IN THE SUPREME COURT OF FLORIDA

CASE NO. 82, 746

THE STATE OF FLORIDA,

Petitioner/Appellee,

vs.

DENNIS MARSHALL HALL,

Respondent/Appellant.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
4000 Hollywood Blvd.,
Suite 505-S
Hollywood, FL 33021
(305) 985-4788

WILLIAM R. BLACK
Certified Legal Intern

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PRELIMINARY STATEMENT

The Petitioner, THE STATE OF FLORIDA, was the appellee in the court below and the prosecution in the Circuit Court. The Respondent, DENNIS MARSHALL HALL, was the Appellant in the District Court and the defendant in the trial court. The parties will be referred to, in this brief, as they stand before this court. The symbol "R" will be used, in this brief, to refer to the Record on Appeal before the District Court, the symbol "SR" will identify the Supplemental Record on Appeal before that court, the symbol "T" will be used to designate the transcript of lower court proceedings and the symbol "App." will be used to designate the appendix to this brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On November 6, 1991, the respondent DENNIS MARSHALL HALL was convicted of Trafficking in Cocaine and Possession of Cocaine and placed on one (1) year probation. (R. 19, 21).

The State filed an Affidavit of Probation violation, on October 27, 1992, charging the respondent with failure to make monthly payments, failure to obtain gainful employment and failure to complete the TASC treatment program. (R. 24). The respondent entered a denial to the allegations. (R. 14, 15).

The respondent was arrested, on November 5, 1992, the last day of his period of probation, for the Sale of a Controlled Substance within 1000 feet of a School, as alleged in Circuit Court case 92-37869. (T. 9). The State filed an Amended Affidavit of Probation Violation, on November 12, 1992, charging the respondent with failure to live and remain at liberty without violating any law. (S.R. 1)[1]

A hearing was convened on March 15, 1992 at which testimony was adduced from the probation officer relative to all the charges contained on both affidavits. (R. 27, 28, 29, T. 1). The trial court, based on the testimony of the probation officer,

[1] The probation officer, Kenneth Carter, represented at the probation-violation hearing that the amended affidavit was filed on November 5, 1992, (T. 17); however, the record shows that the affidavit was not filed until November 12, 1992. (S.R. 1).

found the evidence sufficient to support each of the charges contained in both Affidavits of Probation Violation, ordered the revocation of the respondent's probation (R. 30) and sentenced the respondent to seven (7) years. (R. 18, 27, 30; T. 19).

The District Court on appeal amended the trial court's order by striking the charge contained in the Amended Affidavit of Probation Violation filed on November 12, 1992, and affirmed the trial court on the basis of the charges contained within the original Affidavit of Probation Violation filed on October 27, 1992. (App. 1-3). Finally, the District Court certified the question of whether the charge contained in the amended affidavit could be properly considered. (App. 3).

ISSUE PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT COULD CONSIDER NEW CHARGES IN THE AMENDED AFFIDAVIT OF PROBATION VIOLATION WHERE THE ORIGINAL AFFIDAVIT WAS TIMELY FILED, BUT THE AMENDED AFFIDAVIT WAS NOT FILED UNTIL AFTER THE PROBATIONARY PERIOD HAD EXPIRED BECAUSE THE DEFENDANT COMMITTED THE ALLEGED VIOLATION AT, OR NEAR, THE END OF HIS PROBATIONARY PERIOD?

SUMMARY OF THE ARGUMENT

The Amended Affidavit, filed on November 12, 1992, charged the respondent with failure to live and remain at liberty without violating any law. The offense was committed by the respondent on November 5, 1992, the last day of his probation period. The recognized exception to the general rule, that a court lacks jurisdiction to revoke or modify probation after the expiration of the period of probation, is when the processes of the court have already been placed into motion, the court maintains jurisdiction. The facts and circumstances of this case fit neatly into this exception.

The instant case is distinguishable from the cases, upon which the general rule is predicated. Those cases involved amended affidavits which contained violations that the probation officer should have filed long prior to the expiration of the period of probation. Unlike those cases, the violation charged in this case did not occur until the last day of the period of probation.

Therefore, the District Court's certified question should be answered in the affirmative and the decision of that court to amend the trial court's decision by striking the charge contained in the November 12, 1992, affidavit should be reversed.

ARGUMENT

THE TRIAL COURT COULD CONSIDER NEW CHARGES IN AN AMENDED AFFIDAVIT OF PROBATION VIOLATION WHERE THE ORIGINAL AFFIDAVIT WAS TIMELY FILED, BUT THE AMENDED AFFIDAVIT WAS NOT FILED UNTIL AFTER THE PROBATIONARY PERIOD HAD EXPIRED BECAUSE THE DEFENDANT COMMITTED THE ALLEGED VIOLATION AT, OR NEAR, THE END OF HIS PROBATIONARY PERIOD.

The facts of this case are that the respondent's period of probation was to expire on November 5, 1993. (R. 21-23). The respondent was charged with three violations of the conditions of his probation in an affidavit filed on October 27, 1992. (R. 24). Subsequent to the filing of the original affidavit, the probation officer learned of the respondent's arrest, on November 5, 1992, the last day of the respondent's term of probation, for the Sale of Controlled Substance within 1000 feet of School. (T. 15). This prompted the probation office to file an Amended Affidavit of Probation Violation on November 12, 1992, charging the respondent with failure to live and remain at liberty without violating any law. (S.R. 1). A hearing on the alleged probation violations was held on March 15, 1992. (T.) Testimony was adduced on each of the charges contained in the original affidavit of October 27, 1992, (R. 27, 28, 29, T. 1), and the charged violation contained in the amended affidavit of November 12, 1992. (T. 9, 10). The trial court concluded that the respondent had violated each of these conditions of his probation. (T. 19).

Petitioner contends that the violation contained in the amended affidavit, filed on November 12, 1992, was properly considered by the trial court. The general rule is that "once a term of probation has expired, a court lacks jurisdiction to entertain an application for revocation of probation based on a violation which occurred during the probationary period unless, during the term of the probation, appropriate steps were taken to revoke the probation." Clark v. State, 402 So. 2d 43, 44 (Fla. 4th DCA 1981) citing Bouie v. State, 360 So. 2d 1142 (Fla. 2d DCA 1978); Carpenter v. State, 355 So. 2d 492 (Fla. 3d DCA 1978); State ex rel. Ard v. Shelby, 97 So. 2d 631 (Fla. 1st DCA 1957).

This case fits squarely into his exception to the general rule as articulated in Fryson v. State, 559 So. 2d 377 (Fla. 1st DCA 1990). The Fryson court's ruling was that "the [trial] court is divested of all jurisdiction over the person of the probationer unless in the meantime the *processes of the court have been set in motion* for revocation or modification of the probation. . . " (original emphasis). Id. The probationer's period of probation in Fryson was to expire on March 10, 1987. Id. The trial court, based on an affidavit signed, but not filed, by the defendant's probation officer issued an arrest warrant on March 8, 1987. Id. at 378. This affidavit was not filed with the clerk until November 21, 1989. Id. However, the court affirmed the trial court based on the signed affidavit and the issuance of

an arrest warrant, holding that revocation proceedings had been instituted, even though the Affidavit of Probation Violation was not filed prior to the expiration of the term of probation. Id.

The facts in this case are that the original affidavit was filed on October 27, 1992. This affidavit placed the process of the court into motion to revoke or modify the probation of the respondent. The probation officer testified that the arresting officer informed him, on November 5, 1992, the last day of respondents period of probation, that the respondent had been arrested, that same day, for the Sale of Cocaine. (T. 15, R. 21-23). Acting on this information the probation officer filed the Amended Affidavit of Probation Violation on November 12, 1992. (S.R. 1).

The case of Powell v. State, 606 So. 2d 486 (Fla. 5th DCA 1992), contains reasoning which is relevant to this case. The court reasoned in that case, that each day of community control is as important as the next, and a juvenile should not gain a sense of comfort by violating the terms of this lenient form of punishment when it is apparent that proceedings can not be held prior to the end of the period of community control. Id. at 488. The purpose of community control for a juvenile is the same as probation for an adult and the same importance should apply to each day of probation. Therefore, in this case the respondent should not be allowed to gain a sense of comfort from the

realization that it is practically impossible for the probation officer to file an Affidavit of Probation Violation on the last day of his probation.

The respondent was arrested for the Sale of Control Substance within 1000 feet of a school, on the last day of his probationary period. Were it not for the fact that the probation officer had previously instituted probation revocation proceedings, under the affidavit filed on October 27, 1992, he would have been forced to choose between attempting to file an affidavit in less that a day or allowing the respondent to circumvent the intent of probation. (R. 24)., See Bernhardt v. State, 288 So. 2d 490 (Fla. 1974). Requiring the probation officer to satisfy the general rule, when the facts and circumstances are as in this case, places a markedly unreasonable burden on the probation officer. Therefore, the court should apply the exception articulated in Fryson to the facts and circumstances of the instant case.

The instance case is distinguishable from those cases upon which the general rule is founded. Unlike those cases, the probation officer in the instant case had no prior knowledge of the violation contained in the amended affidavit because the act itself was only committed on the last day of the respondent's term of probation. Clark v. State, 402 So. 2d 43 (Fla. 4th DCA 1981); Bouie v. State, 360 So. 2d 1142 (Fla. 2d DCA 1978);

Carpenter v. State, 355 So. 2d 492 (Fla. 3d DCA 1978); State ex rel. Ard v. Shelby, 97 So. 2d 631 (Fla. 1st DCA 1957).

The original affidavit in Clark was filed, on August 24, 1979, containing charges relative to the possession of a firearm, heroin, and cocaine on or about August 22, 1979. Clark v. State, 402 So. 2d at 44. The amended affidavit which was filed on October 5, 1979, two days after the expiration of the term of probation, contained two additional charges which reportedly took place on August 7, 1979, some two (2) months prior. Id. The court ruled that the amended affidavit was inadmissible. Id. See also, State ex rel. Ard v. Shelby, 97 So. 2d 631 (Fla. 1st DCA 1957); Carpenter v. State, 355 So. 2d 492 (Fla. 3d DCA 1978).

The original Affidavit of Probation Violation in McPherson was filed on January 15, 1987. McPherson v. State, 530 So. 2d 1095 (Fla. 1st DCA 1988). An amended affidavit was filed on March 31, 1987. Id. The probationer's period of probation subsequently expired on August 25, 1987. Id. Then on November 2, 1987, a second amended affidavit was filed. Id. The first charge added in the second amended affidavit was "Driving Under the Influence" which the respondent had committed after the completion of the probationary period. Id. The second charge was a petit theft which the defendant had pled guilty to twenty-two (22) days before the expiration of the term of probation. Id. The court ruled that the second amended affidavit should not have been considered by the court. Id. at 1098.

Eleven days prior to the expiration of his probation, on January 17, 1967, the probationer in Brooker was charged in a separate offense. Brooker v. State, 207 So. 2d 478 (Fla. 3d DCA 1968). Then on February 21, 1967, twenty-four (24) days after the expiration of his term of probation, proceedings were instituted to revoke his probation, on the grounds that he had violated the law during the term of his probation. Id. at 479. The court reversed the revocation stating as its reason that the proceedings must be commenced within the period of probation. Id. at 480.

Under facts and circumstances of those cases the probation officer knew or should have known of the violation long prior to the expiration of the term of probation and the application of the general rule is clearly warranted. Likewise, when the probation officer has a reasonable time in which to file an Amended Affidavit of Probation Violation, the application of the general rule is just.

However, the facts and circumstances of this case are clearly distinguishable. Here the processes of the court were placed into motion to revoke or modify the respondent's probation with the filing of the original Affidavit of Probation Violation on October 27, 1992. (R. 24). Subsequent to the filing of the original affidavit, on the last day of his probation, the

respondent violated the terms of his probation. (R. 21-23). The probation officer was made aware of the violation on the last day of the respondent's period of probation. (T. 15). The probation officer acting in a responsible and timely manner filed the amended affidavit. (S.R. 1). Therefore, the trial court properly considered the violation contained in the Amended Affidavit of Probation Violation filed on November 12, 1992.

Concluding that the instant case fits neatly into the exception articulated in Fryson and is distinguishable from the facts and circumstances upon which the general rule is predicated, the court should answer the certified question in the affirmative.

CONCLUSION

Based on the arguments and authorities contained above, the District Court's certified question should be answered in the affirmative and the decision of that court to amend the trial court's decision by striking the charge contained in the November 12, 1992, affidavit should be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
4000 Hollywood Boulevard
Suite 505-S
Hollywood, Florida 33021

WILLIAM R. BLACK
Certified Legal Intern

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF PETITIONER ON THE MERITS was furnished to HARVEY J. SEPLER, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 22nd day of November, 1993.

CHARLES M. FAHLBUSCH
Assistant Attorney General

WILLIAM R. BLACK
Certified Legal Intern

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,746

THE STATE OF FLORIDA,

Petitioner/Appellee,

vs.

DENNIS MARSHALL HALL,

Respondent/Appellant.

ON PETITION FOR DISCRETIONARY REVIEW

APPENDIX TO INITIAL BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
4000 Hollywood Blvd.,
Suite 505-S
Hollywood, FL 33021
(305) 985-4788

WILLIAM R. BLACK
Certified Legal Intern

93-130745 -C

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1993

DENNIS MARSHALL HALL, **

Appellant, **

vs. ** CASE NO. 93-901

THE STATE OF FLORIDA, **

Appellee. ** # 91-20574

Opinion filed November 2, 1993.

An Appeal from the Circuit Court of Dade County, Jennifer D. Bailey, Judge.

Bennett H. Brummer, Public Defender and Harvey J. Sepler, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, Charles M. Fahlbusch, Assistant Attorney General and William R. Black, Certified Legal Intern, for appellee.

Before JORGENSON, LEVY and GODERICH, JJ.

PER CURIAM.

On November 6, 1991, the defendant, Dennis Marshall Hall, was convicted of trafficking and possession of cocaine and was

placed on one year probation. On October 27, 1992, the state filed an affidavit of probation violation charging the defendant with failure to make monthly payments, failure to obtain gainful employment, and failure to complete the TASC treatment program. On November 5, 1992, the defendant was arrested for the sale of a controlled substance within 1,000 feet of a school. Then, on November 12, 1992, after the expiration of the probationary period, the state filed an amended affidavit of probation violation charging the defendant, in addition to the violations listed in the previous affidavit, with failure to live and remain at liberty without violating the law based upon the offense he committed on November 5th. Following a hearing, the trial court revoked the defendant's probation. The defendant appeals from orders revoking his probation and sentencing him to seven years in prison.

A trial judge has broad discretionary power to grant and to revoke probation. Bernhardt v. State, 288 So. 2d 490 (Fla. 1974). In the instant case, the defendant does not challenge the technical violations contained in the original affidavit. The record shows that competent, substantial, and uncontradicted testimony was presented as to the allegations contained in the original affidavit. This evidence was sufficient to justify the court's revocation of probation and the imposition of the seven year sentence. Morales v. State, 622 So. 2d 1173 (Fla. 3d DCA 1993). However, we strike from the order revoking probation the finding of violation as to the condition based on the offense the defendant allegedly committed on November 5th because that charge

was contained in an untimely filed amended affidavit of probation violation. See Aguiar v. State, 593 So. 2d 1225 (Fla. 3d DCA 1992)(Trial court may not consider an affidavit filed after probation has ended.); Robinson v. State, 474 So. 2d 1274 (Fla. 3d DCA 1985)(The filing of new substantive charges after the expiration of the probationary period is untimely and the trial court has no jurisdiction to consider the new charges.); Kane v. State, 473 So. 2d 786 (Fla. 1st DCA 1985).

Due to our concern that a defendant can commit a crime on the last day of his probation and not be found to have violated his probation, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), we certify the following question to the Florida Supreme Court as a question of great public importance:

> WHETHER THE TRIAL COURT COULD CONSIDER NEW CHARGES IN AN AMENDED AFFIDAVIT OF PROBATION VIOLATION WHERE THE ORIGINAL AFFIDAVIT WAS TIMELY FILED, BUT THE AMENDED AFFIDAVIT WAS NOT FILED UNTIL AFTER THE PROBATIONARY PERIOD HAD EXPIRED BECAUSE THE DEFENDANT COMMITTED THE ALLEGED VIOLATION AT, OR NEAR, THE END OF HIS PROBATION PERIOD?

Affirmed as amended and question certified.