ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA,

KEVIN YOUNG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 88,916
4th DCA CASE NO. 95-1815

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S BRIEF ON THE MERITS

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510
MYRA J. FRIED
Assistant Attorney General
Florida Bar No.: 0879487
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401
(561) 688-7759
Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, the State of Florida, was the Appellee in the Fourth District Court of Appeal and the Prosecution in the Circuit Court. This cause of action comes before this Court on a petition to review this appeal on the basis of a certified question which the Fourth District Court of Appeal certified as being of great public importance.

> IS A DEFENDANT ENTITLED TO CREDIT FOR TIME SPENT ON PROBATION/COMMUNITY CONTROL WHEN A NEW SENTENCE OF INCARCERATION IS IMPOSED FOR VIOLATION OF THE PROBATIONARY PORTION OF A SPLIT SENTENCE AND THE NEW PERIOD OF INCARCERATION, WHEN COMBINED WITH THE PROBATION/COMMUNITY CONTROL PREVIOUSLY SERVED, EXCEEDS THE STATUTORY MAXIMUM FOR THE CRIME CHARGED?

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

The following symbols will be used:

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's Statement of the Case and Facts as a substantially accurate reflection of the proceedings below but would add the following for this Court's consideration:

1. On page 2 of Petitioner's brief, Petitioner makes reference to certain clerical errors made by the court clerk in some of the sentencing documents. Respondent acknowledged in its Answer Brief before the Fourth District Court of Appeal that the court clerk apparently transposed the case numbers for the armed robbery with a deadly weapon charge and the aggravated assault charge on the sentencing documents. (R 63-66, 39-42) Respondent also related to the Fourth District that the appellate court could modify the scrivenor's error without remanding the case back to the trial court. See Warren v. State, 561 So. 2d 36 (Fla. 5th DCA 1990); Brister v. State, 562 So. 2d 452 (Fla. 5th DCA 1990). The Fourth District Court of Appeal agreed with Respondent, and in its opinion stated that the scrivenor's error was corrected by the appellate court, without remanding the case back to the lower court. See Young v. State, 21 Fla. L. Weekly D1734 (Fla. 4th DCA July 31, 1996).

SUMMARY OF ARGUMENT

Respondent contends that the trial court did not err when it gave the Petitioner 724 days credit for time served. Since Petitioner was being sentenced to a term of imprisonment upon revocation of community control, the trial court was not required to give Petitioner any credit for the time Petitioner spent on community control against the new incarcerative sentence. This Court should answer the certified question in the negative, thus affirming Petitioner's conviction and sentence.

ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED ALL OF THE CREDIT FOR TIME SERVED ON COMMUNITY CONTROL WHICH WAS LEGALLY ALLOWED IN APPELLANT'S CASE.

Originally, Petitioner was convicted and sentenced in two cases, one for armed robbery (Case No. 92-22088CF10A), and one for aggravated assault (Case No. 92-22435CF10A). (R 24-25, 44-45) Petitioner's original sentence was 2½ years incarceration followed by two years of community control (Case No. 92-22088CFA), and 2½ years incarceration followed by two years of community control (Case No. 92-22435CFA), to run concurrently with the first conviction. (R 27-31, 48-52)

While Petitioner was on community control, it was determined that Petitioner had violated his community control. A hearing was held and the trial court revoked Petitioner's community control. The trial court then sentenced Petitioner to 5½ years incarceration on the armed robbery, to run concurrently with the aggravated assault conviction. (R 21-22) Petitioner received 724 days credit for time served on the armed robbery conviction. (R 21-22) The trial court also sentenced Petitioner to five years state prison on the aggravated assault charge, with credit for time served of 724 days. (R 22) Petitioner alleges on appeal that the trial court

did not grant him all of the credit for time served while on community control. Respondent contends that the trial court was allowed to sentence Petitioner to any sentence to which he could have received on the original sentences; thus, the trial court was not required to credit Petitioner for time spent on community control when sentencing Petitioner for violating his community control.

The Fourth District Court of Appeal affirmed the lower court's ruling in the instant case, agreeing with Respondent that when a defendant's community control is revoked, the defendant may be sentenced to a term of incarceration which, when added to the time previously served on community control, exceeds the statutory maximum for the convicted offense. See Young v. State, 21 Fla. L. Weekly D1734 (Fla. 4th DCA July 31, 1996).

The Fourth District held that:

> Fatal to appellant's argument is the incorrect foundational premise that the time previously served on community control may be taken into account in determining whether the newly imposed term of incarceration exceeds the statutory maximum.
>
> We agree with the state that Young's sentence must be approved because the trial court was not required to give Young credit for time served on community control against his new sentence of incarceration. See State v. Holmes, 360 So. 2d 380, 383 (Fla. 1978), holding limited by, State v. Summers, 642 So. 2d 742 (Fla. 1994). See also

> §948.06(1), Fla. Stat. (1993)(upon revocation of probation the court may "impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control") and §948.06(2), Fla. Stat. (1993)(upon revocation of probation "[n]o part of the time that the defendant is on probation or in community control shall be considered as part of any time that he shall be sentenced to serve."). Taken together, these statutory provisions mean that upon revocation of probation or community control, the defendant will not be entitled to receive credit for time served on probation or community control against a newly imposed period of incarceration.

Young v. State, 21 Fla. L. Weekly D1734 (Fla. 4th DCA July 31, 1996).

Petitioner relies solely upon the case of Waters v. State, 662 So. 2d 332 (Fla. 1995), for his argument. Respondent maintains that Petitioner has misapplied Waters v. State; the rationale underlying that case should not be applied to the case at bar. This Court held in Waters that where a trial court imposes a probationary split sentence of imprisonment to be followed by probation upon revocation of probation after the completion of community control, the trial court must credit the defendant for time previously served on probation and community control, so that the total period of community control, probation and incarceration already served and to be served does not exceed the statutory maximum for the single offense.

The Fourth District held that this Court has not directly made the pronouncement that the total amount of sanctions that a defendant may be required to endure in any given criminal case may not exceed the legislatively mandated statutory maximum for the offense or offenses committed. The Fourth District Court of Appeal stated that such an interpretation would "seem to fly in the face of the relevant statutory provisions." In its opinion, the Fourth District said:

> . . . [I]n Summers[1], Roundtree[2] and Waters[3], [this Court] has only said that upon resentencing after revocation of probation or community control, the defendant must receive credit for incarceration previously served against incarceration newly imposed and credit for probation or community control previously served against probation or community control newly ordered. Accord Meader v. State, 665 So. 2d 344, 345(Fla. 4th DCA 1995). This only satisfies the statutory directives that upon revocation of probation or community control, the court may award any sentence which it might have originally imposed and that time previously spent on probation or community control cannot be considered as part of any time that the defendant is subsequently sentenced to serve.

Young v. State, 21 Fla. L. Weekly D1734 (Fla. 4th DCA July 31,1996).

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[1]Summers v. State, 642 So. 2d 742 (Fla. 1994)

[2]Roundtree v. State, 644 So. 2d 1358, 1358-1359 (Fla. 1994)

[3]Waters v. State, 662 So. 2d 332 (Fla. 1995)

Section 948.06(1), Florida Statutes (1991), states in part:

> . . . If such probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control.

Section 948.06(2), Florida Statutes (1991), states:

> (2) No part of the time that the defendant is on probation or in community control shall be considered as any part of the time that he shall be sentenced to serve.

These two statutes read in *pari materia* reveal the Florida Legislature's intent on the issue at hand. The Legislature intended to allow a trial court to sentence a defendant upon revocation of either probation or community control to any sentence which the defendant could have received if the defendant had not been placed on probation or community control. The statute specifies that any time the defendant has spent on either probation or community control that time is not to be considered as any part of the time the defendant should be sentenced to serve. Thus, the imposition of probation or community control is not a "sentence" *per se* and the trial court may impose a sentence as if the defendant had never been placed on probation or community control. See Williams v. State, 629 So. 2d 174, 176 (Fla. 2d DCA 1993), review denied 642 So. 2d 748 (Fla. 1994)(upon revocation of

probation or community control, court may impose any sentence it might originally have imposed before placing defendant on community control).

The law in Florida as it now stands allows for credit for time served on probation or community control against **a new term of probation or community control** when the previous probation or community control has been revoked. Florida law does not allow credit for time served for probation or community control when incarceration is imposed after probation or community control is revoked. In the case Phillips v. State, 651 So. 2d 203 (Fla. 5th DCA 1995), the appellate court made the following holding in reference to facts similar to those at bar:

> Summers has not been extended to require a court to consider terms of imprisonment, in considering whether the terms exceed the statutory maximum. Summers held that §948.06(2), Florida Statutes, which provides that "No part of the time that the defendant is on probation or in community control shall be considered as any part of the time that he shall be sentenced to serve, applies when probation or community control is revoked and a term of incarceration is imposed. (Citations omitted.)
>
> In this case, unlike Summers, a term of incarceration was imposed after violating probation and community control. Therefore, §948.06, Florida Statutes, applies to the present case, and the probation and community control period should not be considered in imposing the sentence of five years in the department of corrections. After violating probation, the trial court was permitted to sentence appellant to any sentence which it might have originally imposed before placing appellant on probation

or community control. §948.06(1), Fla. Stat.

Phillips v. State, 651 So. 2d 203, 205-206 (Fla. 5th DCA 1995).

In Summers, this Court makes reference to State v. Holmes, 360 So. 2d 380 (Fla. 1978). This Court stated that "...Holmes should be read to mean 'only that the time already spent on probation may not be credited toward the new sentence, i.e., the term of incarceration imposed.'" State v. Summers, 642 So. 2d 742, 743 (Fla. 1994). This Court held in State v. Holmes, 360 So. 2d 380 (Fla. 1978), that no credit shall be given for time spent on probation. See also Bransfield v. State, 657 So. 2d 1191 (Fla. 5th DCA 1995) (Summers does not apply to case where term of imprisonment is imposed after defendant violates probation; after probation is revoked, trial court can sentence defendant to any sentence which it might have originally imposed, and no part of time defendant was on probation shall be considered as any part of time defendant shall be sentenced to serve); Sheffield v. State, 651 So. 2d 160 (Fla. 2d DCA 1995) (defendant not entitled to credit for time served on probation since sentence received was not reimposition of probation upon revocation but an initial sentencing).

It is axiomatic that community control is not the functional equivalent of jail time, Smith v. State, 615 So. 2d 712 (Fla. 2d

DCA 1993), see also Chancey v. State, 614 So. 2d 18 (Fla. 4th DCA 1993), nor are either probation or community control to be considered as a "sentence" under Florida law. See section 948.06(2), Fla. Stat. (1991). See also Bruggeman v. State, 21 Fla. L. Weekly D2215 (Fla. 2d DCA Oct. 11, 1996)(probation is not a sentence).

In the instant case, the amount of credit for time served was correctly imposed by the trial court. Florida law does not require a trial judge to give a defendant credit for time served for probation or community control when the defendant's probation is revoked and a sentence of incarceration is imposed. Therefore, this Court should answer the certified question in the negative and affirm the Fourth District's ruling.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Respondent respectfully requests this Honorable Court to answer the certified question in the negative and to affirm the Fourth District's holding.

Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401
(561) 688-7759
COUNSEL FOR RESPONDENT

MYRA J. FRIED
Assistant Attorney General
Florida Bar No.: 0879487
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401
(561) 688-7759
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Merits Brief has been furnished by Courier to: Tatjana Ostapoff, Assistant Public Defender, Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on October 25, 1996.

MYRA J. FRIED
Counsel for Respondent

immediately after he was served in November 1992 and that settlement discussions then ensued. Further, plaintiff's counsel indicated by affidavit that he had been contacted by Drucker's counsel in March 1994 regarding the subject lawsuit and settlement of the lawsuit. On April 14, 1994, plaintiff's counsel advised Drucker's counsel by letter that a final judgment had been entered. Yet it was not until December 4, 1995—almost twenty months later—that Drucker and DCF moved to vacate the default final judgment.

Defendants never countered these allegations, but alleged only that Drucker diligently took steps to have the default judgment set aside when plaintiff filed to enforce the default judgment in Israel. The problem with defendants' position is twofold. First, the operative date for determining timeliness is when defendants learned a default or default judgment had been entered. Second, even defendants' affidavit establishes that defendants did not move to set aside the default judgment until six months after plaintiff's May 1995 attempt to enforce the judgment in Israel.

Based on defendants' failure to move to vacate within a reasonable time, I would reverse the trial court's order. At a minimum, I would require that an evidentiary hearing be held on the issues of notice to defendants of the lawsuit, whether defendants acted within a reasonable time in seeking relief from judgment after receiving notice, and whether defendants had sufficient minimum contacts with Florida to subject them to personal jurisdiction here.

Finally, I note that defendants in their motion to vacate not only alleged that the default judgment was void but also raised allegations which would fall within rule 1.540(b)(5). However, this alternative ground was not addressed by the trial court or by the parties on appeal. I would remand for the trial court to consider these alternative grounds as well.

* * *

Criminal law—Costs—Clerk's fee to be deleted from cost assessment

LOUIS WILSON SAINT PIERRE, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-2470. Opinion filed July 31, 1996. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; James T. Carlisle, Judge; L.T. Case No. 94-4781 CFC02. Counsel: Richard L. Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Joan L. Greenberg, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We affirm the conviction and sentence except for the assessment as costs of a $40 clerk's fee. The state concedes error as to the issue. On remand, the court shall delete this item from the order assessing costs. (DELL, WARNER and POLEN, JJ., concur.)

* * *

Criminal law—Sentencing—Community control revocation—Defendant not entitled to receive credit for time served on community control against newly imposed period of incarceration—Question certified: Is a defendant entitled to credit for time spent on probation/community control when a new sentence of incarceration is imposed for violation of the probationary portion of a split sentence and the new period of incarceration, when combined with the probation/community control previously served, exceeds the statutory maximum for the crime charged?

KEVIN YOUNG, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-1815. Opinion filed July 31, 1996. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William P. Dimitrouleas, Judge. L.T. Case No. 92-22088 CF10A and 92-22435 CF10A. Counsel: Richard L. Jorandby, Public Defender, and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellee.

(STEVENSON, J.) The question in the present case is whether a defendant whose community control is revoked may be sentenced to a term of incarceration, which, when added to the time previously served on community control, exceeds the statutory maximum for the convicted offense. We answer the question with a reluctant yes.

Appellant, Kevin Young, was sentenced as a youthful offender to serve concurrent terms of two and a half years in prison to be followed by two years community control on convictions for aggravated assault, a third degree felony, and armed robbery with a deadly weapon, a first degree felony. After revocation of community control, Young was sentenced to five and a half years in prison on the armed robbery conviction and a concurrent five year prison term for the aggravated assault.

Although Young was given credit for 724 days of prior incarceration, the trial court did not take into consideration the time that appellant spent on community control. Since five years is the maximum sentence for a third degree felony (section 775.082(3)(a), Fla. Stat. (1991)), Young argues that the trial court's failure to give credit for the time which Young spent on community control resulted in a sentence which exceeded the statutory maximum on the aggravated assault conviction. Fatal to appellant's argument is the incorrect foundational premise that the time previously served on community control may be taken into account in determining whether the newly imposed term of incarceration exceeds the statutory maximum.

We agree with the state that Young's sentence must be approved because the trial court was not required to give Young credit for time served on community control against his new sentence of incarceration. *See State v. Holmes*, 360 So. 2d 380, 383 (Fla. 1978), *holding limited by*, *State v. Summers*, 642 So. 2d 742 (Fla. 1994). See also § 948.06(1), Fla. Stat.(1993) (upon revocation of probation the court may "impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control") and § 948.06(2), Fla. Stat. (1993) (upon revocation of probation "[n]o part of the time that the defendant is on probation or in community control shall be considered as part of any time that he shall be sentenced to serve."). Taken together, these statutory provisions mean that upon revocation of probation or community control, the defendant will not be entitled to receive credit for time served on probation or community control against a newly imposed period of incarceration.

We answered with a reluctant yes to the question presented because this conclusion means that the legislature intended to permit a defendant to be able to serve a period of probation or community control and incarceration, which when combined together, could exceed the legislatively mandated statutory maximum for the offense. Such an interpretation could lead to some curious and seemingly harsh results. For instance, a defendant sentenced to 15 years probation on a second degree felony who violates probation in his fourteenth year would be in jeopardy of being sentenced to prison for 15 years. Thus, his combined periods of incarceration and probation would total 29 years even though the statutory maximum for a second degree felony is only 15 years. Incredibly, the defendant would have suffered state-imposed sanctions of 29 years for a fifteen year offense. Nevertheless, where the legislative directive is clear on its face, there is no room for different interpretation by the judiciary. The legislature is empowered to determine the permissible range of punishments for violations of penal law.

In *Summers v. State*, 642 So. 2d 742 (Fla. 1994), the court held that upon revocation of probation, credit must be given for time previously served on probation toward any newly imposed probationary term for the same offense, *when necessary* to ensure that the total term of probation does not exceed the statutory maximum for that offense. 642 So. 2d 743. In *Roundtree v. State*, 644 So. 2d 1358,1358-1359 (Fla. 1994), the court extended this reasoning to community control and held that time spent on probation or community control must be credited to a newly imposed term of probation for the same offense so that the total term of probation and community control does not exceed the

statutory maximum for an offense. Recently, in *Waters v. State*, 662 So. 2d 332 (Fla. 1995), the supreme court extended the reasoning of *Roundtree* and *Summers* to the situation where a defendant was sentenced to a split term of probation and incarceration after a revocation of community control. The court held that in imposing a split sentence following revocation of probation, the combination of new sanctions may not exceed the statutory maximum for the underlying offense and that the defendant must be given credit for probation or community control previously served against any new probation or community control imposed. 662 So. 2d at 332.

Appellant argues that the holding in *Waters* suggests that our supreme court may now be of the opinion that the total amount of sanctions that a defendant may be required to endure in any given criminal case may not exceed the legislatively mandated statutory maximum for the offense or offenses committed. However, the supreme court has not made that pronouncement directly and such an interpretation would seem to fly in the face of the relevant statutory provisions. Indeed, in *Summers*, *Roundtree* and *Waters* the supreme court has only said that upon resentencing after revocation of probation or community control, the defendant must receive credit for incarceration previously served against incarceration newly imposed and credit for probation or community control previously served against probation or community control newly ordered. *Accord Meader v. State*, 665 So. 2d 344, 345 (Fla. 4th DCA 1995). This only satisfies the statutory directives that upon revocation of probation or community control, the court may award any sentence which it might have originally imposed and that time previously spent on probation or community control cannot be considered as part of any *time* that the defendant is subsequently sentenced to serve.

We affirm Young's sentence. Because the issue in this case arises frequently and affects numerous criminal defendants within this district and throughout the state, we certify to the supreme court the following as a question of great public importance:

Is a defendant entitled to credit for time spent on probation/community control when a new sentence of incarceration is imposed for violation of the probationary portion of a split sentence and the new period of incarceration, when combined with the probation/community control previously served, exceeds the statutory maximum for the crime charged?

We also correct, without remand to the lower court, the scrivener's error wherein the court clerk transposed the case numbers for the armed robbery and aggravated assault charges so that it erroneously appears that Young was sentenced to five years incarceration for the armed robbery charge and that he was sentenced to five and a half years incarceration for the aggravated assault charge. The judgment is hereby corrected to reflect that Young was sentenced to five and a half years incarceration for the armed robbery conviction and five years for the aggravated assault charge.

Affirmed; judgment modified to correct scrivener's error. (DELL and POLEN, JJ., concur.)

* * *

Criminal law—Juveniles—New adjudicatory hearing required where juvenile was denied right to present closing argument

T.W., a child, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-3222. Opinion filed July 31, 1996. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Richard B. Burk, Judge. L.T. Case No. CJ-95-3827-JM. Counsel: Richard L. Jorandby, Public Defender, and Margaret Good-Earnest, Assistant Public Defender, West Palm Beach, for appellant. Robert Butterworth, Attorney General, Tallahassee, and Joan Fowler, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) The record in this case indicates that Appellant was denied the right to present a closing argument during her delinquency hearing. We, therefore, reverse the circuit court's disposition order and remand this cause for a new adjudicatory hearing. *T.McD v. State*, 607 So. 2d 513 (Fla. 2d DCA 1992); *M.E.F. v. State*, 595 So. 2d 86 (Fla. 2d DCA 1992); *E.C. v. State*, 588 So. 2d 698 (Fla. 3d DCA 1991); *E.V.R. v. State*, 342 So. 2d 93 (Fla. 3d DCA 1977). (STONE, PARIENTE and SHAHOOD, JJ., concur.)

* * *

Criminal law—Probation revocation may not be based solely on hearsay

DONOVAN FORD, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-4079. Opinion filed July 31, 1996. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Dale Ross, Judge; L.T. Case No. 92-23837 CF. Counsel: Richard L. Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Joan Fowler, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) The appellant's probation was revoked based solely upon hearsay, which included the testimony of a police officer concerning a witness's identification of appellant as the perpetrator of the crime of exposure of sexual organs. This constituted hearsay because the witness did not testify at the revocation hearing. § 90.801(2)(c), Fla. Stat. (1995); *Harrell v. State*, 647 So. 2d 1016, 1017-18 (Fla. 4th DCA 1994). "While hearsay evidence is admissible in probation revocation proceedings, hearsay alone is insufficient to establish a violation of a condition of probation." *Kiess v. State*, 642 So. 2d 1141 (Fla. 4th DCA 1994). Therefore, the trial court abused its discretion in revoking appellant's probation. We reverse and remand for a new hearing on appellant's alleged violation. *See Arnold v. State*, 497 So. 2d 1356 (Fla. 4th DCA 1986); *Purvis v. State*, 420 So. 2d 389 (Fla. 5th DCA 1982); *Robbins v. State*, 318 So. 2d 472 (Fla. 4th DCA 1975).

Reversed and remanded. (DELL, WARNER and POLEN, JJ., concur.)

* * *

LUIS BELLO-ESPINOSA, Appellant, v. JOHN T. CHRISTIANSEN, P.A. & JAY R. JACKNIN, d/b/a CHRISTIANSEN & JACKNIN, LAWYERS, and JACQUELINE MOORE, Appellees. 4th District. Case No. 96-0509. Opinion filed July 31, 1996. Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; James T. Carlisle, Judge; L.T. Case No. 95-8405 AE. Counsel: Elaine F. Miller of Miller & Miller, P.A., West Palm Beach, for appellant. Neil B. Jagolinzer of Christiansen and Jacknin, West Palm Beach, for Appellee - John T. Christiansen, P.A., & Jay R. Jacknin, d/b/a Christiansen & Jacknin, Lawyers.

(PER CURIAM.) Affirmed without prejudice to seek review on plenary appeal. *Karr v. Sellers*, 620 So. 2d 1104 (Fla. 4th DCA 1993). (DELL, FARMER and GROSS, JJ., concur.)

* * *

Criminal law—Post conviction relief—No error to deny rule 3.850 claims of involuntary plea and ineffective assistance of counsel

MARIO H. SUAREZ, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 94-1192. L.T. Case No. 91-45878. Opinion filed July 31, 1996. An Appeal under Fla. R. App. P. 9.140(g) from the Circuit Court for Dade County, Michael A. Genden, Judge. Counsel: Mario H. Suarez, in proper person. Robert A. Butterworth, Attorney General, for appellee.

(Before JORGENSON, COPE, and GERSTEN, JJ.)

(PER CURIAM.) Defendant, Mario H. Suarez, was prevented from timely appealing the trial court's denial of his original 3.850 motion for postconviction relief because he did not receive timely notice of that denial. We thus treat defendant's "Petition for Review of Belated Appeal of 3.850 Denial" as a petition for writ of habeas corpus for belated appeal and reach the merits of the appeal of the denial of his original 3.850 motion. *See* Fla. R. App. P. 9.040(c); *Hildebrand v. Singletary*, 666 So. 2d 274 (Fla. 4th DCA 1996); *Button v. State*, 641 So. 2d 106 (Fla. 2d DCA), *rev. denied*, 645 So. 2d 450 (Fla. 1994); *see also State ex rel. Shevin v. District Court of Appeal, Third District*, 316 So. 2d 50 (Fla. 3d DCA 1975); *Viqueira v. Roth*, 591 So. 2d 1147 (Fla. 3d DCA 1992). On the merits, we find no error in the trial court's