IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHN HENRY CARTER,

Respondent.

CASE NO. 95,605

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, John Henry Carter, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

By information on January 8, 1997, Respondent was charged with assault, battery, and/or aggravated battery, stalking, and two counts of burglary. (I 1-2). Respondent pled nolo contendere to aggravated battery, trespass, and misdemeanor stalking and was sentenced to nine months in jail followed by two years of probation. (I 6, 10).

On March 18, 1998, an affidavit of violation of probation was filed charging Respondent with the following: (1) failing to make reports for the months of December, 1997, and February, 1998; (2) failing to pay his costs of supervision; (3)failing to pay court costs; (4) failing to perform his community service; and (5) failing to receive anger control counseling. (I 16). During the violation of probation hearing, Respondent testified that he filed his December, 1997, report, but he admitted that he failed to file his February, 1998, report. (I 39-40).

The trial court found Respondent not guilty of all the alleged violations of probation in the affidavit except for his failure to file one monthly report in February, 1998. (I 25-26). Respondent pled no contest and was adjudicated guilty of violation of probation. (I 49-50, 63). The trial court revoked Respondent's probation and sentenced him to 54.9 months in the state prison. (I 50, 63).

Respondent filed a timely notice of appeal, and the First District Court of Appeal reversed Respondent's revocation of probation. See Carter v. State, 24 Fla. L. Weekly D1063 (Fla. 1st DCA April 30, 1999). The State filed a timely notice to invoke discretionary jurisdiction, and the Florida Supreme Court accepted jurisdiction. This appeal followed.

SUMMARY OF ARGUMENT

ISSUE I.

Probation is a matter of grace, not a right. The underlying concept of probation is rehabilitation, not punishment. The filing of monthly reports is a means in which probation officers continually supervise their probationers. However, if the trial court cannot insist that these reports be filed, then probation ceases to be an effective alternative to imprisonment. Therefore, the failure to file one monthly report is a wilful and substantial violation of probation. Thus, the trial court properly revoked Respondent's probation, and this Honorable Court should reverse the First District's opinion in Carter v. State, 24 Fla. L. Weekly D1063 (Fla. 1st DCA April 30, 1999).

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT REVOKED RESPONDENT'S PROBATION AFTER HE FAILED TO FILE A MONTHLY REPORT?

Introduction

Probation is a matter of grace, not a right. The underlying concept of probation is rehabilitation, not punishment. The filing of monthly reports is a means in which probation officers continually supervise their probationers. However, if the trial court cannot insist that these reports be filed, then probation ceases to be an effective alternative to imprisonment. Therefore, the failure to file one monthly report is a wilful and substantial violation of probation. Thus, the trial court properly revoked Respondent's probation, and this Honorable Court should reverse the First District's opinion in Carter v. State, 24 Fla. L. Weekly D1063 (Fla. 1st DCA April 30, 1999).

The trial court's ruling

The trial court found Respondent guilty of violating probation for failing to file a monthly report with his probation officer in February, 1998. (I 47). The trial court revoked Respondent's probation and sentenced him to a 54.9-month state prison term.

Standard of Review & Burden of Persuasion

The standard of review for probation revocation orders is whether the trial court abused its discretion. Steiner v. State,

604 So.2d 1265, 1267 (Fla. 4th DCA 1992). "[A] trial court is vested with broad discretion in determining whether a probationer has violated a condition of the probation. A violation which triggers a revocation of probation must be 'willful and substantial.' Alleged violations must be proven by the greater weight of the evidence." Burgin v. State, 623 So.2d 575, 576 (Fla. 1st DCA 1993).

This abuse of discretion standard was defined by the Florida Supreme Court in the case of Canakaris v. Canakaris, 382 So.2d. 1197, 1203 (Fla. 1980), in the following manner:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

In order to establish an abuse of discretion, Respondent must show that reasonable people could not differ as to whether a violation of probation occurred. Respondent did not meet this standard, and this Court should reverse the district court's opinion.

Preservation

If a lawyer fails to make an objection, fails to renew the objection, or fails to make the timely objection on the record and renew it when necessary, the matter is not preserve for appellate review. See Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991). It is well settled that objections must be made with sufficient specificity to apprise the trial court of the

potential error and to preserve the point for appellate review. Castor v. State, 365 So.2d 701 (Fla. 1978).

In the case at bar, Respondent properly preserved this issue for appellate review. (I 51).

Merits

It is well settled law in Florida that probation is a matter of legislative and judicial grace, not a right. Robinson v. State, 442 So. 2d 284, 286 (Fla. 2nd DCA 1983); Bouie v. State, 360 So. 2d 1142 (Fla. 2nd DCA 1978); Baker v. State, 319 So. 2d 628 (Fla. 1st DCA 1975). Rehabilitation, not punishment, is the underlying concept of probation. Freeman v. State, 382 So. 2d 1307, 1308 (Fla. 3rd DCA 1980); Burns v. United States, 287 U.S. 216, 53 S.Ct. 154 (1932).

Pursuant to statute, probation is "a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03." § 948.001(5), Fla. Stat. (1997). The burdens of compliance with conditions of probation are minimal compared to the alternative imprisonment. Chappell v. State, 429 So. 2d 84, 85 (Fla. 5th DCA 1983); Watkins v. State, 368 So. 2d 363, 366 (Fla. 2nd DCA 1979). If a condition of probation is valid, then the trial court has the discretion to consider the violation of the condition to be material. Diller v. State, 711 So. 2d 54, 55 (Fla. 5th DCA 1998).

The filing of monthly reports is one of the many conditions of probation that a trial court may impose upon a defendant. §

948.03, Fla. Stat. (1997). It is through these reports that continuing supervision over a probationer is maintained. Diller v. State, 711 So. 2d 54, 55 (Fla. 5th DCA 1998). "If the court cannot insist that these reports be filed, the probation ceases to be a viable alternative to incarceration." Id.

The failure to file a single monthly report is a wilful and substantial violation of probation. Schwartz v. State, 719 So. 2d 965 (Fla. 4th DCA 1998); Strunk v. State, 728 So. 2d 320 (Fla. 5th DCA 1999); but see Carter v. State, 24 Fla. L. Weekly D1063 (Fla. 1st DCA April 30, 1999); Moore v. State, 632 So. 2d 199 (Fla. 1st DCA 1994); Sanders v. State, 675 So. 2d 665 (Fla. 2nd DCA 1996).

In the case at bar, the affidavit of violation of probation stated that Respondent had violated several conditions of his probation. (I 16-20). However, he was only found guilty of failing to file one monthly report in February, 1998. (I 47). During the violation of probation hearing, Respondent admitted that he did not file his February, 1998, report because he wilfully wanted to violate probation in order to go back to court. (I 33, 39-40).

In Schwartz v. State, 719 So. 2d 965 (Fla. 4th DCA 1998), Schwartz claimed that an accident prevented him from filing his monthly report, but other evidence showed that Schwartz was not hindered from the accident in filing his report. Thus, the Fourth District affirmed that Schwartz wilfully and substantially violated his probation when he failed to file one monthly report.

In Strunk v. State, 728 So. 2d 320 (Fla. 5th DCA 1999), the Fifth District affirmed Strunk's revocation of probation when she failed to file a single monthly report, particularly when Strunk gave no explanation at all for her failure to file the report. The Fifth District, in citing Diller v. State, reasoned that the filing of monthly reports is an important part of the continuing supervision of a probationer, and if the court cannot insist upon the filing of these reports, then the underlying purpose of probation is abrogated. Strunk v. State, 728 So. 2d 320, 321 (Fla. 5th DCA 1999). Thus, due to the necessity to continually supervise probationers and uphold the rehabilitative efforts that probation offers, the Fourth and Fifth districts recognized that the failure to file just one monthly report is a wilful and substantial violation of probation.

Probation is a matter of grace and an alternative to incarceration. Its purpose is to provide a means of rehabilitation; it is not a vehicle to abuse the judicial system in an effort to go before a judge to obtain another method to pay restitution as Respondent did in the case at bar. Therefore, in the instant case, this Honorable Court should reverse the First District's opinion in Carter v. State, 24 Fla. L. Weekly D1063 (Fla. 1st DCA April 30, 1999) because Respondent admitted to wilfully violating probation by failing to file his February, 1998, monthly report.

CONCLUSION

Based on the foregoing, the decision of the District Court of Appeal reported at Carter v. State, 24 Fla. L. Weekly D1063 (Fla. 1st DCA April 30, 1999) should be disapproved, and the order for revocation of probation entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S INITIAL BRIEF ON THE MERITS** has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of September, 1999.

_____
Karla D. Ellis
Attorney for the State of Florida

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