

IN THE SUPREME COURT OF FLORIDA

TYRONE HOWARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FLORIDA SUPREME COURT
Chief Deputy Clerk
CASE NO. 66,995

INITIAL BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, FL. 33401
(305) 837-2150

GARY CALDWELL
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	
THE DISTRICT COURT OF APPEAL ERRED BY SHIFTING THE BURDEN TO THE DE- FENDANT TO PROVE THAT THE VIOLATION WAS NOT WILLFUL. PETITIONER'S PRO- BATION SHOULD BE REINSTATED	5
CONCLUSION	7
CERTIFICATE OF SERVICE	7

AUTHORITIES CITED

	<u>PAGE</u>
<u>CASES CITED</u>	
<u>Hilton v. State, 469 So.2d 932</u> (Fla. 3rd DCA 1985)	5
<u>Hudson v. State, 425 So.2d 116</u> (Fla. 2nd DCA 1983)	5
<u>Page v. State, 363 So.2d 621</u> (Fla. 1st DCA 1978)	5
<u>Shaw v. State, 391 So.2d 754</u> (Fla. 5th DCA 1980)	5

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.

STATEMENT OF THE CASE AND FACTS

On July 20, 1984 the trial court placed petitioner on five years probation for strong arm robbery and six months concurrent probation for simple assault. A special condition of four months at the Restitution Center was also imposed. R30. The Department of Corrections subsequently filed an affidavit charging that petitioner had violated his probation by failing "to perform house duties as scheduled by staff." R31. After a hearing, the trial judge found petitioner in violation of his probation, revoked his probation, and sentenced him to two years imprisonment as a youthful offender to be followed by two years of community control. R33-34.

The trial court's finding was based on the testimony of Mr. John Marvin, a probation officer at the Restitution Center. R4. Marvin testified that petitioner told him, in his initial interview on a Friday, that his back was injured and that he couldn't work. R5. Marvin told him to see a doctor by Monday night. On Monday evening petitioner, a seventeen year old youth, told Marvin that he had not seen a doctor because he was waiting for his mother to take him. R6. Marvin testified that he told petitioner that a health center was within easy walking distance, but did not tell petitioner specifically where the center was. R5-7. On that Monday evening, petitioner "seemed to agree" that he would go to the health center the next day. R6. The next day, petitioner did not go to the center and Marvin then filed the affidavit of violation. R6. Marvin further testified that, except for failing to get medical certification, petitioner was not a disciplinary problem at the Restitution Center. R8. Marvin

testified that he was aware of petitioner's back injury based on "certain records" he had received when petitioner was transferred from the county jail. R8.

Petitioner testified that he was in pain on the days in question, and that the pain extended all over his back. R9. Petitioner testified that this back injury had persisted from his earlier stay at the county jail where the jail doctor told him he should have a back brace. R11. Petitioner testified that despite the doctor's statement, he never received a back brace at the jail. R11.

Based on the above evidence, the trial judge found that petitioner had violated his probation "by not following the rules and regulations." R17.

Petitioner appealed to the district court of appeal, which affirmed the trial court's action and wrote: "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." Order of April 3, 1985. Petitioner then invoked the discretionary jurisdiction of this Court and this cause follows.

SUMMARY OF ARGUMENT

The District Court of Appeal erred by shifting to the defendant the burden to prove that the violation of probation was not willful. Petitioner's probation should be reinstated.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED BY SHIFTING
TO THE DEFENDANT THE BURDEN TO PROVE THAT THE
VIOLATION OF PROBATION WAS NOT WILLFUL.
PETITIONER'S PROBATION SHOULD BE REINSTATED

With the exception of the lower court decision at bar, the uniform rule in Florida is that the state has the burden of proving that the defendant willfully violated his probation. See Hilton v. State, 469 So.2d 932 (Fla. 3rd DCA 1985), Shaw v. State, 391 So.2c 754 (Fla. 5th DCA 1980), Hudson v. State, 425 So.2d 1166 (Fla. 2nd DCA 1983), and Page v. State, 363 So.2d 621 (Fla. 1st DCA 1978). The logic in favor of placing the burden on the state is obvious: since the prosecution is seeking to have the probationer imprisoned, it should have the burden of showing by imprisonment is proper.

In light of the foregoing, the district court of appeal erred by shifting the burden to the defense to show that the violation was willful. Since the un rebutted evidence was that

appellant had a bad back which kept him from performing the house duties,¹ the revocation and sentence should have been set aside and petitioner placed back on probation.

¹ It was never clear exactly what "house duties" appellant failed to perform. The only testimony on this point came from Mr. Marvin:

He was excused from his duties until Monday. Well, he was excused throughout the weekend. He was not required to do anything. Come Monday, he was placed on the duty roster to begin Monday evening on the kitchen cleanup crew.

He failed to go to the clinic on Monday morning. When I questioned him about that on Monday evening, he stated that he did not go because he was waiting for his mother to take him up there.

I then reminded him that the clinic was within easy walking distance of the center, and I reminded him that he did not need to have his mother ride him up there. He seemed to agree to that plan of going to the clinic on Tuesday morning.

However, on Tuesday evening when I again questioned him, he advised me that he didn't go to the clinic, and it was at that time that I charged him with violation of probation for not doing his assigned house duties.

R6

* * * *

Q When you were talking about performing duties at the restitution center, are you talking about digging ditches or washing dishes?

A Washing dishes, sweeping floors.

Q Making his bed?

A Right.

R8

CONCLUSION

Petitioner's sentence should be set aside; his probation should be reinstated.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150



GARY CALDWELL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Lee Rosenthal, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 16th day of October, 1985.



Of Counsel