the case judice, the trial judge was permitted to increase Snead's sentence from a recommended range (with the one cell bump) of twelve to thirty months incarceration to seven years incarceration with no possibility of receiving the usual gain time. This was essentially a departure sentence which exceeded the statutory maximum, with no written reasons, and with the extra penalty of allowing no gain time. The trial court should

not be permitted to circumvent the rules regarding a departure from the guidelines by imposing a habitual offender sentence upon a violation of probation.

In Ard v. State, 91 So. 2d 166 (Fla. 1956), this Court was faced with a similar fact situation, where the defendant served five years of probation pursuant to a plea agreement and was then brought into court and sentenced as a "second offender" under Florida Statutes § 775.09 (1941). As in the instant case, the prosecutor knew at the time of sentencing that the defendant had a second felony conviction.[4] This Court observed, "That a man would plead guilty when no witnesses are present to prove his guilt, and in order to obtain probation, take the risk of receiving the more severe penalty that might be inflicted upon him as a second offender [referred to in the opinion as a habitual criminal] challenges the credulity of this court . . ." Ard, 91 So. 2d at 169. The opinion went on to state:

> We do not approve agreements by which certain sentenced will be imposed on consideration of pleas of guilty, but when a man is induced to plead guilty as this appellant was and the judge passes upon him a sentence in accordance with the inducement, and the prosecutor knows of the prior conviction, and the defendant remains under probation for five years of a seven year term the so-called second conviction cannot support a sentence under Section 775.09, supra.

Id.

As in Ard, the district court's opinion in Snead, creates

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[4] Snead's original scoresheet listed two prior third degree felonies, so the prosecutor was clearly aware of Snead's prior convictions at the time he was placed on probation (R14).

precedent for a situation where a defendant may serve eighteen years of a twenty year probationary sentence, and then upon violating the probation be subject to the habitual offender statute for offenses which occurred more than eighteen years before the violation. Florida Statute Section 775.084(1)(a)(2) limits the period of time by which a prior conviction may be considered in classifying a defendant as a habitual offender from release from incarceration or probation to within five years of the instant offense. The decision in Snead would allow a defendant to be habitualized for prior convictions which existed many years prior to the violation of probation, as in the example provided above. This would not seem to be harmonious with the legislative intent behind the recidivist statutes.

Additionally, Florida Statutes § 775.0842 targets defining those persons subject to the habitual offender statute as those "under arrest for the omission, attempted commission, or conspiracy to commit any felony in this state . . . A person who is charged with violating conditions of probation does not fit into this category.

In conclusion, the decision of the district court of appeal should be reversed, as it conflicts with decisions of this Court and of other district courts. The opinion allows for an overly expansive reading of Williams, supra, which concerned a guidelines sentence, as authority for imposing a habitual offender sentence on a violation of probation. The opinion also permits the State to avoid the notice requirement of the habitual

offender statute, and renders a plea agreement in exchange for a probationary sentence invalid. The opinion in Snead further does not allow for the fact that this enhancement was never contemplated as part of the original plea agreement. If the decision was to be upheld, it would result in a clear violation of the rules set forth regulating sentencing recidivists under the habitual offender statute, and permit defendants to be "habitualized" for offenses which occurred years before a violation of probation. Petitioner Snead requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal, with directions to vacate the sentence for resentencing within the guidelines.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the appellant requests that this Honorable Court reverse the Fifth District Court of Appeal's decision with directions to vacate Petitioner's sentence and remand for resentencing within the guidelines.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SOPHIA EHRINGER
ASSISTANT PUBLIC DEFENDER
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112 Orange Ave., Ste. A
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(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: William C. Snead, No. 614376, Madison C. I., P. O. Box 692, Madison, FL 32340-0692 on this 12th day of November, 1992.

SOPHIA EHRINGER
ASSISTANT PUBLIC DEFENDER

haps [1] the husband did not use sufficient measures because reasonable measures, even excessive measures, would have been insufficient.

The father in this case did not abuse the child. We are penalizing the father by forfeiting his parental rights in the child because the father failed to use measures sufficient to control his wife's excessive actions in disciplining the child. He is, in effect, being held vicariously liable for the mother's acts of child abuse. Yet he would be criticized and punished if he used the same measures in attempting to control his wife that the wife used in attempting to control the child. What measures does the law permit the father to use that are harsh enough to make a determined wife stop abusing a child yet are mild (reasonable) enough that the law would not impose a penalty on the husband for their use on the wife? The parent with a child-abusing spouse is penalized by the law if harsh measures are used to control a strong-willed spouse and, as in this case, penalized by the law if such measures are not used.

KEY NUMBER SYSTEM

William C. SNEAD, Appellant,

v.

STATE of Florida, Appellee.

No. 91–2293.

District Court of Appeal of Florida, Fifth District.

May 22, 1992,

Defendant appealed from sentence imposed by the Circuit Court, Volusia County, Gayle S. Graziano, J., pursuant to habitual offender statute. The District Court of Appeal, W. Sharp, J., held that trial court could sentence defendant as habitual offender after he violated terms of probation, even though court did not originally sentence him as habitual offender at time defendant was placed on probation.

Affirmed.

Criminal Law ⇐982.9(7)

Trial court could sentence defendant as habitual offender after he violated terms of probation, even though court did not originally sentence him as habitual offender at time defendant was placed on probation. West's F.S.A. § 775.084.

James B. Gibson, Public Defender, and Kenneth Witts, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John W. Foster, Jr., Asst. Atty. Gen., Daytona Beach, for appellee.

W. **SHARP,** Judge.

Snead appeals from his sentence of seven years (with credit for time served), which was imposed pursuant to the habitual offender statute.[2] He argues that since the court did not originally sentence him as an habitual offender in 1990, the court could not "aggravate" his sentence by "habitualizing" him *after* he was found to have violated the terms of his probation in 1991. We disagree and acknowledge a conflict with ***Scott v. State,*** **550** So.2d 111 (Fla. 4th DCA 1989), ***rev. denied,*** 560 So.2d **235** (Fla. 1990).

In this case, Snead was charged in 1990 with possession of cocaine[2] and resisting arrest with violence.[3] He and the state

1. There is as little difference between unworkable alternatives as between rotten potatoes. There may be much difference of opinion but little difference in result between arguments that the father "could if he would but won't" and "would if he could but can't"—the result is the same: if one parent is prone to abuse a child, there is usually little the other parent can do to effectively prevent it.

1. § 775.084, Fla.Stat. (1989).

2. § 893.13(1)(f), Fla.Stat. (1989).

3. § 843.01, Fla.Stat. (1989).

entered into a plea bargain whereby he agreed to plead *nolo contendere* to the possession charge and the state ***nolle prossed*** the resisting charge. The plea bargain contemplated a guidelines sentence, but noted the judge could depart upward to a maximum of five **years** by giving valid written reasons. Nothing was said about the consequences of violating probation and the kind of sentence that might then be imposed.

The state dropped the resisting charge and Snead was adjudicated guilty of possession. Sentence was withheld, and Snead was placed on probation. Snead's scoresheet put him in the non-state prison bracket. The judge obviously did not elect to "depart)) upwards.

On June **3,** 1991, an amended affidavit of violation of probation was filed. Various conditions were alleged to have been violated and the court so found. The state then filed its notice to seek sentencing pursuant to the habitual offender statute because Snead had committed two prior Florida felonies, and one fell within five years of the 1990 possession crime.

Our sister court concluded in *Scott* that a court must sentence a defendant as an habitual offender at the first opportunity, and if it fails to **do** so, it cannot impose an habitual offender sentence after a later violation of probation. Judge Letts **rea**soned:

> The purpose of habitualization is to protect society against habitual offenders. Probation, on the other hand, may only **be** imposed **if** it appears to the court that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffers the penalty imposed by law. Indeed, in *Shead v. State,* *367* So.2d 264, 267 (Fla. **3d DCA** 1979)the court noted that the required findings under the habitual offender statute and the probation statute are 'inconsistent and mutually exclusive.' [citations omitted]

Scott at 111. The court reversed a habitual offender sentence and remanded for imposition of a guidelines sentence with the sole possibility of a one-cell increase because of the violation of probation, relying on *Lambert v. State,* **545** So.2d **838** (Fla. 1989).

However, it appears to us that *Lambert* involved only the issue of whether or not *factors relating to violation of probation* could be used as grounds for departing upwards in imposing a guidelines sentence, after the defendant violated probation and was being sentenced for the original crime, The court held that the sentence could only be increased by one guidelines bracket for those reasons. Since *Lambert,* the court has permitted multiple bracket increases to correspond with multiple probation violations.[4] But neither of these cases deal with the application of the habitual offender statute in sentencing for the original offense, after violation of probation.

In *Williams v. State,* 581 So.2d **144** (Fla. 1991), the supreme court held that after withholding imposition of sentence and placing a defendant on probation, if the defendant violates probation, the judge may in sentencing for the original violation, depart upwards *beyond* the one-cell bump-up, for reasons which would have initially supported such a departure. The court distinguished *Lambert* and ***Ree*** *v. State,* 565 So.2d 1329 (Fla.1990) because both deal with the impropriety of using the circumstance which culminated in revoking a 'defendant's probation status, to depart "upwards" in imposing ***a*** guidelines sentence. In *Williams,* as in this case, the court was imposing a sentence using facts in existence **prior** to the violation of probation.

In *Poore v. State,* 531 So.2d 161 (Fla. 1988) the supreme court held that if a defendant violates probation after being placed on probation for a criminal offense the judge may return to "square one" and "impose any sentence it originally might have imposed, with credit for time served and subject to the guidelines recommendation." **531** So.2d at 164. This is consistent

4. *See Williams v. State,* 594 So.2d 273 (Fla. 1992).

with section 948.06(1), Florida Statutes (1989) which provides:

> If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, and *impose any sentence which it might have originally imposed before placing the probationer on probation* ***or*** *the offender into community control.*

If in this case, we have really returned to "square one," where the trial court is free to impose any sentence it might have originally imposed, that should include *inter alia* the imposition of a habitual offender sentence. See *Williams*. Such a sentence is based on the defendant's prior record which preceded the offenses for which the sentence is being imposed. It does not depend upon any aggravating factors as to how the defendant violated probation. **Ac**cording] we affirm Snead's sentence but we note a conflict with *State v. Scott*.

AFFIRMED.

GRIFFIN and DIAMANTIS, JJ., concur.

Alfonzo B. LEWIS, Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION, et al., Appellees.

No. 91-1162.

District Court of Appeal of Florida, Fifth District.

May **22, 1992.**

Terminated employee appealed Unemployment Appeals Commission's denial of unemployment benefits. The District Court of Appeal, Johnson, W.C., Jr., **Associate** Judge, held that employee was not guilty of "misconduct" such as would warrant denial of unemployment compensation benefits.

Order quashed; remanded.

Griffin, J., dissented.

Social Security and Public Welfare ⇐388.5

Employee who made urgent delivery by truck for employer, because there was no one else available to make high priority delivery, was not guilty of "misconduct" such as would warrant denial of unemployment compensation benefits, even though his driver's license was suspended at time he was asked to make trip. West's F.S.A. § 443.101(1)(a).

See publication Words and Phrases for other judicial constructions and definitions.

Kurt Erlenbach of Erlenbach & Erlenbach, P.A., Titusville, for appellant.

John D. Maher, Tallahassee, for appellee, Unemployment Appeals Com'n.

No appearance for appellee, Florida Power & Light Co,

JOHNSON, W.C., Jr., Associate Judge.

Alfonzo Lewis appeals an administrative order of the Florida Unemployment Appeals Commission denying him unemployment compensation benefits. That order upheld the decision of the appeals referee and found it to be in accord with the essential requirements of the law. The appeals referee concluded that Lewis had been discharged for misconduct for purposes of the unemployment compensation law. Section 443.101(1)(a), Fla.Stat. (1989). That law provides that no benefits may be received if an employee is discharged for misconduct.

Lewis was hired in August of 1988 by Florida Power and Light Company as a power plant helper. His duties did not ordinarily include driving for the company and having a driver's license was not a requirement of his particular job classification. In October 1990, Lewis was charged