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IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,789

THE STATE OF FLORIDA,

Petitioner/Cross-Respondent,

-vs-

JACKIE FORCHIN,

Respondent/Cross-Petitioner.

ON PETITION FOR DISCRETIONARY JURISDICTION

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner was the Appellee in the Third District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Respondent was the Appellant in the District Court and the Defendant in the trial court.

In this brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent, Jackie Forchin was placed on probation in 1993 following a conviction for possession of a controlled substance. As a special condition of probation, the court ordered that he receive drug treatment on an outpatient basis. On November 10, 1994, during the time he was serving his probation, several police officers observed Forchin exchange money for a small plastic bag containing a white substance while he 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 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.

Forchin was tried by a jury on both charges. The jury acquitted Forchin on the resisting without violence charge, but the jury failed to reach a verdict on the tampering charge. Thereafter, the trial court held a hearing on Forchin's violation of probation in the 1993 case and revoked his probation based on his commission of the substantive crime of tampering with physical evidence and failure to report to his probation officer as directed.

On appeal, Respondent argued that the evidence was legally insufficient to establish that he committed the offense of tampering with evidence where he was neither under arrest nor did he know that a law enforcement officer was about to instigate an investigation at the time he swallowed the plastic bag containing an unknown white substance.

The State argued that the purpose of a revocation hearing is to satisfy the conscience of the court about whether the conditions of probation have been violated and to afford the accused an opportunity to be heard, and that moreover, it is irrelevant in

such a proceeding that a defendant is acquitted of the criminal charge, Recio v. State, 605 So. 2d 553, 554 (Fla. 3d DCA 1992), nor is a formal conviction of a crime essential to enable the trial court to revoke an order of probation where the proof is established by a preponderance of the evidence. Adams v. State, 559 So. 2d 436, 438 (Fla. 1st DCA 1990); Bernhardt v. State, 288 So. 2d 490, 501 (Fla. 1974).

The Third District Court of Appeal found as a matter of law that the tampering with evidence charge could not serve as a basis for the revocation of Forchin's probation, although the district court sustained the trial court's revocation of probation on grounds that Forchin's conduct in failing to present himself to his probation officer on the designated date was willful and substantial by the greater weight of the evidence.

In a petition for rehearing and/or certification, the State argued that the Third District had improperly relied on its holding in State v. Jennings, 647 So. 2d 294 (Fla. 3d DCA 1994) to determine that 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, misapplying the higher standard of proof beyond a reasonable doubt to obtain a conviction to the issue in the present case which was proof by a

preponderance of the evidence or the greater weight of the evidence to support revocation of probation. The State asked that the Third District Court of Appeal certify the question:

> WHETHER SWALLOWING SUSPECTED COCAINE ROCKS IN THE PRESENCE OF THE ARRESTING OFFICERS AFTER THE DEFENDANT HAS BEEN ADVISED THAT THEY ARE IN FACT POLICE OFFICERS BUT BEFORE THE OFFICERS ARE ABLE TO EXECUTE AN ARREST, CONSTITUTES TAMPERING WITH PHYSICAL EVIDENCE?

Rehearing/Certification was denied onOctober 11, 1995. Notice to invoke the jurisdiction of this Honorable Court was filed on October 26, 1995.

QUESTIONS PRESENTED

I

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THIS COURT I N STATE v. JENNINGS, 666 So. 2d 131 (FLA. 1995)?

II

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT COURT'S OPINION IN WASHINGTON V. STATE, 667 So. 2d 255 (Fla. 1st DCA 1995)?

SUMMARY OF THE ARGUMENT

The instant opinion is in express and direct conflict with State v. Jennings, 666 So. 2d 131 (Fla. 1995) in which this Court held that swallowing an object constitutes altering, destroying, concealing, or removing a "thing" within the meaning of the statute proscribing tampering with evidence and the trier of fact could convict the defendant if it found that defendant knew an investigation was about to be commenced when he swallowed the alleged contraband.

The instant opinion is not in express and direct conflict with Washington v. State, 667 So. 2d 255 (Fla. 1st DCA 1995) in which the First District held that the trial court's finding that the defendant willfully failed to comply with the conditions of probation which required him to submit to recommended counseling, was not supported by sufficient evidence where the defendant missed only a single counseling session and was not allowed to continue thereafter.

ARGUMENT I

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN STATE v. JENNINGS, 666 So. 2d 131 (FLA. 1995).

In State v. Jennings, 666 So. 2d 131 (Fla. 1995), this Court held that the trial court erred in granting the defendant's motion to dismiss on grounds that he was not under arrest and did not know an investigation was about to be initiated, where swallowing an object clearly constitutes altering, destroying, concealing, or removing a "thing" within the meaning of section 918.13 and where the officers announced their presence by shouting "police" the trier of fact should not 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.

The Third District Court of Appeal in the instant case found as a matter of law that since 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, as a matter of law, the tampering with evidence charge could not serve as a basis for the revocation of his probation. This ruling expressly and directly conflicts with this Court's decision in State v. Jennings.

When the officers who had Forchin under surveillance got out of their unmarked police cars and identified themselves to Forchin, he was on notice that an investigation was underway. Moreover, another officer, Payne, was behind Forchin with a flashing blue light on his dash. It was after the officers presented themselves that Forchin threw the baggie into his mouth. A struggle ensued in which the officers unsuccessfully attempted to force him to expel the contraband, and he told them "It's gone." Notice of an impending investigation is as clear on the face of this record, as in the Jennings case in which the officer shouted "police" as he approached the defendant. 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.

Particularly where the burden of proof is by a preponderance of the evidence, the trial court, in its role as trier of fact at the revocation hearing, could reasonably conclude that Forchin knew that the police officers were initiating an investigation into the contraband which he sought to conceal from them by swallowing. Therefore, the Third District Court of Appeal improperly held that

as a matter of law, the tampering charge could not serve as a basis for the revocation of Forchin's probation.

ARGUMENT II

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FIRST DISTRICT COURT'S OPINION IN WASHINGTON V. STATE, 667 So. 2d 255 (FLA. 1st DCA 1995).

The Third District Court properly found that Forchin's failure to present himself to his probation officer on November 8 was a willful and substantial violation of the terms of his probation sufficient to support revocation. In determining that the violation was willful and substantial the Third District noted that the probation officer had given Forchin the opportunity to appear on any date from November 1st to 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 at his violation of probation hearing that a heavy rainstorm precluded his appearance on the 8th, the trial court rejected that contention noting that the weather had not precluded the probation officer from being present in the office on that date.

The facts in this case differ considerably from the facts in Washington v. State in that Forchin not only missed the initial

meeting with his probation officer on November 1st at which he was to be referred to an outpatient drug program as part of the conditions of his probation, he failed to appear on any one of the following seven days that his probation officer had left open for him to come in and get a referral in order to commence his outpatient drug program. Essentially he did not miss one meeting, he missed eight possible meetings that were available to him for commencement of his program. Nor was he precluded from meeting with his probation officer in the following seven days after he missed the first meeting, as was the case in Washington v. State. Washington v. State, 667 So. 2d 255 (Fla. 1st DCA 1995).

In that case the First District held that the trial court's finding that the defendant willfully failed to comply with the conditions of probation which required him to submit to recommended counseling, was not supported by sufficient evidence where the defendant missed only a single counseling session and was not allowed to continue thereafter. Washington's probation was revoked for violating the counseling condition by being terminated from the counseling program for poor attendance, failure to pay the required fees and disruptive behavior. However, the First District determined that the record evidence supported only a finding that after missing a single counseling session during the probationary

period, Washington was not allowed to continue the program. In addition to infractions during the probationary period, Washington was found to have been terminated from the counseling program for transgressions which occurred during his term of community control. The First District found that the trial court was without jurisdiction to consider those transgressions and could only consider the infractions which occurred during the probationary period, and a single missed counseling session was not sufficient to demonstrate willful and substantial noncompliance with a condition of probation. Washington v. State, 667 So. 2d at 255-257.

There is no conflict between these decision under the facts in each case. Washington was attending a program and missed one of the meetings but was terminated for conduct he had engaged in during his period of community control. Forchin was to begin his probation by meeting with his probation officer and being referred to an outpatient drug program. He did not comply with the incipient requirement of meeting with his probation officer even though he had eight days in which to organize and comply with the terms and conditions of his probation. In fact, he was arrested on the tampering with evidence charge on November 10 without having met at any time between November 1st and 8th as he was instructed

to do. Forchin had ample opportunity to comply with the requirements of his probation and that he failed to appear at any time in the eight days open to him constitutes a willful and substantial disregard of the term of his probation. The Third District was correct in so finding and affirming the trial court's order revoking his probation on those grounds.

CONCLUSION

WHEREFORE, based upon the foregoing, Petitioner respectfully requests that this Court reverse the district court's decision with directions to reinstate the trial court's order revoking Forchin's probation based on his commission of the crime of tampering with evidence.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **HOWARD K. BLUMBERG,** Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit, 1320 N.W. 14th Street, Miami, Florida 33125 on this 17 day of May 1996.

CONSUELO MAINGOT
Assistant Attorney General