

IN THE SUPREME COURT OF FLORIDA

DENNIS WILLIAMS, et al., :
Petitioner, :
vs. :
STATE OF FLORIDA, :
Respondent. :
_____ :

Case No. 75,919

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
ISSUE I	
HAS THE SUPREME COURT IN <u>Ree v. State</u> , 14 F.L.W. 565 (Fla. Nov. 16, 1989), AND <u>Lambert v. State</u> , 545 So.2d 838 (Fla. 1989), RECEDED FROM THE HOLDING IN <u>Adams v. State</u> , 490 So.2d 53 (Fla. 1986), IN WHICH IT FOUND THAT WHERE A DEFENDANT, PREVIOUSLY PLACED ON PROBATION, HAS REPEATEDLY VIOLATED THE TERMS OF HIS PROBATION AFTER HAVING HAD HIS PROBATION RESTORED, THAT A TRIAL COURT MAY USE THE MULTIPLE VIOLATIONS OF PROBATION AS A VALID REASON TO SUPPORT A DEPARTURE SENTENCE BEYOND THE ONE CELL BUMP FOR VIOLATION OF PROBATION UNDER Section 3.701 (D) (14), Florida Statutes (1984)?	5
CONCLUSION	9
APPENDIX	
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>Adams v. State,</u> 490 So.2d 53 (Fla. 1986)	3, 5-7
<u>Franklin v. State,</u> 545 So.2d 851 (Fla. 1989)	3
<u>Irizarry v. State,</u> 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990)	5
<u>Lambert v. State,</u> 545 So.2d 838 (Fla. 1989)	3, 5-8
<u>Maddox v. State,</u> 553 So.2d 1380 (Fla. 1989)	5
<u>Pentaude v. State,</u> 500 So.2d 526 (Fla. 1987)	6
<u>Ree v. State,</u> 14 F.L.W. 565 (Fla. Nov. 16, 1989)	5, 6
<u>Williams v. State,</u> 15 F.L.W. D912 (Fla. 2d DCA April 4, 1990)	5, 8
 <u>OTHER AUTHORITIES</u>	
Fla. R. Crim. P. 3.701(D) (14)	6, 7
Fla. R. Crim. P. 3.710(D) (14)	3
§ 3.701 (D) (14), Fla. Stat. (1984)	5

PRELIMINARY STATEMENT

Petitioners were the Appellants in the Second District Court of Appeal and the defendants in the trial court. Respondent, the State of Florida, was the Appellee in the Second District CACRT of Appeal. The records on appeal, which were utilized on the District Court level, will be referred to by the Symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Each of the Petitioners were charged in informations filed by the State with at least one felony. Each again was convicted of a felony and placed on probation or community control.¹ The Petitioners were all found to have violated the conditions of probation or community control but reinstated to periods of probation or community control. Subsequently, the Petitioners were again found to be in violation of their probation and/or community control. At the revocation hearings, the respective trial court judges departed from the sentencing guidelines asserting the multiple violations of probation or community control as the basis for the departure sentences.²

On appeal the only issue of merit argued by the Petitioners was the invalidity of the departure sentence beyond the one-

¹ Todd Blemke - 87-2952 (R16); Jimmie Boyd - 87-0278 (R6); Charles D. Bronson - 87-2951 (R5); Joseph Brown - 88-0685 (R5-9); Jacob Campbell - 88-0362 (R7); David Christy - 87-1299 (R6); Jimmy Flournoy - 87-1802 (R2-5); Alexander McKennie - 87-0826 (R4-5); James Edward Mathis - 89-1040 (R85); Willard Mitchell - 87-2395 (R4); Dorothy Murphy - 87-3144 (R3-5); Robert Seiber - 89-1102 (R2-3); Joseph Stanback - 88-0587 (R2, 5); Terrell Thomas - 87-3448 (R9-11); John Waldon - 88-2696 (R5-8, 52-53) and Dennis Williams - 87-1981 (R9-13).

²Todd Blemke - 87-2952 (R53, 54, 56); Jimmie Boyd - 87-0278 (R21, 31-33, 17); Charles D. Bronson - 87-2951 (R25); Joseph Brown - 88-0685 (R21, 24, 30, 43); Jacob Campbell - 88-0362 (R4, 16-21, 27-28); David Christy - 87-1299 (R5, 57, 62, 65-70); Jimmy Flournoy - 87-1802 (R15, 41); Alexander McKennie - 87-0826 (R33, 37, 43); James Edward Mathis - 89-1040 (R105, 116); Willard Mitchell - 87-2395 (R18, 43, 51-53); Dorothy Murphy - 87-3144 (R16, 50-57); Robert Seiber - 89-1102 (R8, 30-33); Joseph Stanback - 88-0587 (R24, 26-28, 29); Terrell Thomas - 87-3448 (R3, 51, 59-61); John Waldon - 88-2696 (R39, 42-45) and Dennis Williams - 87-1981 (R31-34, 60).

cell enhancement allowed under Florida Rule of Criminal Procedure 3.710(D)(14) for a violation of probation or community control. The Second District Court of Appeal affirmed the sentences imposed by the trial courts on the grounds that the recent Florida Supreme Court cases of Franklin v. State, 545 So.2d 851 (Fla. 1989) and Lambert v. State, 545 So.2d 838 (Fla. 1989), did not affect the trial court's right to impose a departure sentence in cases of multiple violations of probations or community control. In reaching these decisions the Second District Court of Appeals relied on the case of Adams v. State, 490 So.2d 53 (Fla. 1986) which approved departure sentences based upon multiple violations of probation.

The court then certified the question of whether multiple violations of probation or community control was still a valid reason for the imposition of a departure sentence as one of great public importance.

SUMMARY OF THE ARGUMENT

The imposition of a departure sentence based upon prior violations of probation or community control by a defendant violates the spirit and intent of the sentencing guidelines. In such cases, a trial court should be precluded from imposing a sentence greater than the one-cell enhancement allowed under the sentencing guidelines.

ARGUMENT

ISSUE I

HAS THE SUPREME COURT IN Ree v. State, 14 F.L.W. 565 (Fla. Nov. 16, 1989), AND Lambert v. State, 545 So.2d 838 (Fla. 1989), RECEDED FROM THE HOLDING IN Adams v. State, 490 So.2d 53 (Fla. 1986), IN WHICH IT FOUND THAT WHERE A DEFENDANT, PREVIOUSLY PLACED ON PROBATION, HAS REPEATEDLY VIOLATED THE TERMS OF HIS PROBATION AFTER HAVING HAD HIS PROBATION RESTORED, THAT A TRIAL COURT MAY USE THE MULTIPLE VIOLATIONS OF PROBATION AS A VALID REASON TO SUPPORT A DEPARTURE SENTENCE BEYOND THE ONE CELL BUMP FOR VIOLATION OF PROBATION UNDER Section 3.701 (D)(14), Florida Statutes (1984)?

In the case of Williams v. State, 15 F.L.W. D912 (Fla. 2d DCA April 4, 1990), and the remaining consolidated appeals before this court the Second District Court of Appeal stated that multiple violations of probation were a valid reason for imposing a departure sentence in a violation of probation case. Although, in light of Ree and Lambert, supra, the court certified the above-stated question as one of great public importance, it should also be noted that at least two other District Court of Appeals conflict directly with the Second District Court of Appeal on this issue. Maddox v. State, 553 So.2d 1380 (Fla. 1989); Irizarry v. State, 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990). Both the Fifth and the Third District Courts of Appeals have held that under such circumstances as those presently before the Court, multiple violations of probation were no longer a valid reason for a

sentencing departure. The Second District Court of Appeal felt that the holding of Adams v. State, 490 So.2d 53 (Fla. 1986), which upheld departure sentences based upon repeated violations of probation, had not been invalidated by the recent Florida Supreme Court cases of Lambert and Ree, supra, whereas, the Fifth and Third District Courts of Appeal reasoned that the recent Florida Supreme Court cases did in effect overrule the decision in Adams, supra.

This Court in Lambert v. State, 545 So.2d 8383 (Fla. 1989), discussed the policy reasons for the holding that factors related to a violation of probation or community control could not provide the basis for a departure sentence. This court also receded from the decision in Pentaude v. State, 500 So.2d 526 (Fla. 1987), to the degree it conflicted with Lambert, supra. The policy reasons espoused in Lambert, supra, requiring the recession from Pentaude, supra, are equally applicable to the holding of Adams v. State, 490 So.2d 53 (Fla. 1986). As noted in Lambert, a "...violation of probation is not itself an independent offense punishable by law in Florida... . If departure based upon probation violation were to be approved, the courts unilaterally would be designating probation violation as something other than what the legislature intended." Id. at 841.

When a trial court judge imposes a departure sentence based upon repeated violations of probation or community control, he is in essence unilaterally creating a new substantive offense and affixing the penalty he deems appropriate for its violation. The purpose of Florida Rule of Criminal Procedure 3.701(D)(14),

limiting the departure upon a violation of probation or community control to a one-cell increase, is to establish uniformity in sentencing a defendant upon a violation of probation. At the time a defendant is initially placed on probation or community control, the trial court judge, as well as the defendant, is aware of the possible incarcerative sentence which may be imposed upon a violation of probation. If the defendant violates the probation or community control, the trial court judge determines whether to reinstate the defendant or to impose the applicable prison sentence. The defendant has previously failed to in some way, conform to the requirements of his probationary status, thus a judge's decision to reinstate him must, in all honesty, be made with the knowledge that the defendant may again violate his probation. A defendant should not face a sentence in excess of the applicable guidelines and potentially as great as the statutory maximum for the offense of conviction, because of the trial judge's ultimate decision. In other words, trial court judges should not be allowed to circumvent the basic policy of Florida Rule of Criminal Procedure 3.701(D)(14), limiting the sentences imposed in a violation of probation case to a one-cell increase, by stating that a defendant has repeatedly violated his probation and then impose a departure sentence. Thus, Adams, must have been overruled by Lambert. Otherwise, the effect of such a sentence in reality creates a new substantive offense where a defendant repeatedly violates his probation or community control, allowing for multicell sentencing departures based upon the violation of probation which

is "contrary to the spirit and intent of the guidelines." Lambert,
supra, at 842.

The decision of the Second District Court of Appeal in Williams, and the consolidate cases is erroneous as they fail to correctly apply the logic and legal reasoning employed in Lambert. Multiple violations of probation or community control should not be considered as a valid basis for departure and thus the decisions of the Second District Court of Appeal must be reversed.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Second District Court of Appeals decisions in the Petitioners cases should be reversed and the cases remanded for resentencing within the guidelines.

APPENDIX

PAGE NO.

Opinions rendered April 4, 11, 18, 1990:

Todd Blemke - 87-2952	A1
Jimmie Boyd - 87-0278	A2
Charles D. Bronson - 87-2951	A3
Joseph Brown - 88-0685	A4
Jacob Campbell - 88-0362	A5
David Christy - 87-1299	A6
Jimmy Flournoy - 87-1802	A7
Alexander McKennie - 87-0826	A8
James Edward Mathis - 89-1040	A9
Willard Mitchell - 87-2395	A10
Dorothy Murphy - 87-3144	A11
Robert Seiber - 89-1102	A12
Joseph Stanback - 88-0587	A13
Terrell Thomas - 87-3448	A14
John Waldon - 88-2696	A15
Dennis Williams - 87-1981	A16