

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DWAIN WOODSON,

Petitioner,

vs.

Case No. SC04-56
5D03-71

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF ON THE MERITS OF PETITIONER

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ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER REVOKING APPELLANT'S ORDER OF PROBATION; THE TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING APPELLANT WILLFULLY AND SUBSTANTIALLY VIOLATED PROBATION; THE FIFTH DISTRICT'S CONCLUSION THAT A PROBATIONER AS A MATTER OF LAW IS PROHIBITED FROM COMPLETING THE CONDITIONS OF SEXUAL OFFENDER PROBATION TOWARD THE END OF THE PROBATIONARY PERIOD EXCEEDS THE COURT'S AUTHORITY AND VIOLATES APPELLANT'S FEDERAL AND STATE RIGHTS TO DUE PROCESS OF LAW.

This Court should accept jurisdiction due to certified conflict with *Young v. State*, 566 So. 2d 69 (Fla. 2d DCA 1990). Respondent asserts that there is no conflict between *Young* and the instant case and relies on factual differences and something nebulously described by Respondent as the "statutorily mandated character of sexual offender probation" in its plea for this court to refuse to accept jurisdiction. (Respondent's Brief p. 13)

Respondent misstated petitioner's position five times in its brief on the merits. (Respondent's Brief p. 9, 19, 21, 32) Five times, Respondent complained that Petitioner was advocating a per se rule wherein a trial court could never find a willful and substantial violation for failing to actively participate in a sex offender treatment program where a portion of the probationary period remained. (Respondent's Brief

p. 9, 19, 20, 21, 32) Petitioner has never argued this position. Petitioner has always maintained that **it is only if the trial court or the statute at issue fails to set a time parameter within which a probationary condition must be completed**, then a probationer may have the entire probationary period in which to complete the condition.

Respondent incorrectly claims that Petitioner has asked this court to establish a per se rule where a probationer who fails to abide by statutorily mandated conditions can never be found in violation of probation. (Respondent's Brief p. 9, 20) Respondent then argues against this per se rule of its own creation. Respondent simply refuses to acknowledge the real issue here: the due process rights of the probationer.

Due process, then, is what lies at the heart of this appeal.

Respondent ignores the absence of any time frame in the statute at issue and complains that any court imposed date for when each probationer's sex offender treatment to be completed is not feasible because each probationer's treatment is individualized. (Respondent's brief p.19). The solution to this possible dilemma conjured by Respondent lies in Respondent's own argument against having a per se rule. Simply have the trial court continue to assess each defendant's order of probation as it is supposed to do, on a case by case basis. *State v. Carter*, 835 So.2d 259 (Fla. 2002) (A per se rule strips the trial court of its obligation to assess any alleged

violations in the context of a defendant's case. Trial courts must consider each violation on a case by case basis for a determination of whether, under the facts and circumstances, a particular violation is willful and substantial and is supported by the greater weight of the evidence.)

Respondent wrongfully interpreted Petitioner's demand for due process into an argument that would allow a probationer "to choose when he or she complies with the conditions of probation." (Respondent's brief page 19) Respondent's take on Petitioner's position is inflammatory. Petitioner is in no way suggesting that a probationer should have unfettered freedom to determine when he or she would comply with the conditions of a probation order. Due process requires, however, that a probationer be told of a date by which he must complete a condition before he can be violated for failure to complete that condition. If a probationer is given no date to complete a condition, for example, a date by which an HIV test is to be completed and the results disclosed, when can the probationer be violated? One week after probation begins? Two weeks after probation begins? Due process requires that a person on probation have more information.

In the instant case, Petitioner's order of probation provided no date of completion for any of the conditions. In stark contrast to Respondent's assertion that there was no evidence that Petitioner would be willing to complete counseling, Petitioner clearly testified at the hearing that he would be willing to complete counseling.

Petitioner regularly attended the therapy sessions, going seventeen to eighteen times. (Vol. 1 p. 36) Mr. Affolter, Petitioner's therapist, testified that neither Petitioner's attendance nor his behavior was the cause of his termination from the program. Petitioner did not attempt to manipulate the court. Petitioner regularly attended the sessions, and admitted that he was having difficulty publically speaking in the group therapy. Mr. Affolter testified that such reluctance was a common problem, and was even expected in a sexual offender therapy group.

Respondent provides slippery slope arguments in support of its position, but fails to acknowledge Petitioner's fundamental right to due process.

CONCLUSION

For above stated reasons, Mr. Woodson requests that this Honorable Court reverse the judgment of the Fifth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Charles Crist, 444 Seabreeze Blvd, Fifth Floor, Daytona Beach, Florida, 32118 via his basket at the Fifth District Court of Appeal, and a copy hereof to: Dwaine L. Woodson, DOC #X32139, Wakulla Correctional Institution, 110 Melaleuca Drive, Crawfordville, FL 32327, on this 2nd day of June, 2004.

MICHAEL S. BECKER For:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.210(a)(2) Fla. R. App.P.

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