

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 15 1988
CLERK, SUPREME COURT
BY _____
Deputy Clerk

DAVID LAMBERT,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 71,890

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue, 9th Floor
West Palm Beach, FL 33401
(305) 820-2150

JEFFREY L. ANDERSON
Assistant Public Defender
Counsel for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
ARGUMENT	

POINT INVOLVED

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE.	2
CONCLUSION	8
CERTIFICATE OF SERVICE	8

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Lewis v. State</u> , 510 So.2d 1089 (Fla. 2d DCA 1987)	7
<u>Royal v. State</u> , 508 So.2d 1313 (Fla. 2d DCA 1987)	7
<u>Russ v. State</u> , 313 So.2d 758 (Fla. 1975)	6
<u>State v. Mischler</u> , 488 So.2d 523 (Fla. 1986)	5
<u>State v. Pentaude</u> , 500 So.2d 526 (Fla. 1987)	2
<u>Tuthill v. State</u> , 12 F.L.W. 2250 (Fla. 3d DCA, September 15, 1987)	6,7
<u>Williams v. State</u> , 500 So.2d 501 (Fla. 1986)	2
<u>Wilson v. State</u> , 510 So.2d 1088 (Fla. 2d DCA 1987)	7
<u>Young v. State</u> , 13 F.L.W. 325 (Fla. 5th DCA, February 4, 1987)	6
 <u>OTHER AUTHORITY</u>	
<u>Florida Rules of Criminal Procedure</u>	
Rule 3.701(d)(11)	2,7

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the court below and the defendant in the trial court. Respondent was the Appellee in the court below and the prosecution in the trial court. A copy of the district court's opinion is attached to this brief as part of the Appendix.

The following symbols will be used in this brief:

"R"	Record on Appeal
"A"	Appendix
"SR"	Supplemental Record
"SSR"	Second Supplemental Record (Transcript of Hearing on December 3, 1984).

ARGUMENT

POINT INVOLVED

THE TRIAL COURT ERRED IN DEPARTING FROM THE
GUIDELINE SENTENCE.

In its brief Respondent argues that the trial court was not departing from the guidelines because of the new substantive offenses which Petitioner allegedly committed while on community control. However, the trial court's first written reason for departure -- "That the Defendant while on community control committed new substantive offenses" -- followed by a listing of factors relating to the new substantive offenses for which Petitioner had not been convicted refutes such a claim (A2,SR18). Respondent then relies on State v. Pentaude, 500 So.2d 526 (Fla. 1987) to argue that the substantive offenses causing the violation may justify a departure sentence. However, in Pentaude the defendant was convicted of the substantive offenses causing the violation. The result in Pentaude comports with the fundamental rule that "Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction." Fla.R.Crim.P. 3.701(d)(11). In Williams v. State, 500 So.2d 501 (Fla. 1986) this Court applied the same rule to reverse a departure based on an offense for which the defendant had not been convicted:

Were we to permit the deviation from the guidelines because of a defendant's failure to appear, we would, in essence, be circumventing the legislatively established punishment of five years by eliminating the trial. With a trial, a defendant would be sentenced to only five years. Without a trial, he could be sentenced to any period within the statutory maximum (for all his pending offenses) that the

judge might (arbitrarily) choose without any hope of parole. Such a Kafkaesque situation cannot be permitted. As the Monti court correctly concludes, permitting departures for an offense for which the defendant has not been convicted is clearly prohibited by Florida Rule of Criminal Procedure 3.701(d)(11).

500 So.2d at 503 (emphasis added) (footnotes omitted).

Florida Rule of Criminal Procedure 3.701(d)(11) clearly prohibits a departure based upon factors relating to the new substantive offenses allegedly committed by Petitioner.

Respondent also notes that whether "Petitioner was to be subsequently acquitted of those charges is of no moment, and the sentence herein would not have to be modified" (RB11). Petitioner agrees with this statement to the extent that if factors relating to the new substantive offenses are declared to be valid reasons for departure, despite Rule 3.701(d)(11), the increase in the sentence¹ would not have to be modified should Petitioner be acquitted later at trial. In other words, as in Williams, supra, another Kafkaesque situation would occur -- Petitioner would be punished by more than 12 years in prison for conduct for which he was later acquitted. Fortunately, Rule 3.701(d)(11) was designed to prevent such situations by prohibiting departures for substantive offenses where there is no conviction.

In analyzing the present issue, it is important to determine exactly what conduct the defendant is being punished for after he violates his probation. The defendant is being punished for the offense he was placed on probation for -- i.e. the offense he was

¹ From 12 to 30 months in prison to 15 years in prison.

adjudicated guilty of.² The defendant is not supposed to be punished for the new substantive offenses which he has yet to stand trial for. However, in this case Petitioner is, in essence, being sentenced to 2½ years for the offense at conviction and 12½ years for the new substantive offenses for which he has yet to stand trial for. This departure is, at best, an improper form of double dipping. If the departure is upheld, Petitioner will have been punished twice for the same criminal conduct if he should later be convicted of the new substantive offenses. First, he is punished by an extra 12½ years in prison in this case specifically because of the conduct. Second, if there is a conviction, he will be punished for that conduct at a later trial. Of course, extra punishment will result when points are scored because the conduct occurred while he was on legal constraint -- the community control. Thus, if later found guilty, Petitioner will have been punished twice for committing the new substantive offenses while on community control. Petitioner should only be punished once for these substantive offenses, after his trial on the substantive offenses. Again,

² The facts involved in this offense are completely different than those which are later alleged. The "victim," Milton Moore, a very violent person, "came to have it out" with Petitioner and kept walking toward Petitioner (SSR3). Petitioner told him to stop and backed away to avoid Moore (SSR3, 10). Moore kept coming and Petitioner then shot him in the leg (SSR3,10). Moore admitted that he was going to use a firearm to shoot Petitioner and was incarcerated in state prison for possessing the same firearm (SSR2). The prosecutor represented that Moore was a man of violence who indicated that he would kill Petitioner if he did not go to jail (SSR13). When Moore's girlfriend began to beat Petitioner, Petitioner offered a conditional threat toward her (SSR10).

the purpose of Rule 3.701(d)(11) is to prohibit departure for the new substantive offenses where there is no conviction. An even more unjust event occurs when the departure results even though the defendant is later acquitted of the substantive offenses.

Respondent also notes that the much lower standard of proof exists at a revocation hearing and concludes that factors relating to the substantive offenses will justify a guideline departure "where the conscience of the court was satisfied that these acts occurred" (RB12). Such an argument not only ignores Rule 3.701(d)(11) and the requirement that facts upon which a guideline departure is based must be proven beyond a reasonable doubt per State v. Mischler, 488 So.2d 523 (Fla. 1986), but also violates the very reason for the creation of the guidelines -- uniformity of sentencing. The purpose of the guidelines is to avoid the disparity in sentencing which may result from decisions based upon the "conscience of the court."

Another point regarding the significance of the lower burden of proof required at a revocation hearing should also be made, the defendant may forego fully defending himself against the new substantive charges where he will later have to defend himself against the substantive charges.³ This is precisely what happened in this case (R86-87). As a result of Petitioner waiting until his trial to present his defense, even though there was

³ Where Petitioner had obviously violated his community control by being absent from his residence without permission, he would logically wait until his trial on the substantive offenses to fully present his defense to those charges.

conflicting testimony,⁴ the trial court's conscience was satisfied that Petitioner's conduct had violated the terms of his probation:

THE COURT: I heard no denials of any of this. The defendant did not wish to state anything in his own behalf and testify. There was conflict in the testimony but I have nothing to oppose the tenor of all of it being true.

(R99).

The conflicting testimony, which had a "tenor" of being true, and which Petitioner chose not to testify about because of upcoming criminal charges, simply does not justify a quintupling of Petitioner's sentence.⁵

Respondent also quotes from the Fifth District Court of Appeals decision in Young v. State, 13 F.L.W. 325 (Fla. 5th DCA, February 4, 1987) which adopts the dissenting opinion in Tuthill v. State, 12 F.L.W. 2250 (Fla. 3d DCA, September 15, 1987). The dissent in Tuthill essentially says that probation is a matter of judicial grace and that the finding of a violation is determinative of the sentence. The dissent is incorrect in the latter assertion. The purpose of a revocation hearing is to determine

⁴ As noted by the trial court, many of the facts in evidence were in conflict. For instance, there was evidence that Ms. Gordon never saw Petitioner with a knife (R25,40-41). Other testimony, even if not in conflict, will certainly be challenged by Petitioner at his trial on the substantive offenses.

⁵ In addition it should be noted that due process rights are much more limited at a revocation hearing than at a trial on the substantive offenses. Russ v. State, 313 So.2d 758 (Fla. 1975). Thus, Petitioner should logically present his defense at the later trial on the substantive offense.

whether the probationer is suitable, or unsuitable, for continued probation. Once it is then determined that he is unsuitable for probation, the question is how he should be sentenced for the original offense. The revocation is not determinative of the sentence as the dissent in Tuthill suggests, rather, the sentence imposed after revocation "must be in accordance with the guidelines." Fla.R.Crim.P. 3.701(d)(11). In accordance with the guidelines, reasons for deviating from the guidelines shall not include factors relating to an offense without conviction. Fla.R.Crim.P. 3.701(d)(11); Tuthill v. State, 12 F.L.W. 2250 (Fla. 3d DCA, September 15, 1987); Lewis v. State, 510 So.2d 1089 (Fla. 2d DCA 1987); Wilson v. State, 510 So.2d 1088 (Fla. 2d DCA 1987); Royal v. State, 508 So.2d 1313 (Fla. 2d DCA 1987). While the judicial grace of probation may be eliminated by a finding of a violation by the conscience of the court, to increase the sentence beyond the recommended guideline range the reason for departure must be clear and convincing, supported by reasons proven beyond a reasonable doubt, and consistent with Rule 3.701(d)(11).⁶ The certified question should be answered in the negative, Petitioner's sentence must be reversed, and this cause remanded for resentencing within the recommended guideline range. Petitioner relies on his brief on the merits for further argument on this point.

⁶ With the exception of the one cell departure without reasons for departure for community control which became effective October 1, 1986.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner would request this Honorable court to reverse the decision of the district court with directions that Petitioner be sentenced within the recommended guideline range.

Respectfully submitted,

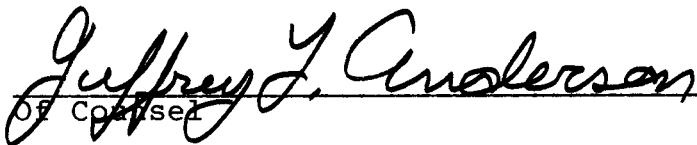
RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(305) 820-2150



JEFFREY L. ANDERSON
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 13th day of April, 1988.



Of Counsel