IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,746

THE STATE OF FLORIDA,

Petitioner,

-vs-

DENNIS MARSHALL HALL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

This cause is brought to the Court pursuant to a certified question by the Third District Court of Appeal, as a matter of great public importance.

The petitioner, the State of Florida, was the appellee in the appellate court. The respondent, DENNIS MARSHALL HALL, was the defendant at the trial level and the appellant on appeal.

References to the record are abbreviated as follows:

(R) = Record on Appeal

(T) = Transcript of Proceedings

(S.R.) = Supplemental Record on Appeal

STATEMENT OF THE CASE AND FACTS

The respondent accepts the state's characterization of the procedural and factual context for this action and summarizes the operative dates as follows:

> **November 6, 1991**, respondent placed on one (1) year probation, (R. 21);[1] probation was to terminate on November 5, 1992, (T. 17-18);
>
> **November 5, 1992**, original affidavit of probation violation filed alleging technical violations, (R. 24);[2]
>
> **November 5, 1992**, respondent arrested for substantive offense (sale of cocaine within a thousand feet of a school), (S.R. 2; T. 9);[3]
>
> **November 12, 1992**, amended affidavit of probation violation filed; this affidavit recites the technical violations from the original affidavit, and adds the above substantive charge. (S.R. 1).[4]

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[1] This sentence was entered pursuant to a conviction for trafficking in cocaine and possession of cocaine. (R. 19).

[2] Although the affidavit was dated October 27, 1992, it was not filed until November 5, 1992.

At the revocation hearing, the probation officer stated that he filed this original affidavit on November 5, 1992. (T. 16).

[3] This offense was the basis for a separate trial in circuit court case number 92-37869.

[4] Even though the probation officer represented that the amended affidavit was filed on November 5, 1992, (T. 17), the affidavit is file-stamped November 12, 1992. (S.R. 1). This was 373 days after

The trial court considered the allegations contained in the original and the amended affidavits, including the substantive charge in the amended affidavit. The court revoked the respondent's probation and sentenced him to seven (7) years of imprisonment. (R. 18, 27, 30; T. 3).

On direct appeal, the third district affirmed the probation revocation based on the technical violations, but struck from the revocation order all reference to the substantive offense that was contained in the amended affidavit. The court certified, as a matter of great public importance, the question of whether the trial court may consider charges contained in a late-filed affidavit of probation violation, even though the offense in question was allegedly committed during the probationary period. (App. to petitioner's brief).[5]

This Court postponed a decision on jurisdiction and set the matter for briefing on the merits.

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the entry of the order placing the respondent on one (1) year probation.

[5] The question certified by the district court is:

> "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?"

QUESTION PRESENTED

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?

SUMMARY OF THE ARGUMENT

The state filed a timely affidavit of probation violation (alleging technical violations, not the subject of this appeal) and an untimely amended affidavit of probation violation (alleging a substantive charge, as well as the prior technical charges).

The trial court revoked probation on the basis of the technical and the substantive charges. The district court affirmed revocation based on the technical violations, reversed on jurisdictional grounds the substantive violation, and certified the jurisdictional question to this Court.

It is the respondent's position that the new, substantive charge contained in the amended affidavit cannot be considered in the revocation decision because that affidavit was not timely filed. This Court and nearly all district courts in the state have decided the issue in this manner and the state's efforts to persuade this Court to carve out an exception to the jurisdictional parameters of the probation statute are futile and without legal support.

ARGUMENT

THE TRIAL COURT MAY NOT CONSIDER, AS A MATTER OF JURISDICTIONAL LAW, NEW CHARGES CONTAINED IN A LATE-FILED AMENDED AFFIDAVIT OF PROBATION VIOLATION, EVEN THOUGH 1) THE STATE TIMELY FILED AN ORIGINAL AFFIDAVIT AND 2) THE OFFENSE (UNDERLYING THE NEW CHARGE IN THE AMENDED AFFIDAVIT) ALLEGEDLY OCCURRED ON THE LAST DAY OF THE PROBATIONARY PERIOD.

The state argues, as it did in the district court, that the trial court had the necessary jurisdiction to consider the new (amended) charges because 1) the probation-revocation process had been "set in motion" by the filing of the original affidavit (of probation violation) and jurisdiction lies no matter when the amended affidavit is filed and 2) even if jurisdiction does not automatically lie, since the underlying conduct occurred so late in the probationary period, the state did not have an opportunity to timely file the amended affidavit.[6]

Neither of these positions is supported in law.

1) Automatic jurisdiction to consider untimely amended charges

It is unquestionably the law in Florida that untimely filed charges cannot be considered in the probation-revocation context.

> "It is undisputed that after the end of a specified period of probation, the trial court lacks jurisdiction to entertain a

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[6] The state does **not** contest that the probationary period expired before the filing of the amended affidavit, that both the filing of the original affidavit and the respondent's arrest for the substantive offense underlying the new charges occurred on the same day, and that the amended affidavit was filed seven (7) days after the commission of the substantive offense and eight (8) days after the expiration of the probationary period.

> proceeding or application for revocation of probation for a violation which occurred during the term of probation unless in the meantime, the processes of the court have been set in motion for revocation or modification of the probation pursuant to Section 948.06, Florida Statutes (1975)."

Carpenter v. State, 355 So. 2d 492, 493 (Fla. 3d DCA 1978). Accord Carroll v. Cochran, 140 So. 2d 300, 301 (Fla. 1962); Aguiar v. State, 593 So. 2d 1225, 1225 (Fla. 3d DCA 1992); Purvis v. Lindsey, 587 So. 2d 638, 639 (Fla. 4th DCA 1991); Little v. State, 519 So. 2d 1139, 1140 (Fla. 2d DCA), review denied, 528 So. 2d 1182 (Fla. 1988); State ex rel. Ard v. Shelby, 97 So. 2d 631, 632 (Fla. 1st DCA 1957).

This is especially true when the charges arise in an untimely filed amended affidavit of probation violation. E.g., McPherson v. State, 530 So. 2d 1095, 1098 (Fla. 1st DCA 1988); Robinson v. State, 474 So. 2d 1274, 1275 (Fla. 3d DCA 1985); Kane v. State, 473 So. 2d 786, 787 (Fla. 1st DCA 1985); Clark v. State, 402 So. 2d 43, 44 (Fla. 4th DCA 1981).

The state concedes as much on page 7 of the petitioner's brief on the merits. However, the state submits that since it already filed a timely original affidavit, "setting in motion" the revocation process, jurisdiction over the new (amended) charges automatically lies. It is difficult to reconcile this position in light of the above law.

The primary case upon which the state relies for this argument is Fryson v. State, 559 So. 2d 377 (Fla. 1st DCA 1990). In that case, the affidavit of probation violation was timely filed

(submitted to the court)[7] and the trial court signed an arrest warrant based on the charges contained in the above affidavit. Both the submission to the court and the signing of the arrest warrant occurred within the probationary period. However, the clerk failed to file-stamp the affidavit until the probation period had expired.

Fryson moved to dismiss the revocation action because of the late filing (i.e., loss of jurisdiction). The trial court denied the motion and the first district affirmed, holding that as a result of the timely signing and submission of the affidavit and the timely issuance of the arrest warrant, the probation revocation process had been set in motion. 559 So. 2d at 378.

This is, of course, an entirely different situation than we have here. Fryson does not stand for the proposition that a timely filed original affidavit necessarily vests jurisdiction to consider charges contained in an untimely filed amended affidavit. To so hold would directly conflict with the law established by this Court

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[7]

The opinion initially describes the affidavit as filed on March 8, 1989 (two days before the expiration of the period), but later states that the affidavit was not filed until after the period had expired. Compare 559 So. 2d at 378, paragraphs 2 and 4.

Presumably, the court initially referred to the signing of the affidavit and the submission of it to the court, and later referred to the actual file stamping of the affidavit.

and nearly every district court in Florida.[8]

The state then argues that the date of commission of the substantive offense named in the amended affidavit precluded it from timely filing an amended affidavit of probation violation. Again, the state cites no law to directly support this argument.

2) Inability to timely file the amended affidavit

This is an equitable-type argument -- is it fair to require the state to file a pleading on the last day of a specified probationary period? In support of its argument, the state cites dicta from Powell v. State, 606 So. 2d 486, 488 (Fla. 5th DCA 1992) and a series of admittedly factually distinguishable cases.

In Powell, the respondent had been initially sentenced, as a juvenile, to community control; he violated the terms of his release and the trial court advanced the disposition hearing, without providing adequate due-process safeguards, so that it could be held within the community control period.

The state cited to dicta in the Powell opinion stating that

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Cases recognizing that the probation-revocation process was "set in motion" include Carroll v. Cochran, 140 So. 2d 300 (Fla. 1962) (arrest warrant issued within probationary period, but not served until period expired); State v. Wimberly, 574 So. 2d 1216 (Fla. 2d DCA 1991) (affidavit signed and submitted to court within probationary period, court signs arrest warrant within period, clerk's office not file stamp affidavit until period expired); Clark v. State, 402 So. 2d 43 (Fla. 4th DCA 1981) (**the filing of an original affidavit does not constitute "setting in motion" the revocation process to allow for untimely amended charges**); Brooker v. State, 207 So. 2d 478 (Fla. 3d DCA 1968) (Information charging substantive offense filed within probationary period, but affidavit of probation violation not filed until period had expired).

"[e]ach 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 his lenient form of punishment when it is apparent that violation and disposition hearings cannot be held prior to the nineteenth birthday." 606 So. 2d at 488.

While we agree with this general proposition, it does not really help in deciding the specific issues raised by the instant case.

As for the admittedly factually distinguishable cases cited in the petitioner's brief, they too add little to determining how much time is necessary to file an affidavit of probation violation and whether the strict jurisdictional parameters established by Fla. Stat. 948.06 (1991) have been exceeded in this case.

The plain fact is that the probationary period is jurisdictional and there is no statutory authority, or record support below,[9] for creating an exception to the law.[10]

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[9] The trial record contains no facts that would flesh out why the timely filing of the amended affidavit was a practical impossibility or how much time the ordinary probation officer reasonably needs in which to file the affidavit of probation violation.

As a result, the state is asking an appellate court to make necessary factual findings that should have been made below.

[10] A parallel may be drawn to the civil statute of limitations case where the legislature has specified a period of time within which a civil action must be commenced in order for the trial court to assume jurisdiction over the cause and the parties. 51 Am.Jur. 2d, Limitations of Actions §2.

While a few exceptions exist to toll a statute or limitations, see 35 Fla.Jur. 2d §§1, 57-72, none apparently allows a party to

That being the case, the state is bound by the parameters of the probationary period. It cannot now come before this Court and ask that it be excused from the well accepted and applied law on the subject, especially when the factual representations before the trial court were so scant.[11]

If jurisdiction is ultimately accepted by the Court, which we would argue it should not be, the decision of the district court should be affirmed and the certified question answered in the negative.

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exceed the limitation period because he didn't have time to file a claim.

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The respondent argued in the district court below that since the trial court considered the substantive violation along with the technical violations, and because the record does not reflect whether the trial court would have revoked probation on the technical violations, alone, and if so, would have imprisoned the respondent to the extent that it did, the proper remedy is to reverse the revocation and remand for reconsideration. Jess v. State, 384 So. 2d 328 (Fla. 3d DCA 1980) (where record is unclear whether trial court **would have** revoked probation, and sentenced defendant as it did, absent invalid grounds, remedy is to reverse and remand for new probation revocation hearing); see generally Albritton v. State, 476 So. 2d 158 (Fla. 1985) (test for affirming departure sentence based, in part, on invalid grounds is whether the trial court **would have** departed absent the invalid grounds).

By concluding that the evidence of technical violations provided a sufficient basis to revoke the respondent's probation, the district court applied a could have revoked test. As argued, this is an incorrect application of the law.

CONCLUSION

Based on the forgoing analysis and authorities, the respondent requests this honorable Court to affirm the decision of the Third District Court of Appeal in this cause.

Respectfully submitted,

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By: _____
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Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 8th day of December, 1993.

_____
HARVEY J. SEPLER
Assistant Public Defender