

FILED

SID J. WHITE

AUG 29 1991

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MARCO MCPHERSON, :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 _____ :

Case No. 78,284

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

✓ ROBERT D. ROSEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0826065

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
ISSUE	
WHETHER THE DECISION IN <u>MCPHERSON V. STATE</u> , 16 F.L.W. D1769 (Fla. 2d DCA July 5, 1991), CONFLICTS WITH OTHER DISTRICT COURTS OF APPEAL AND THE FLORIDA SUPREME COURT ON THE ISSUE OF ALLOWING GUIDELINE DEPARTURES ON VIOLATION OF PROBATION CASES?	5
CONCLUSION	8
APPENDIX	
1. Decision of the Second District Court of Appeal in <u>McPherson v. State</u> , 16 F.L.W. D1769 (Fla. 2d DCA July 5, 1991).	A1
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>Adams v. State,</u> 490 So.2d 53 (Fla. 1986)	5
<u>Irizarry v. State,</u> 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990)	6
<u>Lambert v. State,</u> 545 So.2d 838 (Fla. 1989)	5, 6
<u>Maddox v. State,</u> 553 So.2d 1380 (Fla. 5th DCA 1989)	6
<u>McPherson v. State,</u> 16 F.L.W. D1769 (Fla. 2d DCA July 5, 1991)	3, 9
<u>Ree v. State,</u> 14 F.L.W. 565 (Fla. Nov. 16, 1989)	5, 6
<u>Williams, et al., v. State,</u> Case No. 75,919.	
<u>Williams v. State,</u> 559 So.2d 680 (Fla. 2d DCA 1990)	6
 <u>OTHER AUTHORITIES</u>	
§ 3.701(D)(14), Fla. Stat. (1984)	6
§ 784.07, Fla. Stat. (1987)	1
§ 806.13(1)(b)2, Fla. Stat. (1987)	1
§ 810.09(a), Fla. Stat. (1987)	1
§ 831.01, Fla. Stat. (1989)	1
§ 831.02, Fla. Stat. (1989)	1
§ 843.01, Fla. Stat. (1987)	1

STATEMENT OF THE CASE AND FACTS

On November 23, 1987, the Petitioner, MARCO ANTONIO MCPHERSON, pled no contest to the following crimes: (1) resisting an officer with violence contrary to section 843.01, Florida Statutes (1987); (2) battery on a law enforcement officer contrary to section 784.07, Florida Statutes (1987); (3) battery on a law enforcement officer contrary to section 784.07, Florida Statutes (1987); (4) trespass on property other than structure or conveyance contrary to section 810.09(a), Florida Statutes (1987); (5) criminal mischief contrary to section 806.13(1)(b)2, Florida Statutes (1987) (case no. 87-11278) (R8-10, 13). The recommended guideline sentence was any non-state prison sanction (R14). The trial court sentenced the Petitioner to two years probation on the first three counts and six months probation on the other two (R14-16). On November 9, 1988, the Petitioner was found to have violated his probation (R40). The trial court revoked his probation and sentenced him to 30 months in prison followed by two and a half years probation on count one, and 30 months in prison for both counts two and three, all sentences to run concurrent (R33-36). The Petitioner had already completed his sentences for counts four and five (R31).

On February 26, 1990, the Petitioner pled guilty to the following crimes: (1) uttering a forged instrument contrary to section 831.02, Florida Statutes (1989); (2) forgery contrary to section 831.01, Florida Statutes (1989) (case no. 90-1594) (R72-73). The Appellant was sentenced to two years community control on

both counts, each sentence concurrent (R74). The Petitioner's probation in case no. 87-11278 was revoked, and the Petitioner was sentenced to two years community control on each count, all sentences concurrent with each other and with case no. 90-1594 (R56-59).

On May 31, 1990, the Petitioner admitted violating his community control (R101-102). The trial court revoked the Petitioner's community control in all cases and sentenced him as follows: (1) in case no. 87-11278, five years in prison for all three counts, all sentences concurrent; (2) in case no. 90-1594, five years in prison for both counts, each sentence concurrent but consecutive to case no. 87-11278 (R63-66, 78-80, 115-117). The recommended guideline sentence was community control or 12-30 months incarceration (R82). The trial court listed on the scoresheet its reason for departure as the Petitioner's multiple violations of probation and community control (R82). The Petitioner filed timely notice of appeal (R91).

The Second District Court of Appeal affirmed the judgment and sentence of the trial court but certified to this court as a question of great public importance whether a second violation of probation constitutes a valid basis for a departure sentence beyond the one-cell departure provided in the sentencing guidelines. McPherson v. State, 16 F.L.W. D1769 (Fla. 2d DCA July 5, 1991). The Petitioner filed a notice to invoke discretionary jurisdiction on July 12, 1991. On July 22, 1991, this court handed down an

order postponing its decision on jurisdiction and ordering the
Petitioner to file a merit brief.

SUMMARY OF THE ARGUMENT

By allowing the trial court to depart from a guideline sentence on a violation of probation, the Second District Court of Appeal is conflicting with this Court and other district courts of appeal. This Court and other district courts of appeal have held that the guideline sentence with a one-cell bump up is all that is allowed once a defendant has been violated.

ARGUMENT

ISSUE

WHETHER THE DECISION IN MCPHERSON V. STATE, 16 F.L.W. D1769 (Fla. 2d DCA July 5, 1991), CONFLICTS WITH OTHER DISTRICT COURTS OF APPEAL AND THE FLORIDA SUPREME COURT ON THE ISSUE OF ALLOWING GUIDELINE DEPARTURES ON VIOLATION OF PROBATION CASES?

From the facts of this case it is readily apparent that the Second District Court of Appeal is allowing trial courts to depart from guideline sentences -- if written reasons are given -- on violation of probation and community control cases. It is doing so under the justification that several violations are a reason for a departure. This Court has held, however, that multiple violations of probation and/or community control cannot be used as a reason to depart from the guidelines. In addition, this Court has held that trial courts cannot depart from the guidelines in a probation or community control violation case. In several cases the Second District Court of Appeal certified this practice to this Court with the following question:

Has the Supreme Court in Ree v. State,¹ 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

¹ The new citation for Ree based on a motion for rehearing is 565 So.2d 1329 (Fla. 1990).

departure sentence beyond the one cell bump for violation of probation under § 3.701(D)-(14), Fla. Stat. (1984)?

This question was certified in 16 cases and is presently pending before this Court in Williams, et al., v. State, Case No. 75,919.

The Second District Court of Appeal cited to Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), which allows a trial court to depart from the guidelines upon remand for resentencing upon repeated violations of probation. This policy has been rejected by this Court in Ree, supra, and Lambert, supra. It has also been rejected by two other district courts of appeal in Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989), and Irizarry v. State, 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990). The Fifth and Third District Courts of Appeal held that multiple violations of probation were no longer valid reasons for a guidelines departure. This Court's holding on the subject as set forth in Ree and Lambert is that "any departure sentence for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines." Lambert, 545 So.2d at 842; Ree, 565 So2d at 1331.

The policy argument in favor of upholding multiple violations of probation as a reason to depart is presumably that probationers who are given a second chance warrant more punishment than those who have had only one chance. This argument is unsound, because the amount of mercy shown initially does not logically correlate with the amount of punishment imposed later when the mercy is withdrawn. Twice as much mercy does not logically justify

twice as much punishment. The guidelines already provide for a one-cell increase in the recommended sentence for a violation of probation. If a court concludes that a first violation is not so egregious that it warrants incarceration, then it is inconsistent to say that this same non-egregious violation could warrant increasing the sentence to the statutory maximum when the court determines the amount of punishment to impose on a second violation. Such a rule would entice judges to offer probation to defendants twice and thereby gives them the rope to hang themselves.

CONCLUSION

Mr. McPherson asks for resentencing within the guidelines.

APPENDIX

PAGE NO.

1. Decision of the Second District Court
of Appeal in McPherson v. State, 16 F.L.W. D1769
(Fla. 2d DCA July 5, 1991). A1

from the Circuit Court for Hillsborough County; M. William Graybill, Judge. Elizabeth S. Wheeler of Berg & Wheeler, P.A., Brandon, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anne Y. Swing, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the appellant's convictions but reverse the appellant's habitual offender sentences and remand for resentencing. In order to be sentenced as a habitual offender under section 775.084, Florida Statutes (1988), a defendant must have successive felony convictions. The appellant's two prior convictions were rendered on the same date, and so they should have been treated as a single offense. Walker v. State, 567 So. 2d 546 (Fla. 2d DCA 1990).

Reversed and remanded for resentencing. (SCHEB, A.C.J., and RYDER and PATTERSON, JJ., Concur.)

* * *

Criminal law—Sentencing—Habitual offender classification improper where predicate felony convictions were rendered on same date

STANLEY LEWIS GASKINS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01726. Opinion filed July 5, 1991. Appeal from the Circuit Court for Polk County; J. Tim Strickland, Judge. James Marion Moorman, Public Defender, and Jennifer Y. Fogle, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Davis G. Anderson, Jr., Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the appellant's convictions but reverse the appellant's habitual offender sentence on circuit court case number 89-5239 and remand for resentencing on that case. We affirm the sentences in the appellant's remaining cases.

In order to be sentenced as a habitual offender under section 775.084, Florida Statutes (1988), a defendant must have successive felony convictions. The appellant's two prior convictions were rendered on the same date, and so they should have been treated as a single offense. Walker v. State, 567 So. 2d 546 (Fla. 2d DCA 1990).

Reversed and remanded for resentencing on case number 89-5239. (SCHEB, A.C.J., and RYDER and PATTERSON, JJ., Concur.)

* * *

Criminal law—Sentencing—Habitual offender classification improper where predicate felony convictions were rendered on same date

CORNELIUS MARION, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01160. Opinion filed July 5, 1991. Appeal from the Circuit Court for Hillsborough County; M. William Graybill, Judge. James Marion Moorman, Public Defender, and Deborah A. Goins, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the appellant's convictions. We also affirm the issue wherein the appellant attacks the constitutionality of section 775.084, Florida Statutes (1988 Supp.). See Arnold v. State, 566 So. 2d 37 (Fla. 2d DCA 1990). However, we reverse the appellant's habitual offender sentences and remand for resentencing. In order to be sentenced as a habitual offender under section 775.084, Florida Statutes (1988), a defendant must have successive felony convictions. The appellant's two prior convictions were rendered on the same date, and so they should have been treated as a single offense. Walker v. State, 567 So. 2d 546 (Fla. 2d DCA 1990).

Reversed and remanded for resentencing. (SCHEB, A.C.J., and RYDER and PATTERSON, JJ., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Question certified whether supreme court has receded from decision in which it found that trial court may use multiple violations of probation as a valid reason to depart beyond the one-cell bump for violation of probation where defendant, previously placed on probation, has repeatedly violated the terms of his probation after having had

his probation restored

MARCO MCPHERSON, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01832. Opinion filed July 5, 1991. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee; Consuelo Maingot and Michael J. Neimand, Assistant Attorneys General, Miami, for Appellee.

(PER CURIAM.) We affirm the convictions and guideline departure sentence in this case pursuant to Williams v. State, 559 So. 2d 680 (Fla. 2d DCA 1990). As in Williams we certify to the Florida Supreme Court the following question of great public importance:

HAS THE SUPREME COURT IN REE v. STATE, 565 So. 2d 1329 (FLA. 1990), 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 RULE 3.701(d)(14), FLORIDA RULES OF CRIMINAL PROCEDURE?

(SCHEB, A.C.J., and RYDER and PATTERSON, JJ., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Question certified whether supreme court has receded from decision in which it found that trial court may use multiple violations of probation as a valid reason to depart beyond the one-cell bump for violation of probation where defendant, previously placed on probation, has repeatedly violated the terms of his probation after having had his probation restored

HUEY THRIFT, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01971. Opinion filed July 5, 1991. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, and Andrea Norgard, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michele Taylor, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the convictions and guideline departure sentence in this case pursuant to Williams v. State, 559 So. 2d 680 (Fla. 2d DCA 1990). As in Williams we certify to the Florida Supreme Court the following question of great public importance:

HAS THE SUPREME COURT IN REE v. STATE, 565 So. 2d 1329 (FLA. 1990), 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 RULE 3.701(d)(14), FLORIDA RULES OF CRIMINAL PROCEDURE?

(SCHEB, A.C.J., and RYDER and PATTERSON, JJ., Concur.)

* * *

Criminal law—Post conviction relief—Newly discovered evidence—No abuse of discretion in trial court's rejection of witness' allegations that robbery victim had told him that victim had fabricated his testimony against defendant in exchange for lenient treatment from state on charges then pending against victim

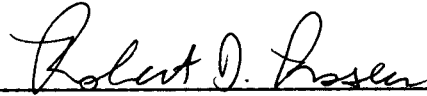
FREDDIE WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd

A I

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of August, 1991.

Respectfully submitted,



JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

ROBERT D. ROSEN
Assistant Public Defender
Florida Bar Number 0826065
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

RDR/mlm