

IN THE SUPREME COURT OF FLORIDA

CARLOS A. PIMENTEL, :
Petitioner, :
vs. :
STATE OF FLORIDA, :
Respondent. :
----- :

Case No. 1

FILED
MAY 21 1990
CLERK OF THE SUPREME COURT
TALLAHASSEE, FLORIDA
BR

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
ISSUE I	
THIS COURT HAS JURISDICTION BECAUSE THE SECOND DISTRICT RELIED ON A CASE WHICH IS CURRENTLY PENDING REVIEW IN THIS COURT.	3
CONCLUSION	4
APPENDIX	
DECISION OF THE SECOND DISTRICT COURT OF APPEALS OF FLORIDA IN <u>PIMENTEL V.</u> <u>STATE</u> , CASE NO. 89-00748 (FLA. 2D DCA MAY 11, 1990).	A1-A3
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

CASES

PAGE NO.

Jollie v. State,
405 So.2d 418 (Fla. 1981)

3

Williams v. State,
15 F.L.W. D912 (Fla. 2d DCA April 4, 1990)

1-3

STATEMENT OF THE CASE AND FACTS

The trial court departed from the guidelines recommendation of 2 1/2 to 3 1/2 years in prison and imposed a combined sentence of thirty years in prison. The four reasons for departure were (1) unamenability to probation, (2) timing of violation, (3) second violation, and (4) nature of violation (attacking a police officer). On May 11, 1990, the second district court of appeal affirmed this departure sentence on the authority of Williams v. State, 15 F.L.W. D912 (Fla. 2d DCA April 4, 1990). Petitioner now seeks further review in the Supreme Court of Florida.

SUMMARY OF THE ARGUMENT

If this court accepts jurisdiction in Williams, then it should also accept jurisdiction in the present case.

PD

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CARLOS A. PIMENTEL a/k/a JOSE)
QUINONES a/k/a NEIVER CASTRO)
GUZMAN,)
)
Appellant,)
)
v.)
)
STATE OF FLORIDA,)
)
Appellee.)

CASE NO. 89-00748

Opinion filed May 11, 1990.

Appeal from the Circuit Court
for Hillsborough County;
Harry Lee Coe, III, Judge.

James Marion Moorman, Public
Defender, and Stephen Krosschell,
Assistant Public Defender, Bartow,
for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Anne
Y. Swing, Assistant Attorney
General, Tampa, for Appellee.

SCHOONOVER, Judge.

Received By
MAY 11 1990
Appellate Division
Public Defenders Office

The appellant, Carlos A. Pimentel, a/k/a Jose Quinones,
a/k/a Neiver Castro Guzman, challenges the final judgments and
sentences imposed upon him after he was found guilty of violating
the terms and conditions of his probation in two different cases.
We affirm in part and reverse in part.

The appellant, while serving two different terms of probation, under two different names, was charged with violating his probation in both cases. He pled not guilty to the charges, and one hearing was held in connection with both cases.

In circuit court case number 86-12147, the appellant under the name of Jose Alberto Quinones was charged with and found guilty of violating the terms and conditions of his probation when he committed two new crimes under the name of Neiver Castro Guzman. The trial court revoked his probation and sentenced him to serve a departure sentence of fifteen years imprisonment for the underlying crime of robbery. We find no merit in the appellant's contention that the trial court's reasons for departure were invalid. We, accordingly, affirm the judgment and sentence entered in that case. See Williams v. State, No. 87-01981 (Fla. 2d DCA April 4, 1990).

In circuit court case number 87-6875, the appellant under the name of Carlos A. Pimentel was charged with violating the terms and conditions of his probation by failing to report to his probation officer. At the probation revocation hearing, the state presented no evidence concerning this violation. The trial court, however, found him guilty of violating the terms and conditions of his probation. The court then revoked his probation and sentenced him to serve a departure sentence of fifteen years imprisonment for the underlying offense of possession of cocaine with intent to sell or deliver. The court ordered this sentence to be served consecutively to the sentence imposed in case number 86-12147.

A person's probation cannot be revoked for conduct not charged by affidavit and warrant. See § 948.06(1), Fla. Stat. (1987); Harris v. State, 495 So.2d 243 (Fla. 2d DCA 1986). In case number 87-6875, the state charged the appellant with violating his probation by failing to report to his probation officer and at the probation revocation hearing failed to present any evidence that he was guilty of that charge. Although sufficient evidence was presented to establish that the appellant was guilty of other offenses, we have held that probation cannot be revoked for one reason when the affidavit and warrant state another. Mack v. State, 342 So.2d 562 (Fla. 2d DCA 1977). The trial court, therefore, erred by revoking the appellant's probation in case number 87-6875.

We, accordingly, reverse and remand with instructions to reinstate the appellant's probation in case number 87-6875. The state, however, is not precluded from taking any further appropriate action it deems advisable in connection with the appellant's probation on this charge.

Affirmed in part, reversed in part, and remanded with instructions.

RYDER, A.C.J., and PARKER, J., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 16 day of May, 1990.

Respectfully submitted,



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