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IN THE SUPREME COURT OF FLORIDA

WILLIAM C. SNEAD,

Petitioner,

v. CASE NO. 80,067

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

RESPONDENT'S MERITS BRIEF

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STATEMENT OF THE CASE AND FACTS

The state agrees with the statement of the case and facts set out by the petitioner in his merits brief, with the following additions:

As the petitioner correctly acknowledges, the record on direct appeal included a written plea form signed by the parties, but did not include the original plea colloquy, (Petitioner's merits brief at p.2 and n.1) The written plea states at paragraph 5 that "[t]he Judge has made no promises as to what I will receive as a sentence. The prosecutor has recommended: State will nolle pross Count 11--resisting officer with violence." (R 5) The plea form states at paragraph 8 that "I understand my sentence will be imposed under the Sentencing Guidelines....The Court can exceed [the] presumptive sentence and impose up to the maximum of 5 years.'' (R 6)

The petitioner appears to concede, in footnote 1 of his merits brief, that the following statement made by the district court in the opinion issued in this case is not supported by the record:

> 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 petitioner did not assert, either at resentencing or on direct appeal, that his plea was not voluntary and intelligent. (R 50-8, Appendix A to this brief)

Mr. Snead was originally placed on probation in this case on April 23, 1990. (R 9-10) The trial court found that he violated that probation as early as June 5, 1990, by ingesting cocaine, and that he was continuously in violation of several conditions of his probation from June, 1990 through October, 1990. (R 48)

SUMMARY OF ARGUMENT

The district court's decision in this case should be affirmed. This court's previous decisions construing the sentencing guidelines rules do not preclude habitual offender sentencing after a violation of probation. The habitual offender statute takes all habitual offender sentencing outside the operation of the guidelines altogether.

The State acknowledges that the petitioner was not given written notice, prior to his original plea--which resulted in a probationary split sentence pursuant to the guidelines--that the State would seek habitual offender sentencing. The issue whether written notice must in all be cases be given before entry of a nolo contendere or guilty plea is pending in Ashley v. State, no. 79,159. If this court quashes the Fifth District's decision in Ashley, the State requests this court to remand this case so that it can show that failure to give the statutory notice before the petitioner entered his plea was harmless.

If this court approves the district court's decision in Ashley, the State submits that the petitioner has not shown that he is entitled to any relief from the resentencing order. Petitioner did not allege or show in the trial court that his original nolo contendere plea was induced by the promise of a guidelines sentence. In any event, the results of violating probation are collateral, rather than direct, consequences of entering a guilty or nolo contendere plea.

ARGUMENT

THE TRIAL COURT CORRECTLY SENTENCED THE PETITIONER AS A HABITUAL FELONY OFFENDER AFTER HE VIOLATED THE TERMS OF HIS PROBATION.

The State submits that the district court's decision and opinion in this case should be approved, since the petitioner has not shown that he is entitled to any relief from the trial court's resentencing order.

In this case, the Fifth District panel certified conflict with the Fourth District'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 316 (Fla. 5th DCA 1992). In Scott, the defendant pleaded guilty to a second-degree felony, and was specifically advised that if he violated his probation, he could be sentenced up to the fifteen-year statutory maximum. 550 So. 2d at 111. Neither the trial court nor the state referred to the habitual offender statute at Scott's original sentencing. Id. After he violated probation, Scott was sentenced as a habitual offender. On appeal, the Fourth District Court of Appeal held that it would have affirmed the sentence were it not for this court's recent decision in Lambert v. State, 545 So. 2d 838 (Fla. 1989). Scott at 112.

In this case, the original plea agreement refers to a guidelines sentence, but also states that the judge had not committed herself to any specific sentence; the record does not contain the original plea hearing or the original sentencing hearing. The defense objected at resentencing, as a matter of

law, to the defendant's being habitualized for the first time on a violation of probation ("VOP"), but did not assert or show that the original plea was involuntary.

On appeal, the Fifth District held that this court's decision in Williams v. State, 581 So. 2d 144 (Fla. 1991) established that Lambert, supra, does not preclude a habitual offender sentence after a VOP. Snead, 598 So. 2d at 317. Lambert stands for the rule that on resentencing after a VOP, the trial courts may not depart upward from the sentencing guidelines except to the extent of the one-cell "bump" permitted by Rule 3.701(d)(14), Florida Rules of Criminal Procedure.[1] In Williams, supra, 581 So. 2d 144, this court held that a departure sentence may be imposed after a VOP provided the reasons for departure predate the original grant of probation, for two reasons: first, because the "double dipping'' problem noted in Lambert does not arise when the departure reason predates the probation, and second, to avoid a deterrent effect on probation. 581 So. 2d at 146.

The State submits that the district court's decision in this case is correct, and that the petitioner's habitual offender sentence should be affirmed. For the reasons set out above, Lambert does not control. The State acknowledges that Rule 3.701(d)(14), Florida Rules of Criminal Procedure, states without qualification that

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[1] Lambert has, of course, been modified in Williams v. State, 594 So. 2d 273 (Fla. 1992), to permit more than one "bump" to correspond with more than one sequential probation violation.

> [s]entences imposed after revocation of probation or community control must be in accordance with the guidelines.

However, Section 775.084(4)(e), Florida Statutes (1988 supp.) provides, also without qualification, that sentences imposed pursuant to the habitual offender statute are not subject to the sentencing guidelines. The State submits that to the extent the statute conflicts with 3.701(d)(14), the statute controls.

The portion of 3.701(d)(14) set out above was approved as an addition to that rule by this court, without comment, in 1984. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--Sentencing Guidelines), 451 So. 2d 824 (Fla. 1984). The Legislature enacted this court's 1984 proposed change to 3.701(d)(14), also without comment, in Chapter 84-328, § 1, at 1772, Laws of Florida. The portion of Section 775.084(4)(e) described above was added to the statute by Chapter 88-131, § 6, at 709, Laws of Florida. When statutes conflict, the most recent expression of the Legislature's intent prevails. E.g., State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990); State v. Dunmann, 427 So. 2d 166, 168 (Fla. 1983).

Moreover, as this court stated in Burdick v. State, 594 So. 2d 267 (Fla. 1992), by passing the 1988 amendment to Section 775.084 "the legislature was saying that the sentencing guidelines were no longer a limitation on habitual offender sentencing, regardless of the sentence imposed." 594 So. 2d at 270. It is highly improbable that the Legislature meant, by passing the 1988 amendment, to exempt all habitual offender

sentences from the guidelines, *except* those imposed on defendants who are given a last chance on probation and who fail to comply with the conditions agreed to. See Dunmann, supra, 427 So. 2d at 168 (Legislature's apparent intentions are to guide courts in determining whether earlier statute repealed by implication).

The habitual offender statute also provides that

> 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 so as to allow the preparation of a submission on behalf of the defendant.

Section 775.084(3)(b), Florida Statutes (1991). The issue whether the statutory notice is untimely if given after the defendant enters his plea, but before sentencing, is pending in Ashley v State, no. 79,159. The State submits that the Fifth District Court's decision in Ashley v. State, 590 So. 2d 27 (Fla. 5th DCA 1991), is correct, and that the statute requires only sufficient notice for the defendant to prepare a submission to be made on his behalf at sentencing. Id. at 28.

In the event this court quashes the district court's decision in Ashley, the State requests this court to remand this case so that it can show that failure to give the statutory notice before Mr. Snead entered his plea was harmless. See Massey v. State, 17 Fla. L. Weekly 723 (Fla. December 3, 1992). The record of this case does not show whether the petitioner was on actual notice, at the time of the ariginal plea, that he could be habitualized if he violated probation.

In the event this court approves the district court's decision in Ashley, the State submits that Mr. Snead has not shown that he is entitled to any relief from the resentencing order. Mr. Snead did not assert or show, at resentencing or on appeal--although he does now assert[2]--that his original nolo contendere plea was induced by the promise of a guidelines sentence.

In any event, the results of violating probation are collateral, rather than direct, consequences of entering a guilty or nolo contendere plea. Even if the petitioner had no actual notice, at the time he entered his plea, that he could be habitualized if he violated his probation, this court's decisions establish that he would be entitled to no relief. In Seqarra v. State, 388 So. 2d 1017 (Fla. 1980), the defendant, charged with a second-degree felony, negotiated an agreement to plead guilty in exchange for a five-year cap on possible sentences. Id. at 1017. He received five years' probation, violated the probation, and received a fifteen-year prison sentence. This court quashed the district court's decision reversing the sentence, holding that

> so long as the probation imposed complies with the plea agreement, the court has fulfilled the plea bargain and the violation of probation opens a new chapter in which the court ought to be able to mete out any punishment within the limits prescribed for the crime.

Id. at 1018.

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[2] Petitioner's brief on the merits at 11.

In Bilyou v. State, 404 So. 2d 744 (Fla. 1981), the defendant had negotiated a plea agreement calling for "a cap of ten years probation as a possible sentence." Id. at 744. After he violated probation, Bilyou was sentenced to fifteen years in prison; this court approved the district court's decision affirming the prison sentence, citing the language quoted above from Segarra. 404 So, 2d at 745. The Fourth District Court of Appeal relied on that language in Bilyou and Segarra to hold in Zambuto v. State, 413 So. 2d 461 (Fla. 4th DCA 1982), that habitual offender sentencing after a VOP is a collateral consequence of entering the initial plea. 413 So. 2d at 463-4. The State submits that Zambuto is correct on this point, and that Mr. Snead's current prison term is the direct consequence of his own failure to comply with the terms of probation.

The petitioner also argues in his merits brief that a habitual offender sentence is not one of the sentences the trial court originally could have given in this case, because the State did not file notice of its intent to habitualize him until after he violated his probation. The argument rests on the fallacious premise that the trial courts cannot impose habitual offender sentences unless the State files such a notice. See Tolliver v. State, 605 So. 2d 477 (Fla. 5th DCA 1992), rev. pending, no. 80,766 (Fla. 1992).

The petitioner further relies on Ard v. State, 91 So. 2d 166 (Fla. 1956). The state submits that his reliance on that case is misplaced. This court's opinion states that Ard was successfully serving a probationary term when a newly-elected County

Solicitor filed a new information charging appellant for the same crime he was on probation for, alleging for the first time that Ard was a second offender subject to enhanced punishment. 91 So. 2d at 167, 168. This court reversed the trial court's order revoking Ard's probation and imposing a prison sentence, noting that

> [t]here is no evidence that the appellant had violated the conditions of his probation or that any effort had been made to revoke it. After having been on probation for five years he was hailed into court and sentenced to serve five years in the penitentiary because of a former conviction which was known to the county solicitor at the time he agreed to the ... probation.... The statement that the county solicitor had promised that no more would be heard of the matter, if the appellant observed the conditions of his probation, was not contradicted.

Id. at 168. This case, of course, is distinguishable on the basis that Snead did violate his probation.

Petitioner further argues that the district court's opinion should be disapproved because it would permit habitual offender sentencing of defendants whose most recent prior felony took place more than five years before the violations that caused them to be resentenced. The argument has no merit; a defendant being sentenced after a VOP is sentenced for the original offense, not the violation. Violation of probation is not a crime in Florida. Lambert, supra, 545 So. 2d at 841. In any event, Mr. Snead was incarcerated as recently as 1988 for the most recent of the prior felonies relied on by the State at

resentencing; the original offense involved in this case took place in 1989; the violations of probation took place in 1990. (R 24-8, 4, 48)

Reversing the district court's decision in this case would have a deterrent effect on granting probation. See Williams, supra, 581 So. 2d at 146. It would be consistent neither with the Legislature's apparent intentions nor with sound public policy to reverse the Fifth District's decision in this case. The State requests this court to affirm the decision and opinion of the district court.

CONCLUSION

The state requests this court to approve the decision and opinion af the district court.

If this court quashes the district court's decision in Ashley v. State, 590 So. 2d 27 (Fla. 5th DCA 1991), rev. granted no. 79,159 (Fla. 1992), and quashes the decision in this case on the basis of Ashley, the State requests this court to remand this case so that it can show that failure to give the statutory notice before the petitioner entered his plea was harmless. See Massey v. State, 17 Fla. L. Weekly 723 (Fla. December 3, 1992).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Merits Brief has been delivered by hand to Sophia Ehringer, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 20th day of January, 1993.

NANCY RYAN
Assistant Attorney General

IN THE SUPREMET COURT OF FLORIDA

WILLIAM C. SNEAD,

Petitioner,

v. CASE NO. 80,067

STATE OF FLORIDA,

Respondent.

APPENDIX

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APPENDIX A

91-2122

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AB 1-23

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF THE STATE OF FLORIDA

WILLIAM C. SNEAD,

Appellant,

vs.

STATE OF FMRIDA,

Appellee.

CASE NO 91-2293

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF THE STATE OF FLORIDA

WILLIAM C. SNEAD,
Appellant,

V.

STATE OF FLORIDA,
Appellee.

DCA CASE NO. 91-2293

STATEMENT OF THE CASE AND FACTS

Appellant, WILLIAM C. 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). On March 15, 1990, Appellant entered a plea of nolo contendere to the charge of possession, and the State nolle prossed the second count of the information (R5-6, 11). The trial court adjudicated Appellant guilty of the offense, and sentenced him to five years supervised probation (R7-8, 9-10).

On June 3, 1991, an amended affidavit of violation of probation was filed (R15-16). The affidavit alleged that Appellant violated condition five of his probation, which provides that, "You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation," when he was arrested on May 9, 1991 (R15). The affidavit also states that Appellant failed to report to his probation officer and get consent prior to changing his residence, and was in violation due to testing positive for the

presence of cocaine in his system and due to his failure to pay certain monies owed to the State (R15-16).

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 Appellant as a habitual offender on July 26, 1991 (R17). During the sentencing proceedings, the State entered into evidence certified copies of two prior Florida felony convictions (one conviction date falling within five years of the date of the instant offense) (R24-32, 52-53). Defense counsel objected to the enhancement of Appellant'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 Appellant to be a habitual offender and entered a written order pursuant to this ruling (R54, 39-40).

The trial court found Appellant guilty of a violation of probation, and a written judgment was filed adjudicating Appellant guilty of possession of cocaine (R33-34)[1]. Appellant was sentenced to seven years incarceration, with credit for time sewed (R58, 35-36). An order was entered revoking Appellant's probation on October 25, 1991 (R48). Appellant filed a timely notice of appeal (R41). This appeal follows.

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[1] The written judgment filed in case number 89-5406 indicates that Appellant was tried and found guilty of possession of a controlled substance (R33). The record, however, contains a written plea of nolo contendere to the possession charge in 89-5406, and a separate judgment in this case providing that Appellant entered a plea to the offense charged (R5-6, 9-10).

SUMMARY OF THE ARGUMENT

The trial court erred in sentencing Appellant *to* seven years incarceration as a habitual offender. On sentencing Appellant on a violation of probation, the trial court was restricted to imposing the original guidelines sentence, with an allowable one cell increase. Appellant's recommended sentence, with consideration of the one cell bump, was for a maximum of 12-30 months incarceration.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING APPELLANT AS A HABITUAL OFFENDER UPON A REVOCATION OF APPELLANT'S PROBATION.

A sentence imposed upon the revocation of probation may not exceed the one cell bump from the original guideline sentence. Bell v. State, 545 So. 2d 861 (Fla. 2.989); Franklin v. State, 545 So. 2d 851 (Fla. 1989); Lambert v. State, 545 So. 2d 838 (Fla. 1989). In the instant case, Appellant's recommended guideline sentence was for any nonstate prison sanction (R14). Fla. R. Crim. P. 3.988(g) (1990). A one cell level bump on a violation of probation sentence would provide for a maximum recommended sentence of community control or 12-30 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) (1990). The trial court, however, sentenced Appellant to seven years incarceration as a habitual offender.

This issue was squarely raised by the Fourth District Court of Appeal in Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), rev. dism. 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 opinion went on to rely on Lambert, supra, to refute the proposition upheld in its own case, Zambuto v. State, 413 So. 2d 461 (Fla. 4th DCA 1982), which was relied upon by the trial court in the instant case. Zambuto, Id. sanctioned the enhancement of a sentence through the classification of a defendant as a habitual offender on a violation of probation sentence. Zambuto stated that a habitual offender enhancement was merely a collateral consequence of a plea. The court in Scott, supra, found that the Florida Supreme Court's ruling in Lambert, supra, (that a trial judge is limited to imposing the original guidelines sentence, with the allowable one cell increase), compelled a reversal of the defendant's habitual offender sentence imposed on a sentence for a violation of probation.

The trial court misplaced its reliance on Williams v. State, 581 So. 2d 144 (Fla. 1991), in granting the State's motion to sentence Appellant as a habitual offender. Williams, Id. authorized a departure sentence upon a violation of probation, which exceeded the allowable one cell increase. The Court found that the existence of an escalating pattern of non-violent criminal conduct at the original sentencing, was a proper basis for a departure sentence for a violation of the defendant's probation. The basis for this ruling was that the departure sentence was a sentence which could have been originally imposed,

and could therefore be imposed on a violation of probation. In the case at bar, the habitual offender sentence was not an option the trial court could have considered in imposing Appellant's original sentence of probation. This is because the State never filed its notice to seek the enhanced penalty until approximately one year and three months after Appellant was originally adjudicated guilty and sentenced on the charge of possession. The State also failed to provide Appellant with the notice of the enhanced penalty prior to his entering his plea of no contest to the charged offense. Inmon v. State, 383 So. 2d 1103 (Fla. 2d DCA 1980).

Appellant would also argue that a departure sentence as contemplated by Williams, supra, is a guidelines sentence. A habitual offender sentence, such as the one imposed in this case, is not a guideline sentence. Therefore, Williams should not be considered controlling authority in this case.

CONCLUSION

BASED ON the argument contained herein, and authorities cited in support thereof, Appellant requests that this Honorable Court vacate Appellant's sentence, and remand for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to William C. Snead, Inmate No. 265292, #614376, Volusia County Branch Jail, P.O.Box 9730, Red John Dr., Daytona Beach, Florida 32120, on this 3rd day of January, 1992.

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

APPENDIX B

File

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

WILLIAM C. SNEAD,

Appellant,

v. CASE NO. 91-02293

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

The trial court was correct in sentencing appellant to seven (7) years incarceration as an habitual offender. The sentence imposed was not a departure sentence, but rather, a sentence outside the guidelines pursuant to the habitual offender statute.

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT WAS CORRECT IN SENTENCING APPELLANT AS AN HABITUAL OFFENDER UPON A REVOCATION OF APPELLANT'S PROBATION.

Appellant argues that the trial court erred by departing more than the one cell level bump on a violation of probation (B 4-6). This argument is flawed for the simple reason that the sentence imposed was not a departure sentence, but rather, a sentence outside the guidelines pursuant *to* the habitual offender statute. See, *King v. State*, 557 So.2d *899*, 903 (Fla. 5th DCA 1990); § 775.084(4)(e), Fla. Stat. (1989). In fact, appellant concedes that appellant's sentence was not a departure sentence under the guidelines (B 6).

The trial court was correct in sentencing appellant to seven (7) years incarceration as an habitual offender. "When a defendant pleads guilty pursuant to a plea bargain and the court places him on probation, if he violates his probation the court can sentence him to a term in excess of the provisions of the original bargain." *Zambuto v. State*, 413 So.2d 461, 463 (Fla. 4th DCA 1982), citing *State v. Segarra*, 388 So.2d 1017, 1018 (Fla. 1980). In other words, the court held that it was permissible to utilize the habitual offender statute to enhance defendant's sentence for violation of probation. *Id.*

Appellant cites *Scott v. State*, 550 So.2d 111 (Fla. 4th DCA 1989) *rev. dism.*, 560 So.2d 235 (1990), to support its position that *Zambuto, supra,* is not applicable to the case at bas. The Scott court relied on *Lambert v. State*, 545 So.2d 838 (Fla. 1989)

and stated that but for *Lambert*, this court would have affirmed based on *Zambuto* and *State v. Payne*, 404 So.2d 1055 (Fla. 1981) (upon revocation of probation, a defendant may be sentenced to any term which might have originally been imposed, regardless of whether the term of the second sentence exceeds that of the first, without violating double jeopardy). The Fourth District Court of Appeal erroneously relied on *Lambert*, because *Scott* involved an habitual offender sentence on a violation of probation, as in the case at bar. Conversely, *Lambert* involves a departure sentence under the guidelines. *Zambuto* espouses the correct principles of law and is controlling in the case at bar. Moreover, *Bell v. State*, 545 So.2d 861 (Fla. 1989) and *Franklin v. State*, 545 So.2d 851 (Fla. 1989) are equally distinguishable as *Lambert*, in that they also involve departure from the guidelines.

Assuming arguendo, that this court treats appellant's sentence as a departure from the guidelines, the trial court was still correct in sentencing appellant to seven (7) years incarceration. After a violation of probation, the judge, upon sentencing defendant for the original offense, may depart from the guidelines beyond the one-cell bump-up for violation of probation, and impose a departure sentence for valid reasons which existed at the time defendant was placed on probation. *Williams v. State*, 581 So.2d 144, 147 (Fla. 1991); see *also*, *Pennington v. State*, 578 So.2d 815 (Fla. 1st DCA 1991) (departure sentence was lawful, as it was based upon defendant's unscored juvenile record that existed at the time of the original sentencing proceeding, rather than acts constituting a probation violation);

Jones v. State, 571 So.2d 56 (Fla. 2d DCA 1990) (defendant's unscored capital conviction was valid reason to depart upward in *excess* of one-cell for sentence imposed on a violation of probation); § 948.06(1), Fla. Stat. (1989).

In contradistinction, the cases cited by appellant are distinguishable from the case sub-judice, The holding in *Lambert*, appears to apply only to cases in which the departure sentence is based upon acts constituting the probation violations. *Williams* at 145-146; *Pennington* at 815. Both *Bell* and *Franklin* cite and rely on *Lambert*, and accordingly, are distinguishable for the aforementioned reason.

Appellant's argument concludes that because the state failed to provide appellant with a notice of intent prior to his plea of no contest, that the habitual offender sentence was not an option the trial court could have considered in imposing appellant's original sentence of probation. This argument is flawed, The state did not file its notice of intent for the very simple reason that it did not intend to seek enhancement at the original sentence because there was a plea agreement that contemplated probation. In any event, the defendant is not entitled *to* be advised of the possible future application of the habitual offender statute. *Zumbuto, supra. See also,* Fla.R.Crim.P. 3.172(c)(i). "Hence, there was no concomitant duty to serve notice prior to entry of the plea." *Ashley v. State*, 16 FLW 02971 (Fla. 5th DCA Nov. 29, 1991). The case of *Inmon v. State*, 383 So.2d 1103 (Fla. 2d DCA 1980), *rehrg. den.*, as cited by appellant to support its position an the issue of notice is merely dicta,

and, in any event, was criticized as to its soundness or reasoning in *Elaidio v. State*, 16 FLW D1806 (Fla. 4th DCA July 10, 1991).

It is clear that the habitual offender sentence was an option when appellant was originally sentenced. The state was armed with a 1988 conviction for unlawful possession of a controlled substance and a 1988 conviction for aggravated battery (R 24-32). These convictions certainly met the requirements of the habitual offender statute. Moreover, the state's notice of intent filed on July 26, 1991, was certainly served on appellant with sufficient time prior to imposition of sentence, so as to allow for preparation of a submission on behalf of appellant (R 17). The sentencing hearing was not held until October 10, 1991 (R 50-59).

The imposition of the seven (7) year sentence was correct and should be upheld.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished by delivery to Kenneth Witts, Assistant Public Defender, and counsel for the appellant in the Public Defender's Box, located in the Fifth District Court of Appeal, this 16th day of January, 1992.

JOHN W. FOSTER, JR.
ASSISTANT ATTORNEY GENERAL