IN THE SUPREME COURT OF FLORIDA

JAMES DICK,

Petitioner,

vs. : Case No. 80,219

STATE OF FLORIDA,

Respondent.

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

AMENDED INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, James Dick, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal will be referred to by the symbol "R" fallowed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Between May 7 and May 28, 1991, the State Attorney of the Twentieth Judicial Circuit in Charlotte County filed four informations charging the Petitioner, James Dick, with burglaries and thefts occurring on April 14, 15, and 16, 1991. The specific charges were as follows:

> In trial court case number 91-241, Mr. Dick was charged with burglary of a dwelling contrary to section 810.02, Florida Statutes (1989), and grand theft, contrary to section 812.014, Florida Statutes (1989). (R54-55)
>
> In trial court case numbers 91-294, 91-240, and 91-244, Mr. Dick was charged in each with burglary of a dwelling and petit theft. (R29-30, 38-39, 67-68)

On August 19, 1991, the Petitioner entered a plea of no contest to the charges in exchange for a sentence within the recommended guidelines range and an agreement that no community control would be imposed. (R2-4, 6-7, 11, 42-44) On October 4, 1991, the Honorable Darryl C. Casanueva, Circuit Judge, sentenced the Petitioner in case number 91-241 to thirty months in prison followed by ten years on probation on the charge of burglary of a dwelling, and to a concurrent term of thirty months in prison followed by two years on probation on the charge of grand theft. The Petitioner received 171 days' credit for time served. (R16-19, 60-64)

In case numbers 91-294, 91-240, and 91-244, the court imposed concurrent terms of ten years on probation on the charges of

burglary of a dwelling' and sixty days in jail on the petit theft charges. (R19-23, 34-36, 47-51, 72-75) Mr. Dick's guideline scoresheet, to which no objection was made, recommended a sanction of twelve to thirty months in prison. (R12, 33)

Defense counsel objected to the sentences imposed in case numbers 91-294, 91-240, and 91-244 on the basis they were not consistent with the requirements of the sentencing guidelines, and precluded the receipt of credit for time served. (R23-24)

On all probationary terms the court imposed as special conditions of probation: (1) the prohibition against the Petitioner being in any place that offers for use, sale, or distribution any controlled substance as defined by Chapter 893 as it reads or is amended to read; and (2) the prohibition against the Petitioner drinking more than two beers or two ounces of alcohol a day or requiring total abstinence from alcohol if his probation officer deems it necessary. (R16, 18-21)

Defense counsel timely filed notice of appeal on October 18, 1991. (R76-78) On appeal Mr. Dick argued that the court's sentencing scheme was contrary to the intent of the guidelines and that the conditions of probation were impermissible. The Second District Court of Appeal affirmed the sentence on June 26, 1992, on

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'These sentences actually fell within the permitted and not the recommended range.

the basis of State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991) (Supreme Court Case # 79,176), which contains the following certified question:

> IF A TRIAL COURT IMPOSES A TERM OF PROBATION CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER THE REVOCATION OF PROBATION ON THE SECOND OFFENSE?

The Second District also declined to address the conditions of probation on the basis no objection was made at sentencing.

This court accepted jurisdiction of petitioner's cause by order dated November 4, 1992.

SUMMARY OF THE ARGUMENT

Appellant's sentence is contrary to the intent of the sentencing guidelines, This Court's rulings in State v. Green, 547 So. 2d 925 (Fla. 1989), Lambert v. State, 545 So. 2d 838 (Fla. 1989), and Poore v. State, 531 So. 2d 161 (Fla. 1988), support a holding that the certified question posed in Tripp v. State, 591 So. 2d 1055 (Fla. 2d DCA 1991), jurisdiction accepted, Tripp v. State, (Case No. 79,1761, should be answered in the negative and the sentencing scheme here should be prohibited.

Appellant's conditions of probation relating to frequenting areas where drugs might be used and consuming alcohol are illegal and must be stricken.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT?

The Petitioner, James Dick, challenges the imposition of probation as the only sanction imposed on burglary charges in trial court case numbers 91-294, 91-240, and 91-244, because the sanction violates the intent of the sentencing guidelines. Additionally, he challenges as illegal certain conditions of probation imposed in all four of his cases,

As to the first contention, trial counsel objected to the imposition of probation as the only sanction imposed in three cases because he believed the court was attempting to circumvent the guidelines. Specifically, counsel argued that the sanction would preclude the receipt of credit for time served if Mr. Dick should be violated on his probation in case numbers 91-294, 91-240, and 91-244. To be consistent with the intent of the guidelines, Mr. Dick should be given the thirty months in prison followed by probation on these cases in the same way he was sentenced in his other case, number 91-241. (R23-24)

As noted in State v. Tripp, 591 So. 2d 1055 (Fla. 2d DCA 1991), jurisdiction accepted, Tripp v. State, (Case No. 79,176), the sentencing method used here allows trial courts to greatly exceed the incarceration contemplated by the guidelines and Lambert v. State, 545 So.2d 838 (Fla. 1989) upon a single violation of probation. Tripp, at 1057 and n.3, citing Sylvester v. State, 572

So. 2d **947** (Fla. 5th **DCA** 1990), and **Ford** v. State, 572 So. 2d 946 (Fla. 5th DCA 1990). Although in Trim the appellate court struck as improper the award of jail credit for time served on a separate conviction, it questioned the propriety of this type of sentencing method under Lambert, State v. Green, **547 So.** 2d 925 (Fla. 1989), and Poore v. State, **531** So. 2d 161 (Fla. 1988).

To give effect to the sentencing guidelines, all sentences imposed on the same day and pending for sentencing should be considered together rather than separately using one scoresheet to cover all offenses. **Clark** v. **State,** 572 *So.* 2d 1387 (Fla. 1991); Fla. R. Crim. **P.** 3.701 **d. 1.** The recommended sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. Fla. **R.** Crim. **P.** 3.701 **d.** 8. The purpose behind the sentencing guidelines is to "establish a uniform set of standards" and to "eliminate unwarranted variation in the sentencing process." Fla. R. Crim. P. 3.701 **b.**

To permit a trial court to initially impose a sentence on one pending case which meets the maximum recommended incarcerative sentence under the guidelines and impose probation only on other pending **cases** allows a court, upon violation of probation, to impose a sentence **again** meeting the maximum incarceration under the guidelines without awarding credit for time served. Under the sentencing method employed in this case, the Petitioner could be violated on probation and be sentenced to prison with the bump-up on one **case** and without credit for time served, and be given probation again on the other cases. Subsequent revocations of

probation could result in successive prison sentences which would reach far beyond the original recommended sentence and permissible bump.

This is contrary to the integrity of the guidelines and defeats the purpose of uniformity in sentencing. As noted in Lambert, 545 So. 2d at 838, during simultaneous sentencing a single scoresheet must be used for all offenses pending before the court and the calculation results in a presumptive sentence for all offenses disposed of under the scoresheet. Multicell departures based on probation violation are contrary to the spirit and intent of the guidelines, which is to establish uniformity in sentencing. Lambert, at 842.

Poore v. State, 531 So. 2d 161, 165 (Fla. 1988), addresses the function of probation revocation under the guidelines and the policies for limitation upon revocation, Upon a revocation of probation a sentencing court may impose any sentence up to the maximum for which the defendant stands convicted, subject to credit for time served and within the recommended guidelines range. Although Poore involved one single-count information, and a true split sentence, it's principle -- cumulative incarceration imposed after violation of probation is always subject to any limitations imposed by the sentencing guidelines recommendation -- should be applied here in concert with the teachings of Larnbert.

In Fullwood v. State, 558 So. 2d 168, 169 (Fla. 5th DCA 1990), the defendant originally received ten years on probation on Count I, five years on probation on count II, and three years on

probation with a special condition that he serve 24 months in prison on count III. Fullwood later admitted to violating his probation. His recommended guidelines sentence, with the permitted one-cell increase for the violation, was two-and-one-half to three-and-one-half years in prison, The court increased probation on count 1 to 12 years, revoked probation on count II and imposed a sentence of 22 or 24 months in prison, and let stand the three year probationary term on count 111.

The Fullwood court held that the combined sentences of incarceration for counts II and 111, past and present, exceeded the guidelines range:

> Since the guidelines require a sentence as to each offense and also require that the total sentence not exceed the guidelines range, count III should have been considered in determining Fullwood's total sentence even though probation as to count III was not revoked. In other words, the offenses from one scoresheet must be treated in relation to each other.

Fullwood, at 170, citing, Fla. R. Crim P. 3.701(d)(12); Kirtsey v. State, 553 So. 2d 395 (Fla. 5th DCA 1989).[2]

In Tripp, 591 So. 2d at 1056, the Second District's reliance on State v. Perko, 588 So. 2d 980 (Fla. 1991) (credit for time served on a previous charge should not be awarded on a wholly new charge) and Daniels v. State, 491 So. 2d 545 (Fla. 1986) (jail credit cannot be pyramided for consecutive sentences on multiple charges) is misplaced. Petitioner's case involves charges that were pending for sentencing at the same time under one guidelines

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[2] Contra, Sylvester v. State, 572 So. 2d 947 (Fla. 5th DCA 1990).

presumptive sentence. The charges are based on the same set of facts which resulted in the original incarcerative portion of his sentence as recommended by the guidelines. Any revocation should reach back to the original sentence and require application of credit for time served under State v. Green, 547 So. 2d 925 (Fla. 1989).

If the sentencing scheme imposed here is sanctioned, the result is a circumvention of the sentencing guidelines, allowing for imprisonment far beyond the guidelines range if the defendant is violated on his probation. Under the policies and authorities cited, this Court is asked to answer the question certified in Tripp in the negative, hold the sentence in the instant case improper, and remand for xesentencing.

Additionally, Petitioner contends that conditions of his probation are illegal.[3] The trial court, as a special condition of probation, stated that Mr. Dick is not to be in any place that offers for use, sale, or distribution any controlled substance. It also imposed the special condition of probation that Mr. Dick is not to have more than two beers or two ounces of alcohol per day, or that he must totally abstain from alcohol if his probation officer deems it necessary. (R16, 18-21)

Rodriquez v. State, 378 So.2d 7, 9 (Fla. 2d DCA 1979), sets forth the criteria for determining whether a condition of probation

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[3] No objection was made to the conditions of probation; however, the contemporaneous objection rule is not applicable to the imposition of illegal conditions of probation. Larson v. State, 572 So. 2d 1368 (Fla. 1991).

is invalid. A condition is invalid if it, "(1) has no relationship to the crime for which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality."

In Huff v. State, 554 So. 2d 616, 617 (Fla. 2d DCA 1989), conditions prohibiting association with persons who use alcohol or frequenting places where alcohol or drugs were used bore no relationship to the crime of burglary, were not reasonably tailored to prevent future criminal conduct by the defendant, were too vague, and were invalid. In Edmunds v. State, 559 So.2d 415 (Fla. 2d DCA 1990), conditions pertaining to the consumption or possession of alcohol were also invalid. The conditions here, as in Huff and Edmunds, should be stricken as illegal or as constituting fundamental error.

Further, the condition ordering Mr. Dick not to frequent places where any controlled substance under Chapter 893 is used, sold, or distributed, is too vague. It is impossible for Mr. Dick to know who is engaged in the illegal use of drugs, or which areas are the site of drug activity, See Pratt v. State, 516 So.2d 238 (Fla. 2d DCA 1987). The condition pertaining to alcohol consumption and giving the probation officer authority to curtail the use of alcohol also violates the principle that the court cannot delegate impermissible authority to a probation officer. See Denson v. State, 493 So. 2d 60 (Fla. 1986).

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully requests that this Honorable Court reverse and remand his case for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Peggy A. Quince, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 473-4730, on this 30th day of November, 1992.

Respectfully submitted,

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