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IN THE SUPREME COURT OF FLORIDA

RUSSELL AMBLER MAGUIRE,

Petitioner,

vs. CASE NO. 78,849

STATE OF FLORIDA,

Respondent.

______________________________/

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

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MICHELE TAYLOR
Assistant Attorney General
Florida Bar No. 0616648
Westwood Center, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

The existence of two or more violations of probation or community control remains a valid reason for departure beyond the one-cell bump provided in the guidelines when sentencing a defendant after violation of probation.

ARGUMENT

DOES A SECOND VIOLATION OF PROBATION CONSTITUTE A VALID BASIS FOR A DEPARTURE SENTENCE BEYOND THE ONE-CELL DEPARTURE PROVIDED IN THE SENTENCING GUIDELINES?

As a preliminary matter, Respondent notes that the above question has been certified in three earlier Second District cases, two of which are pending in this Court: Lucious Williams v. State, Case No. 76,016 (consolidated with Dennis Williams); James Williams v. State, Case No. 77,220 (briefs on the merits have been filed); Moten v. State, 579 So. 2d 916 (Fla. 2d DCA 1991).[1]

Respondent submits that the threshhold question in this case and similar cases is whether, in spite of Lambert v. State, 545 So.2d 838 (Fla. 1989), multiple violations of probation or community control still remains a valid reason to depart from the sentencing quidelines beyond the one-cell bump allowed by Florida Rule of Criminal Procedure 3.701(d)(14).[2] This Court should answer that question in the affirmative.

Multiple violations of supervision is a valid reason for an upward sentencing departure pursuant to this Court's opinion in

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[1] A similar issue, whether this Court by its holding in Lambert has receded from its holding in Adams, was certified in at least two Second District opinions presently pending before this Court: Dennis Williams v. State, Case No. 75,919 (oral argument heard on March 7, 1991), and Huey Thrift v. State, Case No. 78,319 (briefs on the merits have been filed).

[2] Although the trial court and the parties in this case agreed that Maguire's violation of probation committed on April 25, 1990 was only his second violation, the record reveals that he was also found to be in violation of probation on December 12, 1989, when he was arrested for driving while his license was suspended or revoked. As a result, Maguire's probation was modified to include two additional conditions. (R 283).

Adams v. State, 490 So.2d 53 (Fla. 1986). Adams has not been affected by this Court's recent holding in Lambert for the following reasons. Lambert held that factors relating to violation of probation or community control cannot be used as grounds for departure. In so holding, Lambert addressed two issues:

> (1) When a new offense has been committed which constitutes a probation violation, must there be a conviction for this new offense before it can be used as a reason for departure on sentencing for the original offense? YES Lambert at 841.
>
> (2) Even where there is a conviction for the new offense which constitutes a probation violation on the original offense, is it appropriate to use this conviction to depart in sentencing the defendant for the original offense? NO. Lambert at 841.

When the reason for departure after violation of supervision is not based on the commission of a new substantive offense or the nature of this new substantive offense, then the concerns of Lambert, necessity of conviction and double-dipping, are not implicated. Multiple violations of supervision, as approved in Adams, is such a reason.[3]

However, Lambert was subsequently interpreted by this Court in Franklin v. State, 545 So.2d 851 (Fla. 1989), to proscribe any departure sentence upon a defendant being sentenced after

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[3] Timing of violations, pursuant to this Court's opinions in Jones v. State, 530 So.2d 53 (Fla. 1988), Tillman v. State, 525 So.2d 862 (Fla. 1988), and Williams v. State, 504 So.2d 392 (Fla. 1987), is another reason to which the same analysis applies and which should remain unaffected by Lambert.

violation of supervision other than the one-cell upward bump provided in Rule 3.701(d)(14). Since Franklin, Lambert has come to stand for a per se one cell bump rule in sentencing after violation of supervision. As pointed out by Judge Harris in his specially concurring opinion in Johnson v. State, 557 So.2d 203 (Fla. 5th DCA 1990), though Franklin, relying on Lambert, makes it clear that a departure from the guidelines should never be permitted in a violation case, Lambert is not so clear. Judge Harris continues:

> In Lambert the certified question and the Court's discussion involved whether the trial court could depart from the guideline range in a community control sentence when the violation constituted a substantive crime for which the defendant had not been convicted. The court held that it would be improper to depart on the basis of criminal conduct where no conviction had occurred because of the provisions of Rule 3.701(d)11, Florida Rules of Criminal Procedure. The court also held that it would be improper to depart on the basis of criminal conduct even after conviction because of the problems of the single scoresheet and the addition of status points under legal restraint. Following the analysis, the Court stated:
>
> > Accordingly, we hold that factors related to violations of probation or community control cannot be used as grounds for departure. To the extent that this conflicts with our earlier decision in Pentaude, we recede from our decision there. Lambert, 545 So.2d at 842.
>
> I urge that the logical interpretation of Lambert is that it recedes from Pentaude only to the extent that the trial judge may not depart in a violation case based upon new criminal conduct whether or not there has been a conviction. There is no indication that the Lambert court ever considered the propriety of authorizing departure for noncriminal conduct violation when such

> authority is necessary to encourage compliance with probation or community control.
>
> In our case the number of violations (twelve alleged), the timing of the violations (seven months after release from prison) and other factors material or relevant to defendant's character (violation of the provision not to carry a firearm while on probation for an offense involving a firearm, and refusing to participate in drug counseling) would seem appropriate for departure under Pentaude.

Johnson at 204. See also Judge Sharp's dissent in Niehenke v. State, 561 So.2d 1218 (Fla. 5th DCA 1990):

> Despite the language in Franklin and Lambert, (citations omitted), which appears to flatly prohibit a trial judge from using a defendant's violation of probation as a reason to impose a departure sentence (beyond the allowed one cell bump-up), I think the facts of this case are distinguishable. In Lambert, the defendants had violated their probations (respectively) by committing new criminal substantive offenses, and the trial judges imposed departure sentences because the probation violation was substantive and egregious, although the defendant had not then been convicted of the new criminal conduct.
>
> Here we have the problem of the multiple probation violator for whom there is no longer any consequence or remedy for further probation violations. Niehenke had already served all of the time permitted under the sentencing guidelines (including the one-cell bump-up). His multiple probation violations were based on "technical" reasons: failure to file reports, to pay costs of supervision, and failure to pay a fine. No later substantive criminal offense are involved here, and thus no possibility of double dipping.
>
> As the trial judge put it at the sentencing hearing:
>
>> [And] that if the Court of Appeal wants to tell me that I can't do this [impose a departure sentence

> beyond the one cell increase], then I will ask the probation department not to bother with coming back with violations of probation for people who have served a maximum they can serve under the guidelines, because we have been told that we can't do anything to them then. They're free spirits at that point, and can do whatever they please. Complete immunity. Because that would be the effect of the ruling otherwise.
>
> Although violation of probation is not an independent offense punishable at law in Florida surely neither the Florida Supreme Court nor the legislature, by adopting the guidelines, intended to abolish it as a practical matter. Yet if multiple probation violators are confined to the one-cell bump-up, that is precisely what has happened. The trial courts will have lost any power to enforce conditions of probation. This is an area drastically in need of clarification.

Niehenke at 1219.

Upon rehearing, Niehenke certified the following question to this Court:

> WHETHER, IN LIGHT OF FRANKLIN V. STATE, 545 SO.2d 851, (FLA. 1989), AND LAMBERT V. STATE, 545 SO.2d 838 (FLA. 1989), A TRIAL COURT IS LIMITED TO THE ONE-CELL BUMP IN SENTENCING A MULTIPLE PROBATION VIOLATOR WHO HAS ALREADY SERVED ALL OF THE TIME PERMITTED UNDER THE SENTENCING GUIDELINES, INCLUDING THE ONE-CELL BUMP?

Also see Ricketson v. State, 558 So.2d 119 (Fla. 5th DCA 1990), where the court felt compelled to reverse Defendant's sentences based on this Court's holdings in Ree v. State, on rehearing 565 So.2d 1329 (Fla. 1989), and Lambert. The court expressed its frustration as follows:

> However, Ricketson had the good fortune to have committed substantive violations of probation and community control BEFORE his terms were successfully served. Thus, trial

> courts cannot use any factor relating to violation of probation or community control in imposing a departure sentence. (cites omitted)
>
> This case could well serve to illustrate the need for the legislature to change the guideline rules on departure sentences based on violations of probation. Until then, we are bound by stare decisis.

Ricketson at 120.

In yet another Williams case dealing with this issue, Randy Williams v. State, 566 So.2d 299 (Fla. 1st DCA 1990), the First District limited its reading of Lambert to "applying only to cases where the factors on which the departure sentence is based relate to the acts or episode constituting the violation of probation or community control." The First District found that the broad language of Ree goes beyond Lambert, which Ree purports to rely on, and then certified the following question to this Court:

> AFTER A TRIAL JUDGE WITHHOLDS IMPOSITION OF SENTENCE AND PLACES A DEFENDANT ON PROBATION, AND THE DEFENDANT SUBSEQUENTLY VIOLATES THAT PROBATION, MAY THE JUDGE, UPON SENTENCING THE DEFENDANT FOR THE ORIGINAL OFFENSE, DEPART FROM THE PRESUMPTIVE GUIDELINES RANGE AND THE ONE-CELL INCREASE FOR VIOLATION OF PROBATION, AND IMPOSE AN APPROPRIATE SENTENCE WITHIN THE STATUTORY LIMIT BASED ON A REASON THAT WOULD HAVE SUPPORTED DEPARTURE HAD THE JUDGE INITIALLY SENTENCED THE DEFENDANT RATHER THAN PLACING HIM ON PROBATION?

This Court answered the above question in the affirmative and approved the decision of the First District in an opinion rendered May 30, 1991. Williams v. State, 581 So.2d 144 (Fla. 1991).

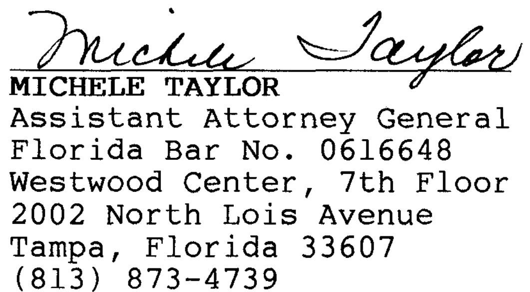
CONCLUSION

In summation, these cases demonstrate the courts' frustrations in broadly applying Lambert as announced in Franklin and Ree to all violation of probation cases so as to limit the court's sentencing multiple probation violators to the one-cell bump provided in the guidelines. Pursuant to this Court's opinion in Adams, multiple violations of supervision should continue to be a valid reason for departure of greater than the one cell bump provided for in the Rules of Criminal Procedure. The concerns addressed in Lambert, necessity of conviction and double-dipping, are not implicated when a court departs based on a defendant's multiple prior violations of supervision or when the instant violation is technical and not substantive. The scoresheet does not allow the inclusion of the number or timing of violations of probation or community control. If Lambert is construed to apply a per se rule of one cell bump, the trial court's discretion in imposing an appropriate sentence will be unduly restricted. The rule announced in Franklin and Ree is nowhere to be found in Lambert upon which it relies.

WHEREFORE, based on the above reasons and authorities, the State asks this Honorable Court to affirm the decision of the Second District Court of Appeal and answer the certified question in the affirmative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



MICHELE TAYLOR
Assistant Attorney General
Florida Bar No. 0616648
Westwood Center, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Aubrey O. Dicus, Jr., Esquire, Battaglia, Ross, Hastings and Dicus, Post Office Box 41100, St. Petersburg, Florida 33743, on this 11th day of December, 1991.

OF COUNSEL FOR RESPONDENT