FILED
SID J. WHITE
AUG 13 1991
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

HUEY THRIFT, :

Petitioner, :

vs. : Case No. 78,319

STATE OF FLORIDA, :

Respondent. :

_______________________________:

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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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court 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

On August 15, 1988 the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida filed an Information charging Petitioner, Huey Thrift, with two counts of Grand Theft, contrary to section 812.014(2)(c), Florida Statutes (1988). On September 6, 1988, Mr. Thrift pled guilty and was placed on 2 years probation. (R10-16) The sentence was within the guidelines range of any non-state prison sanction. (R13-14)

On December 28, 1988 an affidavit was filed alleging Mr. Thrift violated his probation. (R17) On June 8, 1989, probation was modified to 3 years each count concurrent. (R21)

On September 13, 1989, Mr. Thrift was again charged by Affidavit with violating probation. (R22-23) On June 6, 1990, Mr. Thrift admitted to being in violation of probation. (R49) The court then stated it was going to exceed the guidelines and directed the State to prepare on order. (R54)

On June 8, 1990, defense counsel presented case law to the court and argued the sentence could not exceed the guidelines. (R58) The court again directed the State to prepare an order exceeding the guidelines 1 cell bump due to multiple violations. (R59-60)

On June 25, 1990, Mr. Thrift was sentenced to 5 years on each count, to run consecutive. (R30-35, 66) The recommended one-cell bump was 12 to 30 months. (R36) The written order stated the reason for the sentence was due to "varied and multiple violations." (R28)

On June 26, 1990, a timely Notice of Appeal was filed. (R39)

On July 25, 1991, the Second District Court of Appeal affirmed Petitioner's conviction and certified the following question to this Court:

> 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?

Petitioner, on July 23, 1991, sought discretionary review by this Court. On July 26, 1991, this Court accepted review and issued a briefing schedule.

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, 559 So.2d 680 (Fla. 2d DCA 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 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 violates his probation and then impose a departure sentence. Thus, <u>Adams</u>, must have been overruled by <u>Lambert</u>. 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." <u>Lambert</u>, <u>supra</u>, at 842.

The decision of the Second District Court of Appeal in Williams 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.

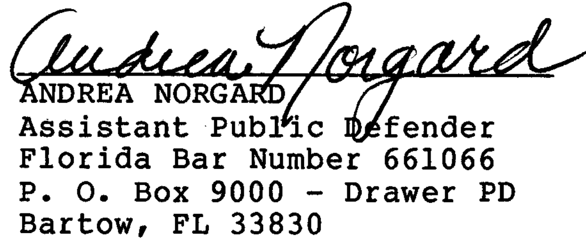
CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Second District Court of Appeals decision in the Petitioner's case should be reversed and the case remanded for resentencing within the guidelines.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michele Taylor, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 8th day of August, 1991.

Respectfully submitted,



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