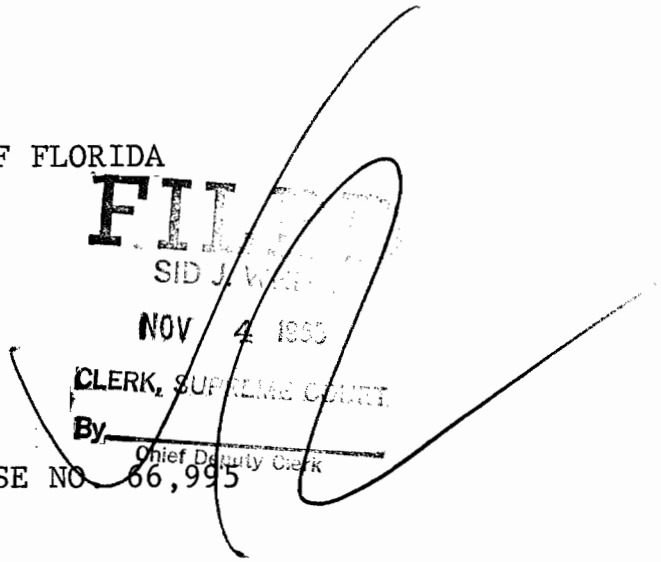
IN THE SUPREME COURT OF FLORIDA



TYRONE HOWARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,995

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

The symbol "R" denotes the record on appeal.

The symbol "PB" denotes Petitioner's brief on the merits.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and his Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial court, with the following additions and clarifications:

Mr. Marvin, the probation officer, testified that he told Petitioner, during his initial interview on Friday, that he would be required to either work or get a medical certification indicating his unfitness to work (R. 6). Mr. Marvin did receive records from the County Jail indicating that Petitioner had been treated for a back injury, however he did not receive anything indicating that Petitioner was disabled (R. 8).

The duties Mr. Marvin requested Petitioner perform included washing dishes, sweeping floors, and making his bed (R. 6, 8). Petitioner refused to go to the clinic on Friday afternoon, Monday, and Tuesday, even though he claimed that his back was hurting him "real bad" (R. 10). Petitioner admitted that he never even tried to do any work (R. 10-17).

The trial court found Petitioner had violated his probation by violating the terms and conditions of his obligations at the restitution center (R. 17).

The Fourth District Court of Appeal affirmed the trial court's decision by stating that:

> After reviewing the briefs and the record on appeal in this case, we find the appellant failed to demonstrate that his probation violation was not willful and substantive. (Emphasis added).

ISSUE INVOLVED ON APPEAL

WHETHER THE DISTRICT COURT OF APPEAL SHIFTED THE BURDEN OF PROOF TO PETITIONER OR SIMPLY COMMENTED ON THE EVIDENCE FOUND IN THE INSTANT RECORD?

SUMMARY OF THE ISSUE

The Fourth District Court's statement that "Appellant failed to demonstrate that his probation violation was not willful and substantive," was based on the facts and the briefs submitted. This statement was not one shifting the burden of proof from the State to the defendant, and sub judice the record supports the finding that the State met its burden of proof.

ARGUMENT

THE DISTRICT COURT OF APPEAL DID NOT SHIFT THE BURDEN OF PROOF TO PETITIONER BUT SIMPLY COMMENTED ON THE EVIDENCE FOUND IN THE INSTANT RECORD.

Respondent agrees with Petitioner insofar as the cases he cites enunciate the principle that the State must demonstrate a substantial, willful violation of probation occurred to justify revocation. E.g., Hilton v. State, 469 So.2d 932 (Fla. 3rd DCA 1985), Shaw v. State, 391 So.2d 754 (Fla. 5th DCA 1980); Hudson v. State, 425 So.2d 1166 (Fla. 2nd DCA 1983); Page v. State, 363 So.2d 621 (Fla. 1st DCA 1978).

Respondent does however take issue with Petitioner's contention that the "unrebutted evidence was that appellant had a bad back which kept him from performing the house duties . . . (PB 5, 6). While there was evidence that Petitioner had previously suffered a back problem, no evidence was submitted that showed Petitioner's back was in such poor condition that he could not wash dishes, sweep floors, or make his bed.

A reading of the instant record reveals testimony by probation officer, Jon Marvin, to the effect that Petitioner refused to participate in the restitution center's work program, complaining of a bad back (R. 5). However, when given an opportunity to receive medical attention, Petitioner failed to take a short walk to the county clinic. Petitioner refused to go to the clinic on Friday afternoon, Monday, and Tuesday,

even though he claimed that his back was hurting him "real bad" (R. 10). Petitioner was told by Mr. Marvin, in his initial interview, that he would be required to work unless he obtained a medical certification indicating that he was not fit for work (R. 5). Still Petitioner made no attempt, over a four day period, to see a doctor.

In Ordonez v. State, 408 So.2d 760, 762 (Fla. 4th DCA 1982), an appellant failed to comply with the reasonable requirements of an institution at which his attendance was required. The appellant had refused to enroll in a required class, and the district court determined his conduct was both a willful and substantial violation of a special condition of probation. It was further noted by the district court that the appellant's refusal was an exercise of his own free will, therefore intentional, and whether or not he intended his actions would precipitate a termination of his relationship with the school, the test of violative conduct was met. In the instant case, Petitioner admitted that he never even tried to do any work (R. 10-17).

In Brill v. State, 159 Fla. 682, 32 So.2d 607 (1947), this Court stated that the purpose of a violation of probation hearing is:

> . . . to satisfy the conscience of the court as to whether the conditions of the suspended sentence have been violated. A secondary purpose is to give the person accused of violating the suspended sentence a chance to explain away the accusation against him . . . (Emphasis added).

Respondent submits the above language was adopted by the Fourth District Court in the opinion at bar, based on the facts in this case. The instant opinion when viewed in light of the briefs submitted to the district court and the applicable facts, does not shift the burden of proof. The evidence adduced here was more than sufficient to satisfy the conscience of the court that conditions of probation had been violated. Furthermore, Petitioner had the opportunity to explain his unwillingness to see a doctor, but his explanation (R. 6) clearly was unsatisfactory to his probation officer and to the court. It is settled law in Florida that the trial judge has broad discretionary power to revoke probation. Bernhardt v. State, 288 So.2d 490, 495 (Fla. 1974). As the Second District Court of Appeal said in McNeely v. State, 186 So.2d 520 (Fla. 2nd DCA 1966):

> . . . Probation isn't a right, its a rare privilege . . .

The State's burden in a violation of probation hearing, is to satisfy the court, from the greater weight of evidence, that a substantial violation has occurred. Singletary v. State, 290 So.2d 116 (Fla. 4th DCA 1974); Wheeler v. State, 344 So.2d 630 (Fla. 2nd DCA 1977). It is obvious from the record that Respondent has done this as the record reveals Petitioner was terminated from the restitution center because of his unwillingness to either work, or seek medical attention (R. 6, 10).

In Chappell v. State, 429 So.2d 84, 85 (Fla. 5th DCA 1983), the district court reasoned:

> . . . Probation is a matter of legislative and judicial grace, and the burdens of compliance are slight compared to the alternative of imprisonment.

Unfortunately for Petitioner, his actions indicated an unwillingness to shoulder even the slight burdens imposed upon him and that is why the trial court's opinion was affirmed. Since the facts at bar show that Respondent met his burden of proof of demonstrating that a willful and substantial violation occurred, Respondent submits the Fourth District's ruling should be affirmed, subject only to such clarification as this Court deems necessary.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Honorable Court to affirm the Judgment of the Fourth District Court of Appeal.

Respectfully submitted

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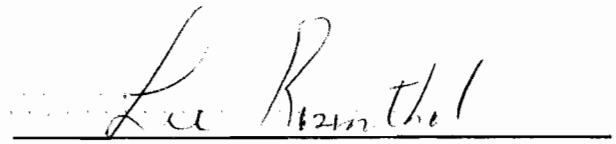

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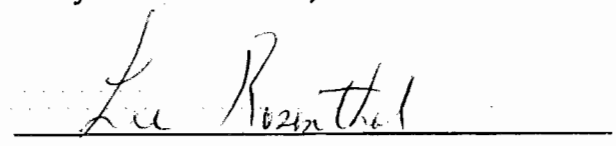
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief on the Merits has been furnished by courier to: GARY CALDWELL, Assistant Public Defender, 15th Judicial Circuit of Florida, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 this 31st day of October, 1985.



Of Counsel