ORIGINAL

FILED
THOMAS D. HALL
JUN 0 5 2000
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

TIMOTHY MEEKS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00799

RESPONDENT'S ANSWER BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID P. GAULDIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 261580
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

TIMOTHY MEEKS,

Petitioner,

v. CASE NO. SC00799

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Pursuant to the Florida Supreme Court's Administrative Order dated July 13, 1998, this brief has been printed in Times New Roman (14 point) proportionately spaced.

The petitioner's preliminary statement is accepted, with the addition that references to the petitioner's initial brief shall be by the letters "PB" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the facts as outlined in Meeks v. State, 754 So.2d 101 (Fla. 1st DCA 2000).

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative. Pending before the court at the time for sentencing relative to this case, respondent had not committed a substantive violation. Because respondent had earlier allegedly committed a

substantive violation but because the court failed to sentence respondent for the earlier substantive violation, the court waived its opportunity to sentence respondent for a substantive violation. This situation is analogous to the situation where a person who qualifies as an habitual offender is placed on probation (but not as an habitual offender), violates his probation, and is resentenced. In that situation, the person who violated his probation cannot be resentenced as an habitual offender even though he might have been originally qualified to be sentenced as an habitual offender.

The state argues that because Section 948.06(1) is referenced in Section 958.14, once a substantive offense is committed, a person is no longer a youthful offender.

Much of Section 948.06(1) is procedural in nature, and because statutes dealing with the same or similar subjects must be read *in pari materia*, and because the specific statute controls the general, the specific sentencing provisions of Section 958.14 control over the general sentencing provisions of Section 948.06. At any rate, the reference to Section 948.06 does not declassify a youthful offender from being a youthful offender merely because the youthful offender has violated his probation or community control.

Finally the state argues that respondent's failure to remain confined at his residence was a "substantive" violation of his community control. The state improvidently relies upon a case where it was held that the failure to remain confined to one's residence while on community control is a "non-technical" violation.

That case is distinguishable for two reasons. First, the case did not involve a youthful offender. Second, while it is possible to construe the failure to remain confined to one's residence while on community control as a "non-technical

violation," that still does not mean that the violation was a "substantive violation." Indeed, to give meaning to all the language of the statute, such a violation could be construed as a "nonsubstantive violation," which would still leave the respondent a youthful offender.

ARGUMENT

ISSUE

CAN A CIRCUIT COURT RE-SENTENCE A YOUTHFUL OFFENDER FOR A SUBSTANTIVE VIOLATION UNDER SECTION 958.14 FLORIDA STATUTES WHEN THE ACTS UPON WHICH THE VIOLATION IS BASED DO NOT CONSTITUTE A SEPARATE CRIMINAL OFFENSE?

The answer to the certified question is quite simply no, a circuit court cannot re-sentence a youthful offender for a substantive violation under Section 958.14, Florida Statutes, when the acts upon which the violation is based do not constitute a separate criminal offense.

Quickly, the situation below is this. Respondent was originally placed on probation as a youthful offender. Respondent allegedly substantively violated his probation by committing a new crime (trespass). Respondent was placed on community control as a youthful offender. Subsequently, on a technical or nonsubstantive violation, respondent violated his community control.

Section 958.14, Florida Statutes, provides that where a youthful offender violates a condition of probation or community control, he can be sentenced to the custody of the Department for a substantive violation for a period of time no longer than the maximum sentence allowed for the offense with credit for time served or, for a technical or nonsubstantive violation, he can be sentenced to the Department

for a period no longer than six years or the maximum sentence for the offense (whichever is less) with credit for time served.

Inherent in the statute is the notion that the applicable sentence relates to the violation at the time of sentencing. In other words, at the time respondent allegedly committed a substantive violation of his probation, he could have been sentenced to a period of time with the Department up to the maximum sentence for the offense for which he was found guilty with credit for time served.

Likewise, when he technically violated his community control, or committed a nonsubstantive violation, he could no longer be sentenced for a period any longer than six years or the maximum sentence for the offense (whichever is less) with credit for time served.

Put another way, the trial court waived its opportunity to sentence respondent for the substantive violation when the trial court did not sentence respondent for the substantive violation on the probation (as allowed by statute) when it had the opportunity to do so.

The only violation before the court was a technical violation and as such respondent could only have been sentenced for a technical (or nonsubstantive) violation.

This situation appears to be analogous to the situation where a person who qualifies as an habitual offender is placed on probation not as an habitual offender, violates his probation, and is resentenced. In that situation, the person who violates his probation cannot be resentenced as an habitual offender even though he might have originally qualified to be sentenced as an habitual offender. King; v. State, 681 So.2d 1136 (Fla. 1996) and Norton v. State, 719 So.2d 985 (Fla. 5th DCA 1998).

Petitioner, on the other hand, argues that when respondent was sentenced in this case he was not sentenced as a youthful offender because he had earlier

committed a substantive offense and was therefore no longer a youthful offender.

The plain language of Section 958.14, however, completely belies this assertion:

> **958.14 - Violation of probation or community control program.** - A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of s. 948.06(1). However, no youthful offender shall be committed to the custody of the Department for a substantial violation for a period longer than the maximum sentence for the offense for which he or she was found guilty, with credit for time served while incarcerated, or for a technical or nonsubstantive violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he or she was found guilty whichever is less, with credit for time served while incarcerated.

Nothing in the plain language of this statute states or implies that once a youthful offender violates his community control or probation by a substantive offense or by a non-technical or nonsubstantive violation is the offender no longer a youthful offender. Indeed, the plain language of the statute in two places continues to refer to the offender as a "youthful offender." Thus, by virtue of the plain language of the statute, once a youthful offender, always a youthful offender.

What the statute does do, however, is specify how a youthful offender may be sentenced, depending upon whether the youthful offender has committed a substantive violation or a technical or nonsubstantive violation. If the youthful offender commits a technical or nonsubstantive violation, then the youthful offender may be sentenced to a period no longer than six years or the maximum sentence for the offense (whichever is less), with credit for time served while incarcerated. If, on the other hand, the youthful offender has committed a substantive offense, the youthful offender may be committed to the custody of the Department for a period

no longer than the maximum sentence for the offense for which the youthful offender was found guilty, with credit for time served while incarcerated.

Note carefully that the sentencing scheme for a youthful offender is carefully delineated. Even if the youthful offender commits a substantive violation, the youthful offender remains a youthful offender, but may only be sentenced to a term no greater than the maximum sentence for the offense for which he or she was found guilty, with credit for time served.

Nonetheless, this statute still limits the extent to which a youthful offender can be sentenced. For instance, it is quite possible under the guidelines to receive a sentence greater than the maximum sentence allowed by statute. Even so, Section 958. 14 limits a youthful offender who has committed a substantive violation to a sentence no greater than the statutory maximum.

Thus, there is a distinction between a youthful offender who has committed a substantive violation and a (for lack of a better term) general offender, who is subject to the general guidelines, or the other draconian sentencing schemes now available to the circuit court judge.

Notwithstanding the plain meaning of the statute (which does not remove a youthful offender from youthful offender status merely by virtue of having committed a substantive violation), the state, relying upon the dissenting opinion in the First District Court of Appeal's opinion in this case, argues that the reference in Section 958.14 back to Section 948.06(1) is an expression by the legislature that a youthful offender is no longer a youthful offender if he or she violates probation or the terms of the community control program.

There are a number of flaws in this argument. First, this language is found in the very first sentence of Section 958.14 and states: "A violation or alleged violation of probation or the terms of a community control program shall subject the youthful

offender to the provisions of s. 948.06(1)." If this sentence had the meaning attributed to it by the state and by the dissenting judge in the First District Court of Appeal's opinion, then it would not matter whether the respondent committed a substantive violation or a technical violation or a nonsubstantive violation, because under the provisions of 948.06(1), the trial judge would be able to sentence the youthful offender to "any sentence which it might have originally imposed." But to construe the statute in that way would obliterate the plain language of the rest of the statute.

Second, even Judge Miner in his dissenting opinion and the lower court's opinion admitted that part of Section 948.06(1) relates to procedural matters:

> To be sure, Section 948.06(1) speaks . to procedural matters such as arrest and hearmg but it is also substantive in that it authorizes the trial court to revoke probation or community control upon a finding of a "material" violation by the probationer or community controlee and to sentence the offender to "any sentence which it might have originally imposed." Additionally Section 948.06(1) requires the Court to adjudge the "probationer or offender guilty of the offense charged" unless such has been previously done. [754 So.2d at 106].

Thus, even Judge Miner admits that much of the statute referenced by 958.14 relates merely to procedural matters.

Third, it is a general rule of statutory construction that where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another. T.R. v. State, 677 So.2d 270 (Fla. 1996). Indeed, this court has done so in the past in reference to these statutes. See, for example, Poore v. State, 53 1 So.2d 161 (Fla. 1988).

Moreover, another rule of statutory construction is that a particular provision (or here, a statute, 958.14), will prevail over the general statute, (here Section

948.06).

This court may easily construe these statutes in harmony by recognizing that 948.06 is referenced in 958.14 for procedural matters, and the particular sentence to be applied is controlled by the specific language of 958.14. This is an especially compelling interpretation because, as pointed out previously, there is a difference between the maximum sentence that can be imposed under 958.14, and the maximum sentence that can be imposed under 948.06 or general law.

If this court construes Section 958.14 consistent with the state's interpretation, then the language of 958.14 is useless, meaningless, and overridden by the general probation-community control violation statute. Clearly, this is not what the legislature either intended or stated.

Finally, the state argues that because Meeks was placed on community control and violated that community control by failing to remain at his approved residence, Meeks committed a substantive violation, not a technical violation.

In the absence of a statutory definition, a court assumes the common or ordinary meaning of a word. State v. Buckner, 472 So.2d 1228 (Fla. 2d DCA 1985). The plain and ordinary meaning of a word in a statute can be ascertained by reference to a dictionary if necessary. Green v. State, 604 So.2d 471 (Fla. 1992).

That's exactly what the majority in the decision below did:

> The Legislature has not defmed what constitutes a "technical violation" and a "substantive violation" to aid us in discerning its intent, and no appellate court has previously construed the statute in the context of the instant case. Therefore, because the language of Section 958.14, Florida Statutes, is clear, we examine the ordinary meaning of the term "substantive" as used in the statute. "Substantive" is defined as "being a totally independent entity." *Miriam-Webster's Collegiate Dictionary* 1174 (10th ed. 1998). "Substantive offense" is also defined as "one

> which is complete of itself and not dependent upon another." *Black's Law Dictionary 1429 (6th ed.* 1990); see also, State v. Lamar, 659 So.2d 262 (Fla. 1995).
>
> In view of these definitions, the normal usage of the phrase "substantive violation" implies a circumstance that is unrelated and disassociated from another circumstance. When this concept is applied to criminal conduct it implies two separate and distinct criminal offenses. Accordingly, when the legislature used the terms "substantive violation" we conclude its intent was to require more than a mere breach of a condition of probation or community control, which is a by-product of the original offense. A separate act that constitutes a violation becomes a substantive one when it involves the commission of a separate criminal offense. [754 So.2d at 103].

Notwithstanding this imminently reasonable and logical interpretation, the state improvidently relies upon Allen v. State, 666 So.2d 259 (Fla. 4th DCA 1996) for the proposition that the failure to remain confined to one's approved residence is a "substantive" violation, not a technical violation.

This argument has two gaping holes in it. First, and foremost, Allen v. State, did not involve a youthful offender. The question in Allen was whether the defendant violated his community control in a willful and substantial (not substantive) manner. There, the court concluded that because the nature of community control was confinement, Allen committed a "non-technical" violation. The state then, in a gigantic leap of faith, concludes that what Allen committed was a "substantive" violation.

But as mentioned, Allen v. State did not involve the youthful offender statute, and did not involve the legislative term "'substantive" which is found in Section 958.14.

The other huge hole in the state's argument is that courts are not to presume

that a given statute employs "useless language." Johnson v. Feder, 485 So.2d 409 (Fla. 1996).

There are three terms in the statute which are relevant: "Substantive violation;" "'technical violation;" or "nonsubstantive violation."

The state has failed to refer to the term '"nonsubstantive violation" at all in its argument. Even assuming that the violation of community control by the failure to remain confined to an approved residence is not a "technical violation of community control" it still is not a "substantive violation" of community control because it does not constitute the commission of an independent crime. However, this would give meaning to the term "nonsubstantive violation" (neither fish nor fowl, i.e., neither technical nor substantive) which would effect the purpose of the statute. It would also mean that the legislature did not employ "useless language" which this court is required to presume.

Under the interpretations provided by the majority in its opinion below, as well as the interpretations provided in this brief, all of the terms in Section 958.14 have meaning, and the two statutes (958.14 and 948.06) are harmonized.

CONCLUSION

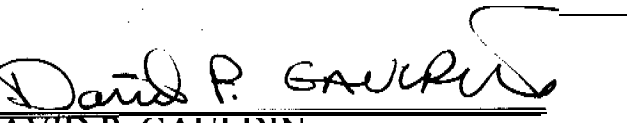
Based on the foregoing arguments and authorities, the certified question should be answered in the negative.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to the Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 16TH day of June, 2000.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



DAVID P. GAULDIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 261580
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

TIMOTHY MEEKS,

Petitioner,

v.

CASE NO. SC00799

STATE OF FLORIDA,

Respondent.

APPENDIX

(To be reported at: 754 So.2d 101)
25 Fla. L. Weekly D684
(Cite as: 2000 WL 266310 (Fla.App. 1 Dist.))

Timothy MEEKS, Appellant,
v.
STATE of Florida, Appellee.

No. 1D97-2905.

District Court of Appeal of Florida,
First District.

March 13. 2000.

Defendant was sentenced as youthful offender on plea of nolo contendere to charge of attempted armed robbery with a firearm. After his probation was revoked and defendant was sentenced to community control, the Circuit Court, Leon County, L. Ralph Smith, J., found defendant guilty of violating condition of community control program and resentenced defendant to prison. Defendant appealed. The District Court of Appeal, Browning, J., held that: (1) as a matter of first impression, a "substantive violation" under the youthful offender statute requires the commission of a separate criminal offense, and (2) defendant's failure to remain confined to his residence was a technical violation.

Reversed and remanded.

Miner, J., filed a dissenting opinion.

[1] STATUTES ⚿181(1)
361k181(1)
When construing a statute, court must follow the intent of the legislature, as expressed by the language of the statute, giving the statutory language its usual and ordinary meaning, unless an ambiguity exists.

[1] STATUTES ⚿188
361k188
When construing a statute, court must follow the intent of the legislature, as expressed by the language of the statute, giving the statutory language its usual and ordinary meaning, unless an ambiguity exists,

[2] STATUTES ⚿241(1)
361k241(1)
A criminal statute is strictly construed in favor of the accused.

[3] INFANTS **⚿69(3.1)**
211k69(3.1)
A "substantive violation" under youthful offender statute governing violations of probation or community control requires the commission of a separate criminal offense by a youthful offender, while a "technical violation" is one arising from a transgression by a youthful offender of a condition of probation or community control that does not constitute a separate criminal offense. West's F.S.A. § 958.14.
See publication Words and Phrases for other judicial constructions and definitions.

[4] INFANTS **⚿69(4)**
211k69(4)
Youthful offender's violation of community control for failure to remain confined to his residence on four dates was a technical violation, and thus, he could be sentenced to no more than six years, less time served. West's F.S.A. § 958.14.

Nancy A. Daniels, Public Defender; and David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; and James W. Rogers, Senior Assistant Attorney General, Tallahassee, for Appellee.

BROWNING, J.

*1 Appellant, Timothy Meeks (Meeks), appeals a sentence and judgment of 10 years' incarceration for a violation of community control. Meeks contends, as a youthful offender, that his sentence is illegal because under section 958.14, Florida Statutes (1991) **[FN1]**, his violation is "technical," rather than "substantive," and therefore the maximum sentence the trial judge can impose is six years, less time served, or the maximum authorized for his original sentence, with credit for time served, whichever is less. See § 958.14, Fla. Stat. We agree, and reverse and remand for re-sentencing.

On September 11, 1992, Meeks was charged with one count of attempted armed robbery with a firearm, an offense that carries a maximum penalty of 15 years' incarceration. As part of a plea bargain, he entered a plea of nolo contendere in exchange for a youthful offender sentence of 4 years in prison and 2 years of probation, with 65 days of credit for time served. On December 3, 1992, Meeks was sentenced as agreed, except he was given 93 days of credit for time served.

Meeks served his prison term and was released to serve his probationary sentence. On September 24, 1996, an affidavit of violation of probation was filed alleging Meeks had violated several conditions of his probation, including an arrest for trespass after warning, a substantive violation, On November 7, 1996, he admitted violating his probation by committing the crime of trespass after warning. His probation was revoked, and the trial judge sentenced him to 2 years of community control. On January 21, 1997, a violation report was issued charging Meeks with violating his community control by failing to remain confined to his residence on four occasions. On May 8, 1997, a hearing was held and Meeks was found guilty of violating this condition of his community control program. The trial judge revoked Meeks' community control and re-sentenced him to 10 years in prison, with credit for 55 days for time served. This appeal ensued.

The instant case impels us to construe the import of "technical violation" and "substantive violation" under section 958.14, Florida Statutes, and specifically. whether Meeks, as a youthful offender, can be re-sentenced for a substantive violation based upon acts that constitute a willful and substantial violation of community control, but not a separate criminal offense.

[1][2] When construing a statute, we must follow the intent of the legislature, as expressed by the language of the statute. giving the statutory language its usual and ordinary meaning, unless an ambiguity exists. Graham v. State, 472 So.2d 464 (1985); Holly v. Auld. 450 So.2d 217 (Fla.1984). A criminal statute is strictly construed in favor of the accused. State v. Jackson, 526 So.2d 58 (Fla. 1988).

[3] Section 958.14, Florida Statutes, provides:

*2 Violation of probation or community control program.--A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of s. 948.06(1). However, no youthful offender shall be committed to the custody of the department for a substantive violation for a period longer than the maximum sentence for the offense for which he or she was found guilty, with credit for time served while incarcerated, or for a technical or nonsubstantive violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he or she was found guilty, whichever is less, with credit for time served while incarcerated.

(emphasis added).

The legislature has not defmed what constitutes a "technical violation" and a "substantive violation" to aid us in discerning its intent, and no appellate court has previously construed the statute in the context of the instant case. Therefore, because the language of section 958.14. Florida Statutes, is clear, we examine the ordinary meaning of the term "substantive" as used in the statute. "Substantive" is defmed as "being a totally independent entity." Merriam-Webster's Collegiate Dictionary 1174 (10th ed.1998). "Substantive offense" is also defined as "one which is complete of itself and not dependent upon another." Black's Law Dictionary 1429 (6th ed.1990); see also State v. Lamar, 659 So.2d 262 (Fla. 1995).

In view of these definitions, the normal usage of the phrase "substantive violation" implies a circumstance that is unrelated and disassociated from another circumstance. When this concept is applied to criminal conduct it implies two separate and distinct criminal offenses. Accordingly, when the legislature used the terms "substantive violation, " we conclude its intent was to require more than a mere breach of a condition of probation or community control, which is a by-product of the original offense. A separate act that constitutes a violation becomes a substantive one when it involves the commission of a separate criminal offense.

This definition appears to be the one applied by our sister court, although in a factually dissimilar case. State v. Hicks, 545 So.2d 952 (Fla. 3d DCA 1989). In Hicks, the Third District, when reviewing a defendant's original sentence for a separate criminal offense committed after his sentencing as a youthful offender, stated:

> Although Hicks had been classified previously as a youthful offender, he was not charged with violating his community control; instead, he was charged with separate substantive criminal offenses. Under these circumstances, the trial court erred in classifying him as a youthful offender.

Hicks, 545 So.2d at 953 (emphasis added). By describing the second offenses as "separate substantive criminal offenses," the court implies that a "substantive violation" is synonymous with a separate criminal offense. We find this language persuasive and adopt this definition of "substantive violation" under section 958.14, Florida Statutes. To attribute any other meaning would do violence to the rules of statutory construction.

We conclude that a "substantive violation" under section 958.14, Florida Statutes, requires the commission of a separate criminal offense by a youthful offender. It necessarily follows that under section 958.14, Florida Statutes, a technical violation is one arising from a transgression by a youthful offender of a condition of probation or community control that does not constitute a separate criminal offense.

*3 We recognize the possibility of confusion arising from the use of the term "substantive violation" in the instant context, contrasted with the "willful and substantial" standard used in the context of revocation of probation and community control. However, they are not to be construed as synonymous. A "willful and substantial violation" of probation and community control under section 958.14, Florida Statutes, will be only a "technical violation" unless it constitutes a separate criminal offense and, thus, a substantive violation. A willful and substantial violation of probation and community control will always be a "technical violation" under section 958.14, Florida Statutes, not a "substantive violation," unless the acts that form the violation also constitute a separate criminal offense.

We are fortified in our conclusion by the fact that the appellate courts of this state by a non-P.C.A. opinion have never affirmed a re-sentencing of a youthful offender for a substantive violation that was not based upon a separate criminal offense,, This certainly implies that the prosecutors and the trial courts have reached the same conclusion as we regarding the distinction between substantive and technical violations under section 958.14, Florida Statutes. See Robinson v. State, 702 So.2d 1346 (Fla. 5th DCA 1997) (youthful offender's admission of marijuana use and to testing positive for marijuana determined to be a separate criminal offense and a substantive violation); Johnson v. State, 678 So.2d 934 (Fla. 3d DCA 1996) (youthful offender's commission of grand theft, burglary, possession of burglary tools and resisting arrest without violence determined to be substantive violations); Dunbar v. State, 664 So.2d 1093 (Fla. 2d DCA 1995) (youthful offender's failure to pay the costs of supervision of probation, for not reporting, for not seeking employment, and for not trying to get a GED, determined to be technical violations).

[4] For the above reasons, we conclude that Meeks' violation of community control for failure to remain confined to his residence on four dates constitutes a technical violation under section 958.14, Florida Statutes. Thus, Meeks can be sentenced as a youthful offender to no more than six years, less time served, or to a period not longer than the maximum sentence for which he was originally found guilty (15 years with credit for time served), whichever is less. Thus, the trial judge erred by imposing a lo-year sentence. Upon re-sentencing, the court can sentence Meeks to a period of only six years with credit for time served for his technical violation.

Finding that this decision passes upon a question of great public importance, we certify to the Supreme Court of Florida the following question:

> *4 CAN A CIRCUIT COURT RE-SENTENCE A YOUTHFUL OFFENDER FOR A SUBSTANTIVE VIOLATION UNDER SECTION 958.14, FLORIDA STATUTES, WHEN THE ACTS UPON WHICH THE VIOLATION IS BASED DO NOT CONSTITUTE A SEPARATE CRIMINAL OFFENSE?

We also note that the trial court's written judgment incorrectly designates Meeks' offense of attempted armed robbery with a firearm as a "first-degree felony" when, in fact, it is a "second-degree felony." See § 812.13(2), Fla. Stat. (1991); § 777.04(4)(b), Fla. Stat. (1991); Johnson v. State, 667 So.2d 314 (Fla. 1st DCA 1995); Stocker v. State, 617 So.2d 789 (Fla. 1st DCA 1993). The

written judgment should be corrected.

We REVERSE and REMAND for re-sentencing consistent with this opinion.

ERVIN, J. concurs; MINER, J., dissents with opinion.

Miner, J., dissenting with opinion.

Because I believe the majority opinion misses the mark in at least two dispositive respects, I am obliged to dissent,

My colleagues assume, wrongly, I suggest, that Meeks was sentenced under the provisions of section 958.14 first when he admitted violating probation by committing a new criminal offense and thereafter when he was sentenced for violating the pivotal condition of the community control program into which he was placed following his probation violation.

On the record before us. it is clear that appellant bargained for and received youthful offender treatment when he entered a plea to attempted armed robbery. He was initially sentenced to a four year period of incarceration as a youthful offender to be followed by a two year probationary period. After his release from incarceration and shortly after his probation commenced, he admittedly violated probation by committing a new crime but rather than impose further incarceration at that time, the trial court, with the concurrence of the State, placed him into a community control program. Thereafter, his community control officer filed an affidavit alleging that Meeks had violated community control by failing to remain confined to his approved residence, not once but on four separate occasions. After a hearing on these allegations, the trial court revoked appellant's community control status and imposed a ten year sentence with credit for time previously served. Arguing that his violation of community control was only "technical," Meeks filed the instant appeal. Primarily he contends that under the circumstances, the trial court was limited on resentence to a term of no more than six years as provided for in section 958.14. In a holding seemingly premised on the proposition that once a youthful offender always a youthful offender, the majority here agrees. For the following reasons, I disagree.

Section 958.14 provides in pertinent part as follows:

> A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of section 948.06(1). However, no youthful offender shall be committed to the custody of the Department for a substantive violation for a period longer than the maximum sentence for the offense for which he or she was found guilty, with credit for time served while incarcerated, or for a technical or non- substantive violation for a period longer than six years or for a period longer than the maximum sentence for the offense for which he or she was found guilty, whichever is less, with credit for time served while incarcerated.

Section 948.06(1) (emphasis added), to which section 958.14 refers, provides in pertinent part:

> *S Whenever within the period of probation or community control there are reasonable grounds to believe that a probationer or offender in community control has violated his or her probation or community control in a material respect, any law enforcement officer who is aware of the probationary or community control status of the probationer or offender in community control ... may arrest . . . such probationer or offender without warrant wherever found and forthwith return him or her to the court granting such probation or community control, . . . The court, upon the probationer or offender being brought before it, shall advise him or her of such charge of violation and, if such charge is admitted to be true, may forthwith revoke, modify, or continue the probation or community control, or place the probationer into a community control program. If 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 or she has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.

In my view, the reference in section 958.14 back to section 948.06(1) was intended to and does authorize the trial court, upon a finding of a violation of probation or community control, to deal with one who was initially afforded youthful offender

treatment as it would any other probationer or community controllee. Otherwise. the reference back to section 948.06(1) seems to me bereft of meaning. To be sure, section 948.06(1) speaks to procedural matters such as arrest and hearing but it is also substantive in that it authorizes the trial court to revoke probation or community control upon a finding of a "material" violation by the probationer or community controllee and to sentence the offender to "any sentence which it might have originally imposed. " Additionally section 948.06(1) requires the court to adjudge the "probationer or offender guilty of the offense charged" unless such has previously been done.

To be noted also is the fact that section 948.06(1) makes no use or mention of "substantive" or "technical" violation of probation or community control as does section 958.14. Thus, the former clearly expresses legislative intent that should the court find that the offender has violated his or her probation or community control "in a material respect," it is free to impose "any sentence which it might have originally imposed. "

During appellant's probation violation hearing, the assistant state attorney handling the case advised the court as follows:

> Once Mr. Meeks is found to have a substantive violation of his youthful offender, he will then be in adult court, no longer under the youthful offender statute, And if he violates again, then he will be looking at 12 to 27 years in the Department of Corrections. That's the reason that I offered the two years community control.. . .

At no time did appellant object to this representation by the assistant state attorney that the trial court's finding that he committed a substantive violation of probation took him out of the category of youthful offender sentencing and gave the trial court discretion to sentence him as it would any adult. He did not request a continuation of youthful offender status, and the court made no mention of such status. Indeed, nothing in the record before us contains any reference to continued youthful offender treatment after Meeks admitted he violated his probation.

● 6 Perhaps the most troubling aspect of the majority opinion is the holding that only the commission of a new criminal offense by a youthful offender on community control amounts to a "substantive" violation thereof and that the conditions of community control are but "technical" in nature, the violation of which cannot form the basis for revocation of community control status. To be sure, commission of a new criminal offense while on either probation or community control is a "substantive" violation thereof. However, confinement of the community controllee to his or her residence is the very essence of community control status. Thus, the failure of the community controllee to remain so confined surely cannot be characterized as a "technical" violation even if sentencing were to proceed under chapter 958.14. Were such the case, a youthful offender community controllee could abscond and remain at large, for, say, several months or even years without committing a new criminal offense, and under the majority holding he/she would only be guilty of a "technical" violation of that status. [FN2] Thus, it seems to me that the majority opinion confuses the commission of a "substantive" criminal offense with a "substantive" violation of conditions of community control. However, since I believe it is clear that the trial court sentenced Meeks under the provisions of section 948.06(1) both when he violated probation and later when he violated community control, I see no need to further explore the meanings of "substantive" and "technical."

I would affirm the judgment and sentence below for the above-stated reasons.

FN1. Section 958.14, Florida Statutes (1991), has not been amended since Meeks was adjudged a youthful offender, and all subsequent references are to the 1991 version of the statute.

FN2. Use of the word "technical" in section 958.14 is at best confusing to the extent that the statute suggests that violation of such a condition can result in revocation of community control or probation and a prison sentence. Caselaw in Florida has consistently held that violation(s) of a condition of probation or community control must be both willful and substantial before such status may be revoked in the first instance. See Howard v. State, 484 So.2d 1232 (Fla.1986); Davis v. State, 704 So.2d 681 (Fla. 1st DCA 1997); Forchin v. State, 660 So.2d 763 (Fla. 3d DCA 1995); Jones v. State, 611 So.2d 26 (Fla. 1st DCA 1992); Harris v. State, 610 So.2d 36 (Fla. 2d DCA 1992). In my view "substantial" and "substantive" are synonymous terms. "Technical" and "substantial" seem to me to be antonymous terms.

END OF DOCUMENT