

047

O.A. 1-7-93

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IN THE SUPREME COURT OF FLORIDA

AUG 26 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

BILL H. HEWETT,
Petitioner,
VS.
STATE OF FLORIDA,
Respondent.

CASE NO. 79,153

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
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TABLE OF CITATIONS

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CASES CITED:

Clark v. State
579 So.2d 109 (Fla. 1991) 5,8

Hewett v. State
588 So.2d 635 (Fla. 5th DCA 1991) 2

OTHER AUTHORITIES:

Section 948.06(4), Florida statutes (1991) 7,819

STATEMENT OF THE CASE

On May 3, 1990, an affidavit **was** filed alleging Petitioner had violated his probation by failing to make restitution and failing to pay public defender liens and court costs. (R 36) Petitioner had earlier been placed on probation for a period of two years for the offense of grand theft. (R 36) On August 10, 1990, a violation of probation hearing **was** conducted before the Honorable Warren Edwards, Circuit Judge. (R 1-35) At this hearing, Petitioner testified in his own behalf concerning his employment and his ability to make restitution and cost payments. (R 1-17) At the conclusion of Petitioner's testimony, the trial court initially found him guilty of the violation, but set this aside since it was proven that Petitioner did not have the ability to make the payments. (R 19-20) Despite this, and over Petitioner's objection, the trial court extended Petitioner's probation for a period of two years and waived all supervision costs but reimposed the restitution. (R 33,34) There is no order finding Petitioner to be in violation of his probation. (R 52)

Petitioner filed a timely notice of appeal to the District Court of Appeal, Fifth District, on August 15, 1990. (R 57-58) Petitioner was adjudged insolvent and the office of the Public Defender was appointed to represent him on appeal. (R 63-64, 65-66) On appeal, Petitioner argued that unless a trial court found that a probationer has willfully violated **his**

probation, there is no authority for extending the probation even with the probationer's consent. In Hewett v. State, 588 So.2d 635 (Fla. 5th DCA 1991), the Court affirmed Petitioner's judgment and sentence. Petitioner filed a timely motion for rehearing and or certification which was denied on November 20, 1991. Petitioner filed his notice to invoke discretionary jurisdiction on December 10, 1991.

STATEMENT OF THE FACTS

Petitioner testified in his own behalf that he was on probation and as a condition of his probation was required to pay \$700 on one case and \$7,000 on another. (R 4-5) Originally Petitioner had a job which required him to go out of the county which he believed he was allowed to do. (R 7-8) However, this was in violation of his probation and he was violated at that time and lost his job due to the time he spent in jail. (R 8) When Petitioner got back out on probation he attempted to get a job in his chosen field of construction. (R 8) In September of 1989 Petitioner had a car accident which resulted in disabling injuries. (R 8) Petitioner was able to do some small jobs which allowed him to make enough money to pay his bills. He is staying rent free in some church property. (R 11) Petitioner neither drinks nor smokes. (R 10) His doctor advised Petitioner to get into a different line of work so Petitioner has tried to take some marketing seminars. (R 12) Petitioner stated that he would be willing to stay on probation for a little bit longer to make a good faith effort to pay the restitution he owed. (R 13) Petitioner did pay his cost of supervision three or four times until the supervisor agreed to waive the conditions since he did not have the money to make this obligation. (R 15-16) Petitioner is not currently employed on a pay basis. (R 17)

At the conclusion of Petitioner's testimony, the trial court initially found him guilty of the violation, but set this

aside since it was proven that Petitioner did not have the ability to make the payments. (R 19-20) The court then attempted to extend Petitioner's probation two years, but defense counsel objected on the grounds that there was no authority to extend the probation absent a finding of violation. (R 20-21)

Mary Eckman testified that Petitioner was required to pay her \$7,000 in restitution. (R 25-26) Ms. Eckman admitted that she did not know where Petitioner lived and had not seen him do any work since the order was entered. (R 26-27)

Janet Ryder testified that she was Petitioner's probation officer at the time that the affidavit was filed. (R 27) She testified that Petitioner was indeed in a car accident and since then has not been working except for odd jobs, basically, through his church. (R 28) Petitioner did make three payments towards his cost of supervision, two of which were before the car accident. (R 28) Ryder testified that the remaining payments were waived because of Petitioner being out of work. (R 28) Ms. Ryder testified that there has been no other problems with Petitioner's probation, except for the failure to pay the restitution. (R 29) Because she believed that the victim was due to the money that was owed her, she recommended that Petitioner's probation be extended. (R 29)

SUMMARY OF ARGUMENT

A trial court has no authority to extend the term of probation for an allegation that the probationer has failed to make restitution absent proof that the probationer had the financial abilities to make such payments and willfully failed to do so. This Court has previously held in *Clark v. State*, 579 So.2d 109 (Fla. 1991) that absent proof of violation, a trial court cannot change the terms of probation enhancing the terms thereof and should reaffirm this holding and quash the decision of the Fifth District Court of Appeal.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT
COURT OF APPEAL IS CLEARLY
ERRONEOUS INsofar AS IT HOLDS THAT
A TRIAL COURT MAY MODIFY OR EXTEND
PROBATION ABSENT ANY PROOF OF
VIOLATION OF PROBATION.

The issue before this Court is under what circumstances may a trial court extend the term of probation for a probationer absent a finding of willful violation. In the instant case, Petitioner was charged with violating his probation by failing to pay the cost of supervision and failing to pay restitution.

(R 36) The evidence at the hearing clearly showed that Petitioner did not have the financial ability to make these payments and thus no willful violation was proven. That this is the finding is reflected by the court minutes and order in the record wherein the court did not find Petitioner to be violation of his probation. (R 52) On appeal, Petitioner argued that unless a trial court finds that a probationer has willfully violated his probation, there is no authority for extending that probation even with the probationer's consent. However, the District Court of Appeal rejected this argument and held that Section 948.06(4), Florida Statutes (1984) permits a trial court to extend probation in those cases where a probationer is unable to afford to pay restitution or cost of supervision. Petitioner asserts that the Fifth District Court of Appeal is incorrect in its holding.

Section 948.06(4), Florida Statutes (1991) provides:

(4) In any hearing in which the failure of a probationer or offender in community control to pay restitution or the cost of supervision as provided in § 948.09, as directed, is established by the state, if the probationer or offender asserts his inability to pay restitution or the cost of supervision, it is incumbent upon him to prove by clear and convincing evidence that he does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so. If the probationer or offender cannot pay restitution or the cost of supervision despite sufficient bona fide efforts, the court shall consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison a probationer or offender in community control who has demonstrated sufficient bona fide efforts to pay restitution or the cost of supervision. (emphasis added)

The Fifth District Court of Appeal interpreted this provision to permit the extension of the term of probation even absent a finding of willful violation of probation. This is incorrect. First, the provision does not speak specifically to increasing the term of probation. Indeed, such a procedure would in essence allow for a court to punish a person solely because he was poor. Second, Petitioner contends that the alternative to imprisonment in this particular case would include merely reinstatement of the

original term of probation. Third, a further alternative, would include reducing the restitution to a judgment which can then be levied against the Petitioner. Fourth, and most importantly, the Fifth District Court of Appeal's opinion ignores this Court's decision in Clark v. State, 579 So.2d 109 (Fla. 1991), wherein this Court held:

Section 948.06, Florida Statutes (1987) provides the sole means by which the court may place additional terms on a previously entered order of probation or community control. Before probation or community control may be enhanced, either by extension of the period or by addition of terms, a violation of probation or community control must be formally charged and the probationer must be brought before the court and advised of the charge following the procedures of s. 948.06. Absent proof of a violation, the court cannot change an order of probation or community control by enhancing the terms thereof, even if the defendant has agreed in writing with his probation officer to allow such a modification and has waived notice and hearing. Id at 110-111 (emphasis added)

The Fifth District Court of Appeal chose to treat this unambiguous statement as requiring only a hearing before a court may extend probation. This is simply incorrect. If only a hearing was required, then this Court's statement "absent proof of a violation ..." is illogical and incorrect. Since this Court's decision in Clark, post-dated the amendment to Section 948.06 in 1984, it must be presumed that this Court was aware of this provision and chose to interpret it much more narrowly than

the Fifth District Court of Appeal.

In summary, the Fifth District Court of Appeal was incorrect in ruling that a trial court may extend the term of probation absent a finding of willful violation. Such a holding cannot be reconciled with this Court's previous statement and holding in Clark, supra and could not possibly be sustained against a constitutional due process challenge. This Court should quash the decision of the Fifth District Court of Appeal and remand the cause with instructions to reinstate Petitioner to the original term of probation.

CONCLUSION

Based on the foregoing cases, argument and authorities, Petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District Court of Appeal and remand the cause with orders to reinstate Petitioner to the original term of probation.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Bill H. Hewett, 1720 Cox Road, Cocoa, FL 32922 on August 24, 1992.


MICHAEL S. BECKER
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