

IN THE SUPREME COURT OF FLORIDA

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AARON HAMILTON,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

SUPREME COURT CASE NO.: 73,398

PETITIONER'S REPLY BRIEF ON MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

✓ DANIEL J. SCHAFER
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ATTORNEY FOR PETITIONER

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ARGUMENT
POINT I

THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINE RECOMMENDED RANGE WHERE THE REASONS FOR DEPARTURE RELATED TO AN OFFENSE FOR WHICH PETITIONER HAD BEEN ARRESTED BUT NOT CONVICTED.

As to this point, Petitioner relies on the argument made in his initial brief on the merits.

POINT II

IN REPLY TO RESPONDENT'S ARGUMENT THAT
GUIDELINE DEPARTURE COULD PROPERLY BE BASED
ON THE FACT THAT PETITIONER'S VIOLATION
OCCURRED NINE MONTHS AFTER HE WAS PLACED ON
COMMUNITY CONTROL.

It is worth noting that the reason for guideline departure discussed in this point was stated by the trial judge in a mere ten words: "violation occurred nine months after being sentenced to community control." (R 162)

In its brief on the merits the state points out that, "the timing of a defendant's multiple probation violations have been held to be a valid departure reason." While this is arguably a correct statement of the law, the three cases Respondent cites for the proposition show why this reasoning does not apply to Petitioner's case. In Bush v. State, 519 So.2d 1014 (Fla. 1st DCA 1987), the defendant was found guilty of burglary and sentenced to four years probation. While on probation he committed another burglary and grand theft. He was sentenced to 14 months incarceration followed by one year community control. He violated probation again by committing another burglary, and dealing in stolen property. While being held in jail on these charges, he escaped. In the instant case, though Petitioner violated more than one condition of his community control, his case is nowhere near as egregious as that of Bush. Petitioner was placed on community control once and had his community control revoked once.

The state next cites Rodrigue v. State, 481 So.2d 24 (Fla. 5th DCA 1985). This case is more directly on point because it does in fact involve the reason for departure given in Petitioner's case; the timing of a violation of probation. However, Mr. Rodrigue's violation occurred within six hours of the time he was placed on probation, while Petitioner's violation was nine months after supervision began.

The third case cited by the state, State v. Pentaude, 500 So.2d 526 (Fla. 1987) has absolutely nothing to do with the "timing" issue.

Cases involving the temporal proximity of crimes are analogous. In one such case, State v. Jones, 530 So.2d 53 (Fla. 1988), this Court wrote as follows:

Before the temporal proximity of the crimes can be considered as a valid reason for departure, it must be shown that the crimes committed demonstrate a defendant's involvement in a continuing and persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision.


Petitioner's record shows no continuing and persistent pattern. The timing of his community control violations are evidence of absolutely nothing. As stated in Petitioner's initial brief on the merits, the fact that community control violations occurred nine months after the beginning of an eighteen month term of supervision cannot be shown to be different from the normal violation case in any significant way. "Timing of the offense" cannot be a valid reason for departure in this case.

CONCLUSION

Based on the arguments and authorities cited in Petitioner's initial brief and herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this case and order the case remanded for resentencing within the recommended guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, FL 32014, in his Basket, at the Fifth District Court of Appeal, and a copy mailed to: Aaron Hamilton, 1150 S.W. Allapattah, Indiantown, FL 33456, this 3rd day of May, 1989.



DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER