IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,789

THE STATE OF FLORIDA,

Petitioner/Cross-Respondent,

-vs-

JACKIE FORCHIN,

Respondent/Cross-Petitioner.

BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

Respondent/Cross-Petitioner, Jackie Forchin, was the appellant in the district court of appeal and the defendant in the Circuit Court. Petitioner/Cross-Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "SR" will be used to designate the supplemental record on appeal.[1] All emphasis is supplied unless the contrary is indicated.

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[1]The supplemental record on appeal follows page 189 of the record on appeal filed in this court.

STATEMENT OF THE CASE AND FACTS

Jackie Forchin was charged with one count of possession of a controlled substance (R. 1-4). On November 18, 1993, Mr. Forchin entered a plea of nolo contendere to this charge (R. 25). The court entered an adjudication of guilt, and sentenced Mr. Forchin to a 364-day term of imprisonment, to be followed by a one-year period of probation (R. 25-29, 31-33).

On December 1, 1994, an affidavit of violation of probation was filed, alleging that Mr. Forchin had violated the conditions of his probation by committing the offenses of tampering with physical evidence and resisting an officer without violence, as charged in Circuit Court Case No. 94-38424 (R. 45). On December 13, 1994, an amended affidavit of violation of probation was filed, adding an allegation that Mr. Forchin had violated the conditions of his probation by failing to report to the probation office on November 8, 1994, after being instructed to do so by his probation officer on November 1, 1994 (R. 46).

On January 5, 1995, a jury trial commenced in Circuit Court Case No. 94-38424 on the charges of tampering with physical evidence and resisting an officer without violence (SR. 1). The trial judge considered the evidence presented at this jury trial for purposes of the probation violation hearing in this case (R. 168).

At the trial, Officer Horace Morgan of the City of Miami Police Department testified that he observed Jackie Forchin walk toward a concrete-enclosed bus bench and hand money inside the enclosure (SR. 130-131). Officer Morgan claimed that he then observed a hand come out from the enclosure and hand a small plastic bag containing a white substance to Mr. Forchin (SR. 131).

As Officer Morgan watched Mr. Forchin walk away from the bus bench, he sent out a description of Mr. Forchin over his radio to the "take-down unit." (SR. 131-132). Officers

Payne and Couseillant heard this radio broadcast as they were driving through the area in unmarked police cars (SR. 202-203, 227). Both officers approached Mr. Forchin in their unmarked cars as Mr. Forchin walked across the street toward a grassy median (SR. 202-203, 227-228). Officer Payne drove a short distance past Mr. Forchin and stopped (SR. 203-204). He placed a blue police light on his dashboard, and got out of his car (SR. 204). Mr. Forchin did not see Officer Payne, as he was walking away from the area where Officer Payne had stopped, and toward the area where Officer Couseillant had stopped his unmarked car (SR. 204, 227-228).

As Officer Payne walked toward Mr. Forchin, he unsuccessfully tried to get Forchin's attention (SR. 204). As Officer Couseillant was getting out of his unmarked car, Officer Payne identified himself to Mr. Forchin as a police officer (SR. 205, 229). Mr. Forchin turned around to look at Officer Payne, and then turned back around and kept walking away (SR. 205). At that point, Officer Payne saw Mr. Forchin bring his right hand up to his mouth (SR. 205). Officer Couseillant, who was facing Mr. Forchin, testified that he saw Mr. Forchin toss a clear plastic bag containing a white substance into his mouth as he walked away from Officer Payne (SR. 229). Officer Couseillant yelled to Officer Payne that Mr. Forchin had put something in his mouth (SR. 229). Officer Payne grabbed Mr. Forchin and brought him to the ground (SR. 206, 229). The officers unsuccessfully tried to get Forchin to spit out whatever was in his mouth (SR. 206, 229). The officers testified that Mr. Forchin stated, "It's gone" (SR. 206-207, 229). Mr. Forchin was handcuffed and taken into custody (SR. 207).

Mr. Forchin testified at trial that he had walked past the bus bench and handed a dollar bill to a friend who had asked him for beer money (TR. 256-257). After giving his friend the money, Mr. Forchin continued walking down the street (TR. 257-259). As he

stood on the median waiting for the traffic to pass so that he could cross the street, he noticed a car drive slowly by him (SR. 259-261). The next thing he knew he was on the ground being placed in a choke hold by a police officer (TR. 259-261). Another officer placed his knee against the side of Mr. Forchin's head (TR. 262). Mr. Forchin testified that he was thereafter handcuffed and placed in a police car (TR. 264). Mr. Forchin stated at trial that he did not purchase cocaine at the bus stop, and that he had not placed a baggy into his mouth in an attempt to destroy evidence (TR. 266).

During a recess in the jury trial, the court heard testimony concerning the allegation that Forchin had violated probation by failing to report to his probation officer on November 8, 1994 (R. 67-98). Probation officer Lydia Martinez testified that Jackie Forchin reported to her on November 1, 1994, and told her that he had to immediately take his son to the hospital (R. 72, 76). Ms. Martinez explained the conditions of probation to Mr. Forchin, and had him sign the probation order (R. 68-69). She then asked him to return to the probation office at 4:00 P.M. on November 8, 1994 (R. 72, 76).

Ms. Martinez testified that Mr. Forchin did not report to the probation office on November 8, 1994 (R. 73, 75). Ms. Martinez could not remember whether Mr. Forchin had called and left a telephone message for her on November 8th or 9th (R. 78). She did not have any notes reflecting such a call with her at the time of her testimony (R. 78).

Jackie Forchin testified that he reported to Ms. Martinez on November 1, 1994 (R. 86). At that meeting, Ms. Martinez told him to report back to her on November 8, 1994 (R. 87). However, on that date, a rainstorm prevented him from going to the probation office (R. 87). Mr. Forchin testified that he did report to the probation office on the following morning, November 9, 1994 (R. 87-88). He signed the log at the probation office upon his arrival (R. 88). He returned to the probation office two more times that day, but Ms.

Martinez was not at the office (R. 88). He signed the log twice on that day, and on his third visit the receptionist made a notation indicating that he had been there (R. 88).

Recalled as a rebuttal witness, probation officer Martinez testified that she had not checked the logs at the probation office for November 9, 1994, and that no one would have notified her if Mr. Forchin had signed the log on November 9, 1994 (R. 95-96). Ms. Martinez could not recall having received any note concerning Mr. Forchin's appearance at the probation office on November 9, 1994 (R. 96). During defense counsel's examination of Ms. Martinez, the court made a finding that the State had failed to elicit sufficient evidence to establish that Mr. Forchin had not reported to the probation office on November 9, 1994 (R. 98).

The jury trial in Circuit Court Case No. 94-38424 resumed after the rebuttal testimony of Ms. Martinez (R. 98). The jury was unable to reach a unanimous verdict on the charge of tampering with physical evidence, and the jury returned a verdict of not guilty as to the charge of resisting an officer without violence (R. 162-164).

Following the discharge of the jury, the court found that Mr. Forchin had violated his probation by committing the offense of tampering with physical evidence (R. 168). The court found that Mr. Forchin had not violated his probation by committing the offense of resisting an officer without violence (R. 168). Finally, the court found that Mr. Forchin had violated his probation by failing to report to the probation office on November 8, 1994 (R. 168-169). The court revoked Mr. Forchin's probation, and imposed the statutory maximum sentence of five years' imprisonment (R. 169).

On January 24, 1995, Mr. Forchin filed a motion for rehearing of the court's findings of violation of probation (R. 173). This motion was based in part on the fact that the State had entered a nolle prosse as to the charge of tampering with physical evidence (R. 173). The motion for rehearing was denied (R. 173, 175-179).

On appeal to the Third District Court of Appeal, the order revoking probation and the sentence imposed based on that revocation were affirmed. *Forchin v. State*, 660 So. 2d 763 (Fla. 3d DCA 1995). The district court found that the greater weight of the evidence supported the trial court's determination that Forchin's failure to appear at the probation office on November 8th was a willful and substantial violation of probation which supported the order of revocation of probation. The district court also found, however, that as a matter of law, the tampering charge could not serve as a basis for the revocation of Forchin's probation under the authority of the district court's prior decision in *State v. Jennings*, 647 So. 2d 294 (Fla. 3d DCA 1994). Motions for rehearing were filed by Forchin and the State of Florida, and both motions were denied (R. 195).

On October 26, 1995, the State of Florida filed a notice to invoke this Court's discretionary jurisdiction. Jackie Forchin filed a cross-notice to invoke discretionary jurisdiction on November 8, 1995. On March 13, 1996, this Court accepted jurisdiction of the Notice and Cross-Notice and dispensed with oral argument.

SUMMARY OF ARGUMENT

This Court's decision in *State v. Jennings*, 666 So. 2d 131 (Fla. 1995) does not establish that as a matter of law, Jackie Forchin committed the offense of tampering with evidence because he knew that the officers were investigating him when he swallowed the plastic bag containing the white substance. *Jennings* simply establishes that Forchin may be found to have committed the offense of tampering with evidence if the trial court applies the principles established by this Court in *Jennings* and finds that Forchin did know that the officers were investigating him when he swallowed the plastic bag containing the white substance. Accordingly, the proper remedy in this case is to remand the case to the trial court for a new probation violation hearing at which the trial judge will determine if the element of knowledge is established as required by *Jennings*.

Mr. Forchin's failure to appear at the probation office on November 8, 1994 is not a valid basis for revocation of his probation, as the evidence presented in the trial court did not establish that Forchin's failure to appear was a willful and substantial violation of probation. However inept and negligent Mr. Forchin's conduct in failing to arrive at the probation office at 4:00 P.M. on November 8, 1994 because of a rain storm, his repeated visits to the probation office on the very next day establish that he did not willfully and deliberately miss the appointment on the previous day. Under these circumstances, Mr. Forchin's failure to arrive at the probation office cannot provide a basis to support the orders revoking probation and imposing the statutory maximum sentence of five years' imprisonment.

ARGUMENT

I.

THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR A NEW PROBATION VIOLATION HEARING, WITH DIRECTIONS THAT THE TRIAL JUDGE APPLY THE PRINCIPLES ESTABLISHED BY THIS COURT IN *STATE v. JENNINGS*, 666 So. 2d 131 (Fla. 1995) TO DETERMINE IF THE ELEMENT OF KNOWLEDGE IS ESTABLISHED.

Respondent/Cross-Petitioner acknowledges that pursuant to this Court's decision in *State v. Jennings*, 666 So. 2d 131 (Fla. 1995), the Third District Court of Appeal erred in the present case in ruling that as a matter of law Jackie Forchin did not commit the offense of tampering with physical evidence because Forchin did not know that the officers were investigating him when he swallowed the plastic bag containing the white substance. However, respondent/cross-petitioner disagrees with the State's claim that the revocation order must be reinstated because as a matter of law Forchin did commit the offense of tampering with the evidence when he swallowed the plastic bag containing the white substance. The proper remedy in this case is to remand the case to the trial court for a new probation violation hearing at which the trial judge will determine if the element of knowledge is established as required by *Jennings*.

In its brief on the merits filed in this case, the State of Florida claims that pursuant to *Jennings*, the actions of a police officer in shouting "police" as the officer approaches a suspect *mandate* a conviction for tampering with physical evidence:

> *As a matter of law*, given the fact that the police officers identified themselves and Forchin was on notice, his attempt to impair the

> contraband by swallowing it *constitutes* tampering with evidence and the trial court was correct in revoking his probation on the basis of the new substantive crime. *State v. Jennings*, 666 So. 2d at 134.

(Brief of Petitioner on the Merits at 8). This assertion is based on a misinterpretation of this Court's decision in *Jennings*.

In *Jennings*, the trial judge had granted a pretrial sworn motion to dismiss filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), concluding that the undisputed facts did not establish a prima facie case of guilt of tampering with physical evidence. The issue decided by this Court in *Jennings* is whether a charge of tampering with physical evidence *must* be dismissed because *as a matter of law*, the actions of a police officer in shouting "police" as the officer approaches a suspect can never be sufficient to establish that the suspect knew an investigation was about to be instituted. This Court resolved this issue by concluding that it is for the trier of fact to decide whether such evidence establishes the element of knowledge that an investigation was about to be instituted, and therefore it is error to dismiss a charge of tampering with physical evidence pretrial:

> Reasonable persons could differ as to whether Jennings possessed the requisite knowledge under section 918.13. Consequently, we cannot say that the evidence is such that a trier of fact would be precluded, as a matter of law, from finding that Jennings knew an investigation was about to be commenced when he swallowed the alleged contraband.
>
> Accordingly, we quash the decision below and remand for further proceedings.

State v. Jennings, supra, 666 So. 2d at 131, 134.

Thus, this Court's decision in *Jennings* does not establish that as a matter of law, Jackie Forchin committed the offense of tampering with evidence because he knew that the officers were investigating him when he swallowed the plastic bag containing the white substance. *Jennings* simply establishes that Forchin may be found to have committed the

offense of tampering with evidence if the trial court applies the principles established by this Court in *Jennings* and finds that Forchin did know that the officers were investigating him when he swallowed the plastic bag containing the white substance. Accordingly, the proper remedy in this case is to remand the case to the trial court for a new probation violation hearing at which the trial judge will determine if the element of knowledge is established as required by *Jennings*.

II.

THE TRIAL COURT ERRED IN REVOKING THE DEFENDANT'S PROBATION BASED ON HIS FAILURE TO FOLLOW THE INSTRUCTIONS OF HIS PROBATION OFFICER WHERE THE EVIDENCE AT THE PROBATION VIOLATION HEARING FAILED TO ESTABLISH THE WILLFUL AND SUBSTANTIAL NATURE OF SUCH VIOLATION.

The level of proof of a violation of probation which is required to support a revocation of probation is firmly established. Revocation of probation is appropriate when a probationer violates "his probation . . . in a material respect." Section 948.06(3), Florida Statutes (1995). To establish a violation of probation which supports a revocation of probation, the prosecution must prove by a preponderance of the evidence that a probationer willfully violated a substantial condition of probation. *Thomas v. State*, 672 So. 2d 587 (Fla. 4th DCA 1996); *Van Wagner v. State*, 21 Fla. L. Weekly D870 (Fla. 1st DCA April 12, 1996); *Washington v. State*, 667 So. 2d 255 (Fla. 1st DCA 1995); *Salzano v. State*, 664 So. 2d 23 (Fla. 2d DCA 1995); *Carter v. State*, 659 So. 2d 453 (Fla. 4th DCA 1995); *Rainer v. State*, 657 So. 2d 1230 (Fla. 4th DCA 1995); *Bell v. State*, 643 So. 2d 674 (Fla. 1st DCA 1994); *Thorpe v. State*, 642 So. 2d 629 (Fla. 1st DCA 1994); *Green v. State*, 620 So. 2d 1126 (Fla. 1st DCA 1993); *White v. State*, 619 So. 2d 429 (Fla. 1st DCA), *review denied*, 626 So. 2d 208 (Fla. 1993); *Stevens v. State*, 599 So. 2d 254 (Fla. 3d DCA 1992); *Kolovrat v. State*, 574 So. 2d 294 (Fla. 5th DCA 1991); *Young v. State*, 566 So. 2d 69 (Fla. 2d DCA 1990); *Drayton v. State*, 490 So. 2d 229 (Fla. 2d DCA 1986).

Where a probationer makes reasonable efforts to comply with a condition of probation, violation of the condition cannot be deemed "willful." *Thomas; Thorpe*; *Stevens*; *Jacobsen v. State*, 536 So. 2d 373 (Fla. 2d DCA 1988); *Shaw v. State*, 391 So. 2d 754 (Fla. 5th DCA 1980); *Gardner v. State*, 365 So. 2d 1053 (Fla. 4th DCA 1978). The decisional law in Florida is replete with cases which hold that a probation revocation order was erroneously entered because the probationer had made reasonable efforts to comply with a condition of probation, and therefore the violation of the condition could not be deemed willful.

In *Thomas v. State*, *supra*, the defendant was alleged to have violated his probation by failing to successfully complete a six-month residential treatment program at Fern House. The defendant was discharged from Fern House less than three weeks after commencing the program. He was discharged based on his failure to return to Fern House one night past curfew because his vehicle had a flat tire. He did not telephone Fern House directly about his predicament because its policy was not to accept collect calls and he had spent all his money on gas for the car. He did call both his mother and father collect and had them notify the appropriate personnel at Fern House of the situation. However, pursuant to the rules at Fern House, a resident not making contact with Fern House by 11:00 P.M. and not receiving permission to stay out would be automatically dismissed.

On appeal, the court held that the defendant's probation could not be violated based on the defendant's violation of the curfew, because "while defendant's attempts to comply may have been inept or negligent, there is no evidence to support a conclusion that defendant's failure to return to Fern House on time was the product of a knowing and willful act by the probationer." 21 FLW at D993.

In *Stevens v. State*, *supra,* the defendant was placed on probation for several serious sexually related charges, on the condition that he successfully complete a treatment program. The trial court warned the defendant that he would be required to adhere scrupulously to the program's requirements and that even a minor violation might be cause for revocation. The defendant was subsequently terminated from the program because of his absence from a group meeting. At the probation revocation hearing, the defendant, supported by several witnesses, testified that he had attempted to attend the meeting, but was unable to do so because of a sequence of events which included the breakdown of the car in which he was riding. The defendant and his witnesses also stated that they had reached the program by telephone but were unable to secure an excuse for the defendant's absence. The State did not rebut the defendant's evidence, and the trial judge indicated that he believed the testimony. The judge revoked the probation, however, because he found that the defendant should have done more to insure his presence at the meeting in light of the court's previous admonitions.

On appeal, the district court found that the defendant's failure to attend the required meeting was not a valid basis for revocation of the defendant's probation:

> However inept and negligent his conduct, the record does not support the conclusion that Stevens willfully or deliberately missed the meeting. *See Jacobsen v. State*, 536 So. 2d 373 (Fla. 2d DCA 1988)(no willful violation of condition that defendant leave the county by a specific time when he made reasonable efforts to comply by purchasing a bus ticket, but was unable to depart because he was hospitalized for injuries received when robbed); *Shaw v. State*, 391 So. 2d 754 (Fla. 5th DCA 1980)(no willful violation of condition that defendant personally deliver a report when, although the report was timely completed, it was not delivered due to defendant's lack of transportation and subsequent incarceration for an unrelated offense);

> *Gardner v. State*, 365 So. 2d 1053 (Fla. 4th DCA 1978)(no willful violation of condition that defendant leave Florida when he attempted to do so, but his car broke down and he was unsuccessful in repairing it before arrest).
>
> Under the circumstances, the court could well determine, as it obviously did, that even the most technical violation of the terms of probation would justify its revocation. *See Little v. State*, 519 So. 2d 1139 (Fla. 2d DCA 1988), *review denied*, 528 So.2d 1182 (Fla.1988); *May v. State*, 472 So. 2d 890 (Fla. 4th DCA 1985); *Jess v. State*, 384 So. 2d 328 (Fla. 3d DCA 1980). It is required, however, that any such deviation be the product of a knowing and willful act by the probationer. Since there was no such evidence below, the order, judgment and sentence under review are reversed and the cause remanded with directions to dismiss the proceeding for probation violation and for further proceedings consistent herewith.

Stevens, *supra*, 599 So. 2d at 255.

In *Jacobsen v. State*, *supra*, a condition of the defendant's probation required him to leave Lee County on November 6, 1987 and contact the probation office in Orlando no later than November 13, 1987. The defendant was released from jail at 9:10 a.m. on November 6th, and after cashing a check he proceeded to the Trailways bus station. When he arrived at the bus station he observed a sign which stated the only bus to Orlando left at 8:15 a.m. Other departures for Orlando were not posted on the sign because they were not direct trips. The defendant asked a Trailways ticket agent whether the 8:15 a.m. bus was the only one to Orlando, and the agent responded affirmatively. In fact, Greyhound had two buses leaving for Orlando before noon. However, the defendant never checked with Greyhound. He simply purchased a ticket for the 8:15 bus leaving the following morning, and left the bus station. The last event the defendant remembered that evening was leaving a restaurant. The next morning, he awakened with his hands and

legs bound together. He had been stripped of his money, wallet, and identification and had suffered head injuries. He was taken to the hospital where he remained for the next nine days.

On appeal, the order revoking the defendant's probation based on his failure to leave the county was reversed:

> Under the facts presented at the hearing, it cannot be said that his violation was wilful. The evidence adduced at the violation hearing reflects a good-faith effort by Jacobsen to comply with the pronouncement of the trial court. The events which ensued to prevent his departure were not within his control. Where a defendant makes reasonable efforts to comply with the conditions of probation, his failure to so comply may not be wilful.

Jacobsen, supra, 536 So. 2d at 375.

In *Shaw v. State*, *supra*, the defendant's probation officer had directed him to personally deliver a report to the probation office in Ocoee by June 5, 1979. It was undisputed that the defendant had completed the report in time. However, the defendant lived in Orlando, and he could not deliver the report because he had no transportation. The defendant made no efforts to deliver the report between June 5th and June 13th. On June 13th, the defendant was sentenced by the federal court to a prison term. On appeal, the court held that the defendant's failure to submit the report due on June 5th could not be used to revoke his probation because such failure had not been willful in that the defendant had made reasonable efforts to comply with that condition of his probation.

In *Washington v. State*, *supra*, an affidavit of violation of probation was filed alleging that the defendant had violated his probation because he had been terminated from a counseling program for poor attendance, he had failed to pay the program's required fees, and he had engaged in disruptive behavior. On appeal from the order revoking the

defendant's probation based on these violations, the appellate court found that the only violation established at the revocation hearing was the defendant's failure to attend a single counseling session. The court then held such a violation could not by itself support the revocation order:

> The trial court could find a violation of probation only for infractions which occurred during the period of probation. *A single missed counseling session does not demonstrate willful and substantial noncompliance with a condition of probation.*

Washington, supra, 667 So. 2d at 257.

The decision of the district court of appeal in the present case cannot be squared with either the well-established general principles governing revocation of probation, or the results in *Thomas, Jacobsen, Gardner, Shaw* and *Washington*. In the present case, the State failed to establish that Mr. Forchin's failure to appear at the probation office on November 8, 1994 constituted a willful and substantial violation of his probation. Although it was undisputed that Mr. Forchin had not appeared at the probation office on November 8, 1994, the State did not rebut Mr. Forchin's testimony that (1) a rainstorm on November 8, 1994 kept him from getting to the probation office on that date; (2) he reported to the probation office three times on the very next day, and made sure that each visit was noted in the probation office records; and (3) his incarceration on November 10, 1994 prevented him from thereafter reporting to the probation office (R. 86-88). Indeed, the court made a specific finding that the State had failed to elicit sufficient evidence to establish that Mr. Forchin had not reported to the probation office on November 9, 1994 (R. 98).

To support its finding that Mr. Forchin's failure to appear at the probation office on November 8th was a willful and substantial violation of probation, the district court of appeal relied on the following evidence:

> The probation officer had given Forchin the opportunity to appear on any date from November 1st through November 8th. Forchin telephoned his probation officer on November 1st with an excuse for his non-appearance on that date. There was no evidence that

> Forchin thereafter ever attempted to appear before his probation officer from November 1st through the 8th. Although Forchin testified below that a heavy rainstorm precluded his appearance on the 8th, the trial court rejected this contention when it noted that the weather had not precluded the probation officer from being present in the office on that date.

Forchin v. State, 660 So. 2d 763, 765 (Fla. 3d DCA 1995).

The district court's version of the events which transpired between November 1st and November 8th is directly contrary to the undisputed evidence presented at the probation violation hearing. Forchin did not "telephone[] his probation officer on November 1st with an excuse for his non-appearance on that date." Forchin's probation officer specifically testified at the hearing that Mr. Forchin reported in person to her on November 1, 1994:

> Q. When did you talk to Mr. Forchin?
>
> A. 11/1
>
> Q. And was this by telephone?
>
> A. No. He came into the office.
>
> Q. Did you call him to come in or did he come in on his own?
>
> A. He came in on his own.

(R. 75).

Similarly unsupported by the record is the district court's statement that Forchin's probation officer "had given Forchin the opportunity to appear on any date from November 1st through November 8th." Forchin's probation officer specifically testified that when Forchin appeared at the probation office on November 1, she told Forchin that he did not have to return to the office until November 8th at 4:00 p.m.:

> Q. And on November 1st he indicated to you that his child was sick; is that correct?

A. Uh-huh. Yes, it is.

Q. Very sick?

A. He stated he had to take --

[PROSECUTOR]: Objection. Hearsay.

THE WITNESS: -- take him to the hospital.

THE COURT: Overruled.

BY DEFENSE COUNSEL:

Q. I'm sorry?

A. I'm reading from my case sheet. Stated he had to take his son immediately to the hospital. Appointment made for subject on 11/8/94 at 4 p.m.

(R. 75-76).

Thus, the district court's finding in this case of a willful and substantial violation of probation is premised on a version of the facts which is directly contrary to the facts established at the hearing in the trial court. The willfulness and substantial nature of Mr. Forchin's admitted failure to appear for his appointment on November 8th are significantly lessened when the failure to appear is weighed without consideration of a prior failure to appear on November 1st and a subsequent failure to meet a requirement that he appear at the office between November 1st and November 8th.

In addition to its reliance on an inaccurate version of the evidence presented at the probation violation hearing, the district court also erroneously rejected Forchin's explanation that a heavy rainstorm precluded his appearance at the probation office on the 8th. The district court rejected this explanation because the weather had not precluded the probation officer from being present in the office on that date. However, it is undisputed in this case that Mr. Forchin's appointment at the probation office was at 4:00 p.m. The

fact that the probation officer had been able to get to work in the morning does not in any refute Mr. Forchin's claim that he was precluded from getting to that same office at 4:00 p.m. due to a heavy rainstorm at that time. The appearance of heavy thunderstorms in the late afternoon hours is certainly not an infrequent event in South Florida.

However inept and negligent Mr. Forchin's conduct in failing to arrive at the probation office on November 8, 1994 because of a rain storm, his repeated visits to the probation office on the very next day establish that he did not willfully and deliberately miss the appointment on the previous day. Under these circumstances, Mr. Forchin's failure to arrive at the probation office cannot provide a basis to support the orders revoking probation and imposing the statutory maximum sentence of five years' imprisonment.

CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent/cross-petitioner respectfully requests this Court to (1) quash that portion of the decision of the district court of appeal which upholds the revocation of Mr. Forchin's probation based on his failure to appear at the probation office; and (2) direct the district court of appeal to remand the case to the trial court for a new probation violation hearing based solely on the allegation that Mr. Forchin committed the offense of tampering with evidence.

Respectfully submitted,

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BY: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101, this 4th day of June, 1996.

HOWARD K. BLUMBERG
Assistant Public Defender

Appendix

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 95-480

JACKIE FORCHIN,

Appellant,

vs

MOTION FOR REHEARING

THE STATE OF FLORIDA,

Appellee.

_____/

Appellant, Jackie Forchin, pursuant to Rule 9.330, Florida Rules of Appellate Procedure, moves for rehearing in the above-styled cause, and in support of the motion states the following:

1. On September 6, 1995, this Court rendered its decision affirming the trial court's order revoking Mr. Forchin's probation. The revocation order was affirmed based only on the finding that Mr. Forchin had violated his probation by failing to report to his probation officer on November 8, 1994 as directed (A. 1-4).[1] This court found that the greater weight of the evidence supported the trial court's determination that Forchin's failure to present himself to his probation officer on November 8 was willful and substantial in nature to support the revocation.

2. In the decision rendered by this court, the following evidence is cited in support of the finding that the greater weight of the evidence supported the revocation order:

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[1]In this motion, the symbol "A" will be used to designate this Court's decision which is attached to this motion.

> The probation officer had given Forchin the opportunity to appear on any date from November 1st through November 8th. Forchin telephoned his probation officer on November 1st with an excuse for his non-appearance on that date. There was no evidence that Forchin thereafter ever attempted to appear before his probation officer from November 1st through the 8th.

(A. 4).

3. Appellant respectfully submits that this court has overlooked or misapprehended the fact that the evidence presented at the probation revocation hearing was undisputed that Jackie Forchin *did* report to the probation office on November 1st.[2] At the hearing below, Mr. Forchin's probation officer testified that

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[2]This misapprehension may have been the result of a mischaracterization of the undisputed evidence by the trial judge. In finding that Mr. Forchin violated his probation, the trial judge stated:

> She [the probation officer] gave him from the 1st to the 8th. He called on the 1st and had an excuse for not coming in.

(R. 169). In its brief filed in this case, the State relies on this statement by the trial judge to support its argument for affirmance:

> Additionally, the trial court noted to the satisfaction of its conscience, that the probation officer had given the Defendant from November 1st to the 8th to report and he had made excuses on the [sic] for failing to report on the 1st . . .

Brief of appellee at 10. As demonstrated *infra*, the undisputed evidence at the revocation hearing established that Mr. Forchin did report on the 1st. The initial brief of appellant sets forth that evidence in the statement of the case and facts:

> During the jury trial, the court also heard testimony concerning the alleged violations of probation in Circuit Court Case No. 93-11763 (R. 67-98). Probation officer Lydia Martinez testified that Jackie Forchin reported to her on November 1, 1994 (R. 68, 75). At that time, she explained the conditions of probation to Mr. Forchin, and told him to report back to the probation office on November 8, 1994 (R. 68-69, 76, 77).

Brief of appellant at 4.

Mr. Forchin reported to her at the probation office on November 1, 1994:

Q. When did you talk to Mr. Forchin?

A. 11/1

Q. And this was by telephone?

A. No. He came into the office.

Q. Did you call him to come in or did he come in on his own?

A. He came on his own.

(R. 75).

4. Thus, this court's decision in the present case is premised on a version of the facts directly contrary to the set of facts established at the hearing in the court below. The facts in question directly relate to the central issue decided by this court --- whether Mr. Forchin's failure to appear on November 8 was a willful and substantial violation of probation. The willfulness and substantial nature of Mr. Forchin's admitted failure to appear for his appointment on November 8 are significantly lessened when that failure to appear is weighed without consideration of a prior failure to appear on November 1st and a subsequent failure to attempt to appear at the office between November 1st and November 8th. As Mr. Forchin duly reported to the probation office on November 1st, and as he was not required to report back to the office until November 8th, his single missed appointment on November 8th does not demonstrate the willful and substantial non-compliance with a condition of probation which is required to support the revocation order and five-year sentence of imprisonment.

WHEREFORE, the appellant respectfully requests this Court to grant rehearing, withdraw its decision rendered September 6, 1995, and reverse the revocation order and sentence of imprisonment.

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 21st day of September, 1995.

Respectfully submitted,

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By: _____
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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, A.D. 1995

JACKIE FORCHIN,	**	
Appellant,	**	
vs.	**	CASE NO. 95-480
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed September 6, 1995.

An appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and LEVY and GREEN, JJ.

PER CURIAM.

Jackie Forchin appeals an order revoking his probation based upon his alleged commission of tampering with physical evidence

while on probation and failure to report to his probation officer as directed. Based upon this court's decision of State v. Jennings, 647 So. 2d 294 (Fla. 3d DCA 1994), rev. granted, No. 84, 909 (Fla. May 23, 1995), we find that the tampering charge could not legally serve as a basis for the revocation but Forchin's willful failure to report as directed could. Accordingly, we affirm.

Forchin was placed on probation in 1993 following a conviction for possession of a controlled substance.[1] As a special condition of probation, the court ordered that he receive drug treatment on an outpatient basis. While Forchin was still on probation, the State filed an affidavit alleging that Forchin had committed the criminal offense of tampering with physical evidence on or about November 10, 1994 and that Forchin failed to report to his probation officer two days earlier on November 8, 1994 for a referral to an outpatient drug program.

The State's evidence in support of the tampering charge was essentially that several police officers observed Forchin exchange money for a small plastic bag containing a white substance while Forchin stood in an enclosed bus bench. As Forchin walked away from the bus bench toward a grassy median in the street, two officers got out of unmarked cars and identified themselves as police to Forchin. Forchin then swallowed the plastic bag

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[1] Forchin was also sentenced to serve 364 days in jail.

containing the white substance. After a brief struggle wherein the officers were unsuccessful in their attempts to get Forchin to expel the plastic bag, Forchin was arrested for tampering with physical evidence and resisting arrest without violence.[2]

Under virtually indistinguishable facts, this court in State v. Jennings, held that a criminal defendant had not tampered with evidence when he swallowed cocaine rocks after an officer shouted "police" where the defendant was neither under arrest at the time nor did he know that a law enforcement officer was about to instigate an investigation. As in Jennings, Forchin was neither under arrest nor did he know that the officers were investigating him when he swallowed the plastic bag containing the white substance. Thus, as a matter of law, we find that the tampering charge could not serve as a basis for the revocation of Forchin's probation.

As to Forchin's failure to present himself to his probation officer on November 8, we do find that the greater weight of the evidence supported the trial court's determination that Forchin's conduct was willful and substantial in nature to support the revocation. Green v. State, 620 So. 2d 1126, 1129 (Fla. 1st DCA 1993); Steiner v. State, 604 So. 2d 1265, 1267 (Fla. 4th DCA 1992).

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[2] Prior to the probation violation hearing, Forchin was tried by a jury both on the tampering charge and on a charge of resisting an officer without violence. The jury failed to reached a verdict on the tampering charge but acquitted Forchin on the resisting charge.

The probation officer had given Forchin the opportunity to appear on any date from November 1st through November 8th. Forchin telephoned his probation officer on November 1st with an excuse for his non-appearance on that date. There was no evidence that Forchin thereafter ever attempted to appear before his probation officer from November 1st through the 8th. Although Forchin testified below that a heavy rainstorm precluded his appearance on the 8th, the trial court rejected this contention when it noted that the weather had not precluded the probation officer from being present in the office on that date. Since there is ample evidence in the record to support these findings, the trial court's resolution of the evidence will not be disturbed on appeal. See Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982); State v. Guerra, 455 So. 2d 1046, 1048 (Fla. 3d DCA 1984), rev. denied, 461 So. 2d 114 (Fla. 1985); State v. Garcia, 431 So. 2d 651 (Fla. 3d DCA 1983).

Affirmed.