IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1714
L.T. CASE NO. 3D04-78

**EVER NAHON ORTIZ,**

Petitioner,

-vs-

**THE STATE OF FLORIDA**,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

# BRIEF OF RESPONDENT ON THE MERITS

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## INTRODUCTION

The Petitioner, EVER NAHON ORTIZ, was the defendant below, and the Respondent, THE STATE OF FLORIDA, was the prosecution below. In this brief, the Petitioner will be referred to as "Defendant" as in the proceedings below. On February 12, 2007, the clerk of the Third District Court of Appeal forwarded by certified mail that the one volume of the record on appeal, which included the transcripts, were forwarded to the Florida Supreme Court. The symbols "R." will refer to this record on appeal. In addition, the symbol "TAB" will refer to the additional material as indicated in the clerk's index that was submitted to this Court from the Third District Court of Appeal.

## STATEMENT OF THE CASE AND FACTS

On May 1, 2003, Defendant was charged by information for burglary of a dwelling on or about March 24, 2003. (R. 1-3). That same day, Defendant accepted a plea of adjudication withheld and one year of probation. (R. 8). Upon determining that Defendant was competent and understood the plea agreement, the court placed Defendant on probation. (R. 31-35). In addition to the standard conditions of probation, Defendant was given the special conditions to "perform 100 hours of community service at a non-profit organization, as directed" and "1) Theft Course, 2) TASC Evaluation and Treatment, if necessary, 3) 100 Community Service Hours, 4) Restitution $540 equal monthly installments." (R. 8-9). As to these conditions, the court orally informed Defendant to enter, submit, and complete the TASC program, complete the 100 community service hours, and complete the anti-theft course. (R. 32, 35).

On October 16, 2003, Defendant's probation officer, Amy Tate, filed an affidavit of violation of probation. (R. 10-12). The affidavit alleged seven violations of probation. (R. 10-12). On November 18, 2003, Tate filed an amended affidavit, alleging the original seven violations and two additional violations. (R. 14-18). On October 24, 2003, he was taken into custody on the affidavit when Defendant came to the probation office. (R. 53).

On December 12, 2003, a probation violation hearing was held. The State presented Probation Officer Tate as its witness. Tate testified that she had been Defendant's probation officer since he was placed on probation on May 1, 2003. (R. 41). Tate testified that Defendant failed to report to her on October 7, 2003 as she instructed him to do on September 9, 2003. (R. 47, 59). Defendant told her that he was working long hours and could not report on that day. (R. 48). He submitted a report on October 24, 2003. (R. 47).

As of the date of the amended affidavit, Defendant had paid a total of $140 for restitution. (R. 48). However, the day before the hearing, Defendant had made a payment of $858 toward his probation, which resulted in an arrearage of forty cents. (R. 61). Based upon the payment the day before, the court dismissed the charge of arrearage for restitution and supervision without objections from the State. (R. 61).

Tate had instructed Defendant in July about the community service condition. (R. 49). She "had him pick a park where he wanted to go, and I filled out the proper paperwork and gave him the community service log and told him to start performing his community service hours," which was supposed to be performed in equal monthly installments. (R. 62). She also instructed Defendant on how to get the park to accept him. (R. 63). She did not give him a specific number of hours to work each month, but she did warn him several times that he

had to complete the hours by a particular date or he would be in violation of his probation. (R. 64-67). When Tate filed the amended affidavit, Defendant had failed to complete any hours of community service. (R. 49).

Tate testified that Defendant went to the TASC program and the program referred him to Perspective. (R. 14). The Department of Human Services sent Tate a client status report indicating that Defendant had been discharged for leaving against the staff's advice. (R. 50). The report was entered into evidence.[1] (R. 52). Defendant's objection was for characterizing the report as a letter. (R. 52). Tate did not receive an explanation from Defendant as to why he failed to complete the program. (R. 68).

Tate advised Defendant that the anti-theft course was a condition of probation and Defendant never attended a course. (R. 53). Tate believed the anti-theft program was two weeks in length. (R. 43). On October 14th, Tate phoned the Advocate Program and was informed that Defendant had not shown up on his scheduled date in August but he could reschedule for November 9th. (R. 53, 68-69). Defendant told her that he had an appointment for November 6th. (R. 53). Defendant reported to Tate's office on October 24th and was taken into custody. (R. 53).

[1] The report was not part of the record on appeal.

Tate conducted a urine analysis on October 24 that indicated that Defendant tested positive for marijuana. (R. 54). Also, Tate received verification from Pharm Chem Lab. (R. 54, 57). Tate indicated that she had the reports of these tests in her file. (R. 54). The verification was entered into evidence without objection. (R. 54). In the middle of Tate's cross-examination, the court stated that it was going to dismiss the charges related to the use of marijuana because the report was insufficient. (R. 69-70). The State objected. (R. 70).

Defendant testified on his own behalf. For two months prior to him being taken into custody, he worked at Grand Hotel as a maintenance worker. (R. 71-72). He made $320 per week. (R. 72). Defendant entered two paychecks into evidence. (R. 70).

He registered for the Advocate Program, the anti-theft course, and paid $150 at an unknown time. (R. 73). He was not given an exact date to attend, but a period of time. (R. 73). He went once, but was late and rescheduled. (R. 73). At the time he was arrested, he was scheduled to attend on November 8. (R. 74).

Tate instructed him to complete some of his community service. (R. 74). He stated that he tried, but the community service was difficult due to transportation. (R. 74). The community service was to police a park at 40th Street and 72nd Avenue. (R. 74). He advised Tate of his community service in June or July. (R.

75-76). He went twice, but was late and was prevented from working. (R. 75). This was about the same time he started working. (R. 76).

In regards to the TASC program, Defendant testified that he had gone six times and missed two consecutive weeks because of his job. (R. 77). He worked "from 7:30 to 8:00 to start to about 5:00, 6:00, and then I used the train for transportation." (R. 78). He was to report to TASC at 7:30. (R. 78). He informed the program that he had transportation problems. (R. 78). When he returned to the program, he was informed that he was discharged. (R. 78).

Prior to the cross-examination of Defendant, the prosecutor inquired whether the court had dismissed the violation of the law charge. (R. 78). The court responded that he had not and was waiting until both sides rested. (R. 78).

The prosecutor inquired whether Defendant smoked marijuana during his probation. (R. 79). Defendant objected, which the court overruled. (R. 79). Defendant responded that he did once and that is why he did not go to report. (R. 79). On redirect, he added that three days before he was to report in October, he used marijuana. (R. 82). He did not go to report for fear of the drug use being detected. (R. 81-82). He stated that he smoked marijuana because he "ran into a problem - - well - - and I thought that smoking some marijuana maybe it would resolve the problem." (R. 81).

Prior to closing arguments, the court dismissed the failure to pay supervision and restitution charges. (R. 83). Also, the court dismissed the failure to make a truthful report charge. (R. 84).

At the close of the evidence, Defendant argued that the community service violation should be dismissed for lack of evidence that Defendant was notified that he had to complete the hours by a particular date. (R. 83). The State conceded the point. (R. 83). Defendant argued that the TASC program charge should be dismissed because Tate did not have any personal knowledge as to why he was terminated from the program and there is no evidence that Defendant knew that he could be terminated for missing two sessions. (R. 83-85). Defendant argued that the anti-theft course would not constitute a violation, because he had one year to complete the anti-theft course, he only missed the first day, and he had an appointment to attend at a later day. (R. 85-86). Defendant argued that there was no evidence that Defendant was instructed to report to Tate on October 7 in order to find that Defendant failed to follow Tate's instructions. (R. 87). Defendant made no argument in regards to the violation of the law charge. (R. 88). Finally, Defendant argued that he could not be found to have submitted an untruthful report if he did not submit a report. (R. 88).

At the conclusion of Defendant's motions to dismiss, the court found that the prosecutor proved six of the charges, which were (1) failure to submit a timely

report, (2) failure to follow the instructions of the probation officer, (5) failure to complete community service hours, (6) failure to enter and successfully complete the program referred by TASC, (7) failure to complete the anti-theft course, and (8) violation of the law. (R. 89).

Although Defendant's sentencing guidelines were between 21 months and 15 years, the prosecutor recommended 366 days and the probation officer recommended the minimum guidelines of 21 months. (R. 90-92). Defendant's mother addressed the court. (R. 96). Defendant was sentenced to 21 months. (R. 98). Defendant timely appealed. (R. 25).

On appeal, Defendant argued that the trial court improperly revoked his probation based on several conditions of probation. (TAB ). In particular, Defendant argued that the trial court improperly revoked his probation as to the TASC Program, because he was ordered to submit to TASC and the necessary treatment program was not ordered to complete the program. (TAB , pg. 13). The State argued that Defendant failed to preserve the TASC program issue for appeal, that there was no error, and if there was any error it did not constitute fundamental error. (TAB , pgs. 19-21).

The Third District Court of Appeal issued an opinion on the TASC issue only as follows:

> We affirm the trial court's Order revoking Defendant's probation. Moreover, contrary to Appellant's suggestion that probation was not

> violated where he submitted to TASC evaluation despite the admission that he was discharged from the program for missing two consecutive appointments, we hold that when a court Orders anyone to submit to a program, it is inherent within the Order that the Defendant 'successfully complete' the program. Appellant's remaining points are without merit and/or moot in light of our holding.

Ortiz v. State, 932 So. 2d 214 (Fla. 3d DCA 2004). Defendant filed a motion for rehearing on the TASC issue only. (TAB ). On July 25, 2006, Defendant's motion for rehearing was denied. Ortiz v. State, 2006 Fla. App. LEXIS 12963 (Fla. 3d DCA July 25, 2006).

## SUMMARY OF THE ARGUMENT

Defendant's claim that he was not ordered to complete the TASC program is meritless, because the trial court specifically ordered him to enter, submit to, and complete the program. Defendant's claim that he desired to be reinstated in the program and complete it before his probationary period terminated is meritless, because there is no record support that he ever expressed a desire to be reinstated.

This Court should not exercise its ancillary jurisdiction to review the remaining probation violations, because Defendant's case is moot due to his completion of his prison sentence.

## ARGUMENTS

I. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT VIOLATED HIS TASC PROGRAM CONDITION. (Restated).

The facts reveal that May 1, 2003 probation order stated that Defendant shall comply with the special condition of the "TASC Evaluation & Treatment, if necessary." (R. 9). During the hearing on the probation, the trial court orally instructed Defendant that he "must enter and submit [sic] the task [sic] program after a drug and alcohol evaluation, and submit to any treatment that that evaluation may deem necessary as part of your probation" and that he "must **complete** the course, task [sic] and hours and also the restitution." (R. 32, 35). During the probation violation hearing, the probation officer testified that Defendant was discharged from the TASC program for "leaving against the staff's advice." (R. 50). Defendant argued that the TASC charge should be dismissed because his probation officer, Tate, did not have any personal knowledge as to why he was terminated from the program and there was no evidence that Defendant knew that he could be terminated for missing two sessions. (R. 83-85). The trial court held that the State had sufficiently proven that Defendant wilfully and substantially violated condition (6), the TASC program. (R. 89).

## A. Defendant's Claim that He Was Not Ordered to Complete the TASC Program is Meritless.

The standard of review for a violation of probation is abuse of discretion. See Arias v. State, 751 So. 2d 184 (Fla. 3d DCA 2000), *rev. denied*, 767 So. 2d 453 (Fla. 2000). "Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.'" Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing to Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)).

"Whether a defendant has violated probation or community control is a 'question of fact for the trial court that will not be overturned on appeal unless there is no evidence supporting that decision.'" Lindsay v. State, 839 So. 2d 829 (Fla. 4th DCA 2003) (citing to Marcano v. State, 814 So. 2d 1174 (Fla. 4th DCA 2002). In order for a trial court to revoke probation, there must be a finding of a willful and substantial violation. See Thorpe v. State, 642 So. 2d 629 (Fla. 1st DCA 1994). If there is sufficient and substantial evidence before the court upon which to base revocation, then the trial court cannot be found to have abused its discretion. See Perez v. State, 801 So. 2d 1001 (Fla. 4th DCA 2001).

Defendant argued that he was not ordered to complete the TASC program, therefore, he could not violate his probation by failing to complete it. The State argued that Defendant's claim on appeal is without merit because he was ordered

to **enter, submit to, and complete** the TASC program. (R. 32, 35). Based upon the order to enter, submit to, and complete the TASC program and Defendant's failure to abide by the order by being discharged from the program for "leaving against the staff's advice" and/or missing sessions, the trial court did not err in finding that Defendant violated this condition of his probation, because failure to obey the conditions and instructions of the program is sufficient evidence of a willful and substantial violation. See Mills v. State, 840 So. 2d 464 (Fla. 4th DCA 2003) (failure to accept the conditions of the program, which resulted in the defendant's discharge, was sufficient for a willful violation).

Defendant's reliance upon cases in which the defendants were ordered to submit to or enter a program or continue counseling is misplaced, because Defendant was ordered in this case to enter, submit to, and complete the TASC program. Cf. Rial v. State, 835 So. 2d 291 (Fla. 3d DCA 2002) (ordered to "enter the Passageway Programs"); Cyr v. State, 747 So. 2d 1005 (Fla. 2d DCA 1999) (ordered to "continue sex offender counseling"); Carter v. State, 763 So. 2d 1091 (Fla. 4th DCA 1999) (ordered to "attend weekly sessions with a licensed psychiatrist or psychologist"); Larangera v. State, 686 So. 2d 697 (Fla. 4th DCA 1996) (ordered to "continue marital counselling or individual); Bingham v. State, 655 So. 2d 1186 (Fla. 1st DA 1995) (ordered to "submit to PSYCHO/SEXUAL evaluation and treatment as directed by your probation officer"); Bell v. State, 643

So. 2d 674 (Fla. 1st DCA 1994) (ordered to "submit to Psychosexual counseling as directed by your Probation Officer").

In addition, Defendant's reliance upon cases with orders to submit to on-going counselling programs is distinguishable from the case at bar, because the TASC program is a fixed program with a beginning and end. Therefore, submission to the TASC **program** would require attendance within the rules and policy until the program is completed.

### B. Even if Defendant Was Not Expressly Ordered to Complete the TASC Program, There Is an Inherent Order to Complete the Program as the Condition of Probation.

In Lawson v. State, 941 So. 2d 485 (Fla. 5th DCA 2006), the Fifth District Court of Appeal specifically addressed on the merits the issue that Defendant now raises. In Lawson, Lawson was ordered to enter into, participate in, and successfully complete a drug treatment program. He was told he would be discharged if he missed three sessions. Lawson was discharged for a failure to abide by the rule. After a hearing, the trial court held that Lawson willfully and substantially violated the condition of his probation. The district court upheld the trial court's decision because it found that Lawson had fair notice of the conduct that may result in a violation and that the principles of probation required the adoption of an interpretation that defendants do not have free will to decide to do

the conditions of their probations. Id. at 489-490. The court reasoned that a trial court provides fair notice of a condition of probation when the notice provides a reasonable person of common intelligence that the conditions must be immediately satisfied. Id. A reasonable reading of the conditions does not indicate that the defendant has until the "last tick of the clock and as many chances as he [or she] desires to complete the [] program." Id. at 490. The court reasoned that there are three goals of probation that are satisfied with the interpretation that a reasonable person standard must be applied to the reading of probation conditions: (1) rehabilitate the criminal offender so that his or her future conduct will conform to societal standards; (2) protect society from future criminal conduct of the offender; (3) and protect the rights of crime victims. Id. at 491. The initiation of the probation conditions as soon as the defendant is able to satisfy them is the reasonable interpretation that the defendant should be held to. "**Whether more time should be given to start the program, or more attempts allowed after initial failure due to willful noncompliance, are matters that should be left to the sound discretion of the trial court when considering an appropriate sanction in revocations proceedings.**" Id. at 491-492 (emphasis added). The court certified a question of great public importance to this Court.[2] Id. at 492 (SC06-2423).

[2] "DOES A TRIAL COURT ABUSE ITS DISCRETION IN FINDING A

The State urges this Court to adopt the decision of the Fifth District in Lawson. Probation is one alternative to imprisonment for rehabilitation of convicted felons. As with imprisonment that proceeds immediately after sentencing, there is a reasonable implication that all rehabilitation methods should be accomplished immediately upon sentencing. A defendant sentenced to prison does not get to choose which period of his or her life the defendant would like to satisfy the imprisonment sentence. Probation, obviously, provides the defendants with more freedom than imprisonment; however, probation remains a rehabilitation method of a convicted felon. The conditions of probation are the rehabilitation methods ordered by the court and agreed to be performed by the defendant. Probation is not a right to the defendant but a privilege that can be taken away upon a demonstration that the defendant has willfully and substantially violated a condition of probation. The conditions must include a realm of reasonableness and the determination of acts of the defendant that support a willful and substantial violation of the condition of probation should remain within the sound discretion of the trial court.

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DEFENDANT, WHO IS DISCHARGED FROM A COURT-ORDERED DRUG TREATMENT PROGRAM FOR NONATTENDANCE, IN WILLFUL VIOLATION OF PROBATION WHEN THE SENTENCING COURT DID NOT SPECIFY THE NUMBER OF ATTEMPTS THE DEFENDANT WOULD HAVE TO SUCCESSFULLY COMPLETE THE PROGRAM AND IMPOSE A TIME PERIOD FOR COMPLIANCE?" Id. at 492.

Similar to sentences of imprisonment, the conditions of probation should be initiated as soon as reasonably possible unless ordered otherwise by the trial court. The condition to enter a program reasonably includes the direction to enter the program **immediately**. Also, the condition of submitting to and/or completing a rehabilitation or therapeutic program must include the reasonable detail that the rules and policies of such program should be obeyed to avoid being discharged or terminated from such program. The defendant does not submit to a program if the probationer does not obey the rules and policy. If the defendant chooses to not comply with the program's rules and policies and knows that the failure to comply can result in a discharge or termination from the program, a trial court should be allowed to consider whether the defendant's actions support a finding of willful and substantial violation of a condition of probation to submit to and complete the program. See Mills, 840 So. 2d 464 (unexcused absences from a required course as a condition of probation may constitute a willful violation of probation); Boyd v. State, 756 So. 2d 1114 (Fla. 1st DCA 2000) (same); Santiago v. State, 722 So. 2d 950 (Fla. 4th DCA 1998) (same).

In the case at bar, Defendant was discharged for leaving against the staff's advice, which supports that he was informed of the rule, policy, or condition of the program by its staff and disobeyed the rule, policy, or condition which resulted in his discharge. Whether Defendant should be given another opportunity to re-enter

the program and attempt to abide by the rules, policy, or conditions of the program should be left in the sound discretion of the trial court.

### C. Defendant's Claim that the Trial Court Erred in its Revocation Because Defendant Desired to be Reinstated in the TASC Program After Discharge and Had Time to be Reinstated and Complete the Program is Meritless.

Defendant argued that even if there is an inherent requirement to complete within an order to submit, the trial court erred in revoking Defendant's probation because he expressed a desire to continue in the Program despite his discharge and he had remaining time in his probation to complete the program. The State argues that a trial court has the power to revoke a defendant's probation based upon the finding of a willful and substantial violation despite the remaining time in the probation for the defendant to try again. In addition, the State argues that Defendant made no such desire to be reinstated until the appeal, which was too little to late.

In Mills, one of the conditions of Mills' probation was that he was required to have "active participation in and successful completion of a sex offender treatment program." Mills was terminated from the program after ten months. At the revocation hearing, the evidence was that Mills was discharged for excessive absences, lack of participation and motivation, and for failure to take responsibility for his offending behavior. The trial court found that Mills willfully and

substantially violated the conditions of his probation by failing to complete his sex offender treatment program. The appellate court held that the trial court did not abuse its discretion in its determination because the greater weight of the evidence supported the trial court's decision. Id. at 466. In addition, the court held that Mills did not raise the claim that Mills was not required to complete the program in a specific time period and had time remaining in his probationary period; therefore, the issue was not preserved for appeal. Id. at 467. But even if it was preserved, the claim would fail because the trial court could properly deem Mills excessive absences from the program as a willful violation of the condition and revoke the probation. Id. The court distinguished the case from opinions that involved the lack of specificity as to a time period, because the cases also involved a lack of finding of willful violation. Id. In Mills's situation, Mills had made no effort to be reinstated in the program during the time of his discharge until the hearing on the probation violation and "that his possible reinstatement was asserted at the sentencing, but this was too late." Id.

In the case at bar as in Mills, Defendant's absence despite advice of the staff would support a finding of willful and substantial violation of the TASC condition of probation. In addition, in the case at bar, Defendant has expressed **no** desire or willingness to be reinstated into the program after the discharge. The record reveals that on or before October 16, 2003 Defendant was discharged from the

program. (R. 10-12). Defendant was taken into custody on October 24, 2003. (R. 56). The probation violation hearing was on December 12, 2003. (R. 37). Defendant testified that after missing two consecutive weeks due to transportation, he returned to the program and he was informed that he was discharged. (R. 77-78). Although he went to the TASC program after missing two consecutive weeks and was informed that he was discharged, Defendant did not testify that he made any inquiry or attempt to be reinstated into the program at that time. Defendant did not testify that he made an inquiry or attempt to be reinstated the next week or prior to his arrest on Oct. 24. Defendant did not argue that inquiry or an attempt to be reinstated into the TASC program was made during the two months between his arrest and prior to the probation violation hearing. At the hearing, Defendant did not testify to a desire be reinstated into the TASC program if his probation was not revoked. In Mills, the court held that Mills expression of willingness to be reinstated at the sentencing hearing was "too late;" therefore, the State would argue that Defendant's lack of ever expressing a willingness to be reinstated during the trial level proceedings would support a conclusion that he had no desire to be reinstated and this case is distinguishable from the cases Defendant relied upon on this appeal.

### D. Even if this Court finds that it was error to revoke based on the TASC program condition, the trial court's revocation should be affirmed.

This case has come to this Court on discretionary review based on an alleged conflict with the Third District's ruling on the TASC program condition alone. However, there are five remaining violations of conditions of probation that are not subject to the conflict review and would support the affirmance of the revocation of probation. Also, Defendant has conceded to the violation of one of the five conditions. Therefore, even if this Court found that the trial court improperly found that Defendant violated the TASC program condition, the trial court's revocation should be affirmed based on the five remaining violations.

## II. THIS COURT SHOULD NOT EXERCISE ITS ANCILLARY JURISDICTION TO REVIEW OTHER ASPECTS OF THE PROBATION REVOCATION PROCEEDINGS. (Restated).

Defendant argues that "[t]his Court should review the rest of the probation revocation proceeding here as most of the violations were not competently proven and the hearing itself was conducted in a manner that violated Mr. Ortiz's due process right to a fair and impartial tribunal." *Initial Brief, pgs. 21-27.* The State acknowledges the ancillary jurisdiction of this Court. "Once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised

in the appellate process, as though the case had originally come to this Court on appeal. This authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case." Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982). See also Feller v. State, 637 So. 2d 911 (Fla. 1994). The State would submit that the other issues not related to conflict between the district courts are related only to Defendant's revocation of probation and are at this time moot. When Defendant's probation was revoked on December 12, 2003, Defendant was sentenced to 21 months in prison. (R. 98). Defendant was released from prison on April 15, 2005. See http://www.dc.state.fl.us/InmateReleases/detail.asp?Bookmark=1&From=list&SessionID=166188589 . Therefore, Defendant has completely served his sentence and the issues of his revocation are moot. Therefore, just as this Court did in the case of State v. Barton, 523 So. 2d 152, 153 n.2 (Fla. 1988), this Court should decline to review the remaining issues that were raised in the Third District Court of Appeal case.

In the alternative, the State addresses each issue below.

## A. Defendant Failed to Preserve the Issue Raised as to the Community Service Condition and There was Sufficient Evidence to Support the Violation.

On appeal, Defendant argued that the time remaining to complete the community service condition would not support the revocation of his probation based on a failure to complete community service. (TAB , pg. 12). The State argued that Defendant did not raise this issue in the trial court and it is not preserved for appellate review. In addition, the evidence supports a revocation on the failure to complete the community service condition.

Defendant's May 1, 2003 probation order stated that Defendant shall comply with the special condition to "perform 100 hours of community service at a non-profit organization, **as directed**." (R. 9) (emphasis added). The lower court orally informed Defendant that he must complete the hours. (R. 35). The probationer's amended affidavit stated that Defendant violated Condition 6 by failing to complete any community service hours. (R. 14).

During the hearing, Defendant moved for the violation of the condition to be dismissed because there was a lack of evidence that Defendant was notified by Tate to complete the hours by a particular date.[3] (R. 83). Defendant did not argue

[3] The record does support that the prosecutor conceded on Defendant's judgment of acquittal argument that there was no evidence to support a violation of the community service condition. However, a court should not accept or agree with an incorrect concession of error. See Boyett v. State, 688 So. 2d 308, 310 (Fla. 1996).

that the order did not specify a number of monthly hours or that he had time remaining in his probation to complete the hours. However, Defendant attempted to raise this argument for the first time on appeal without having preserved the issue in the lower court. Such a review would have been an error. See F.B., 852 So. 2d at 229-230; Mills, 840 So. 2d at 467.

Also, the issue raised for the first time on appeal did not constitute fundamental error. See F.B., 852 So. 2d at 229-230; Mills, 840 So. 2d at 467. There was sufficient evidence that Defendant violated the community service condition. The probation order required Defendant to perform the hours as directed by his probation officer.[4] (R. 9). Probation Officer Tate testified that she instructed him to start performing his community service hours. (R. 62). She, also,

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Also, it is the trial court's decision on the evidence that is important for appellate review.

[4] Probation officers may provide supervisory instructions on the conditions of probation. See Mathis v. State, 683 So. 2d 634, 636 (Fla. 4th DCA 1996), *receded from on other grounds by*, Matthews v. State, 736 So. 2d 72 (Fla. 4th DCA 1999). "Probation is supervision and control with the hope of rehabilitation. While only the court can set conditions of probation, the judge cannot personally supervise; he cannot set forth a complete guide book of directions in an order of probation. Instead, he properly delegates to the probation supervisor the giving of specific instructions necessary for effective and successful supervision. The court retains complete control over determination of the reasonableness and necessity of instructions given and the materiality of alleged violations." Draper v. State, 403 So. 2d 615, 616 (Fla. 5th DCA 1981). The inclusion of the term "as directed" is a valid delegation of the court's power to the probation officer to routinely supervise and monitor the court-imposed condition of probation. See Wheatley v. State, 629 So. 2d 896 (Fla. 1st DCA 1993); Rowland v. State, 548 So. 2d 812 (Fla. 5th DCA 1989).

warned him several times that if he did not complete the hours by a particular date, he would be in violation of his probation. (R. 65-67). Defendant failed to complete any hours of community service after five months of probation and Tate's instructions. (R. 49). The trial court's conclusion that Defendant violated this condition by failing to follow the continuous instructions from his probation officer to complete some of his hours would be sufficient grounds for the violation. See Roff v. State, 644 So. 2d 166 (Fla. 4th DCA 1994) ("failure to follow supervisory instructions given by his probation officer was a proper ground for revocation of probation").

In addition to Defendant's failure to follow Tate's instruction, the State's evidence supports that Defendant's failure to perform his community service was a direct result of his actions. See Palma v. State, 830 So. 2d 201 (Fla. 5th DCA 2002) (the defendant's mental disorder would not excuse her from completion of her probation condition because it was caused by the defendant's failure to take her medication). Tate testified that Defendant was presented with several options to fulfill his community service requirement and Defendant chose the park. Logically, his choice should have been one that he would be able to satisfy. Despite the opportunity to choose a program that he could satisfy, Defendant chose a program that he later alleged he could not do because of his inability to get to the location on time. (R. 74). This failure to perform should be attributed to

Defendant's own actions and not present an excuse for failure to complete the condition.

After realizing that he was unable to fulfill the condition under his chosen program and knowing that Tate had other community service opportunities, Defendant made no further arrangements prior to the filing of the affidavit of probation in October to begin or complete his community service requirement. See Boyd v. State, 756 So. 2d 1114 (Fla. 1st DCA 2000) (a defendant's inaction before but action after the filing of the affidavit of violation may be considered by the court).

**B. It is within the Trial Court's Discretion to Determine that Defendant's Unexcused Absence from the Anti-Theft Course was a Violation**

On appeal, Defendant argued that the condition would not support a revocation where there was no particular date for completion and time remained for probation. (TAB , pg. 14-15). The State argued that there is evidentiary support for the trial court's conclusion that Defendant violated the anti-theft course condition. The May 1st probation order lists an anti-theft course as a special condition of Defendant's probation. (R. 9). The court orally told Defendant that he must complete the anti-theft course. (R. 35). The probation officer testified that she learned on about October 14th that Defendant failed to show up for his

scheduled appointment in August but Defendant had scheduled an appointment for November 9th. (R. 53, 68-69).

Unexcused absences from a required course as a condition of probation may constitute a willful violation of probation. See Mills, 840 So. 2d 464; Boyd v. State, 756 So. 2d 1114 (Fla. 1st DCA 2000); Santiago v. State, 722 So. 2d 950 (Fla. 4th DCA 1998). Under the totality of the circumstances, just as one missed monthly report may support a revocation, the State argued that Defendant's missed anti-theft course session would support a revocation. See Carter, 835 So. 2d at 259 (a failure to file a single report may justify revocation of probation). Probation is leniency granted by the discretion of the court. See Delee v. State, 816 So. 2d 677 (Fla. 3d DCA 2002), *rev. denied*, 842 So. 2d 843 (Fla. 2003). Under that discretion, the court may determine that one violation of a condition of probation is substantial to revoke the probation. See Id.

C. **Defendant Failed to Properly Preserve the Issue Raised as to the Violating the Law Condition and there was Sufficient Evidence to Support the Violation.**

On appeal, Defendant argued that the court should not have compelled him to answer whether he had smoked marijuana during his probation because it violated his right against self-incrimination. (TAB, pg. 16). The State argued that this issue was not raised in the court below and the issue does not constitute fundamental error. One of the standard conditions of all probations is that the probationer shall not "violate any law of any city, county, state or the U.S. (a conviction in a court of law is not necessary for you to be found in violation)." (R. 8). At the hearing, the probation officer testified that the urine analysis she conducted resulted in a positive result and that the lab report verified that Defendant had used an illegal drug during his probation. (R. 54). During Defendant's testimony, the prosecutor asked on cross-examination "do you admit smoking marijuana while you were on probation?" (R. 79). After the defense objection was overruled, Defendant responded, "[y]es. But just one time. And that was the reason why I didn't go to report." (R. 79).

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." Tillman v. State, 471 So. 2d 32 (Fla. 1985). See also

Strickland, 610 So. 2d at 707 (the argument must be fully made to the lower court to preserve it for appeal). Also, a complete failure of any evidence must be met to constitute fundamental error for an allegation of insufficiency of the evidence. See F.B., 852 So. 2d at 230-231.

Although Defendant objected, Defendant did not raise the specific issue of self-incrimination during the hearing; therefore, the issue of self-incrimination is not preserved for appellate review. In addition, at the close of all evidence when there was an opportunity to argue self-incrimination, Defendant did not give any argument for the dismissal of the violation of the law charge. Therefore, this issue has not been properly preserved for appeal.

The issue would not constitute fundamental error, because there was sufficient additional evidence other than Defendant's testimony that Defendant violated the law. F.B., 852 So. 2d at 229. The probation officer testified that the urine analysis she conducted resulted in a positive result and that the lab report verified that Defendant had used an illegal drug. (R. 54). This evidence would be sufficient evidence for revocation and any allegation of self-incrimination would not constitute fundamental error. Clark v. State, 363 So. 2d 331 (Fla. 1978), *abrogated on other grounds*, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (prosecutorial comment on right to silence, i.e., Fifth Amendment violation, was not fundamental error). See generally California v. Nolan, 95 Cal. App. 4th 1210

(Cal. Ct. App. 2002) (the results of a drug test conducted by the counselor/program coordinator of the drug court program was admissible evidence of the defendant's probation violation).

### D. The State Concedes that the Trial Court Dismissed the Condition to Fully and Truthfully Report Condition and the Revocation on this Condition is Most Likely a Scrivener's Error, But Defendant has Failed to Raise this Issue in the Trial Court.

On appeal, Defendant argued that there was no evidence presented at the hearing that Defendant failed to truthfully report and that the trial court orally dismissed the claim but the written order included the condition in the revocation. The State submits that Defendant has failed to raise this scrivener's error in the trial court and concedes to the record support that the trial court dismissed this allegation of violation.

Defendant's May 1, 2003 probation order states that he must "not later than the fifth of each month, unless otherwise directed you will make a full and truthful report to your officer on the form provided for that purpose." (R. 9). The amended affidavit of violation of probation stated that Defendant failed to make a truthful report on his October 2003 written report by stating that he had not used illegal drugs when in fact the probation officer's urinalysis and confirmed laboratory test concluded that Defendant had used an illegal drug. (R. 15). At the hearing, the probation officer did not testify that Defendant had provided an untruthful report,

but the allegation was made in the filed amended affidavit that the trial court took judicial notice of. (R. 45). The trial court dismissed the alleged violation at the close of the case. (R. 83). During the trial court's final findings of fact and revocation, the trial court specifically stated that he found six violations proven by the State. (R. 89). But the inclusion of the truthful reporting condition would have resulted in seven violations; therefore, the trial court did not find that Defendant violated the truthful reporting condition. In the written order, the truthful reporting violation was included. (R. 24).

However, the inconformity of the oral and written pronouncement is obviously a scrivener's error that can be easily corrected if Defendant presented the issue to the trial court. But the scrivener's error would not change the outcome of revoking Defendant's probation, because there were six other conditions violated that would support the revocation. Although the scrivener's error may be corrected in the trial court, the scrivener's error did not constitute reversible error as to the trial court's revocation of probation. See Mitchell, 871 So. 2d at 1042; Delee v. State, 816 So. 2d 677 (Fla. 3d DCA 2002), *rev. denied*, 842 So. 2d 843 (Fla. 2003).

III. PETITIONER MAY NOT RAISE FOR THE FIRST TIME ON APPEAL CLAIMS THAT WERE NOT RAISED IN THE APPELLATE COURT (or TRIAL COURT). (Restated).

Before this Court, Defendant presents several arguments that were not presented in the lower courts and are not properly reviewable by this Court. F.B., 852 So. 2d at 229-230.

**A. Defendant's Issue of Failing to Submit a Report since September 9, 2003 was not Presented to the Trial or Appellate Court and is not Properly Reviewable in this Court. In Addition, the Issue is Meritless.**

On this appeal, Defendant argues that there was no factual basis for the trial court to make a finding that Defendant failed to submit a monthly report since September 9, 2003. The State argues that Defendant did not argue that the State failed to prove that Defendant did not report since September 9, 2003 to the trial or appellate court; therefore, the issue is not preserved for appeal. In addition, Defendant's reading of this condition is incorrect and that there was sufficient evidence that Defendant failed to report on the fifth day of October per the condition or the seventh day of October per the instructions of the probation officer.

Defendant's May 1, 2003 probation order states that he must "not later than the fifth of each month, unless otherwise directed you will make a full and truthful

report to your officer on the form provided for that purpose." (R. 9). Defendant, also, must "follow carefully and faithfully both the letter and spirit of valid instructions given you by a duly authorized officer." (R. 9). The affidavits of probation violation alleged that Defendant violated the rule to report on the fifth of the month by failing to submit a report since September 9, 2003. (R. 10-18). The affidavit was filed on October 14, 2003 and the amended affidavit was filed on November 12, 2003. (R. 10-18). At the hearing, the probation officer testified that she instructed Defendant to report to her office on October 7 and that Defendant did not show up to submit a report because he had worked long hours and could not report on that date. (R. 48-49). Defendant did report on October 24, 2003, which was 15 days after he was instructed to report. (R. 47). On appeal, Defendant argued that his late filing for the month of October is not a willful and substantial violation once the report has been accepted. (TAB , pg. 11).

Before this Court, Defendant has changed his appellate argument to the State's failure to prove that he did not file a monthly report *since* September 9, 2003 because Defendant submitted a monthly report on October 24, 2003. This was not the argument below. Therefore, it is not properly preserved for review by this Court.

In the alternative, Defendant's argument is without merit. The probation officer testified that she instructed Defendant to file the report on October 7 and

that Defendant did not file the report on October 7. (R. 47). The probation officer testified that Defendant said that he could not report on that day due to his long hours of work. (R. 48). Defendant violated the reporting condition of his probation. Although Defendant later filed a report after the probation officer filed the October 16 affidavit and before she filed the November 18 amended affidavit, Defendant admitted that he lied to his probation officer and the real reason he could not report on October 7 was because he had taken marijuana three days prior and did not want it detected during his reporting day. (R. 81-82).

The State argues that the evidence supports that there was a willful and substantial violation of the reporting condition because Defendant failed to timely file and admitted to willingly smoking marijuana and consciously choosing not to report. This is not a case where the failure to report is based upon some uncontrollable or unwilling condition placed upon the probationer. This is a case where Defendant lied to his probation officer and admits that he made conscious decisions to violate the condition of his probation, i.e., to submit a monthly report on October 7 as directed by his probation officer. These facts of his willful and substantial violation do not change because Defendant later filed a report. The filing of the report is simply a factor that the trial court can consider. But since the facts of his violation support a willful and substantial violation of timely filing, the

appellate court properly affirmed the trial court's finding as to the condition to timely file a report.

Also, the State did not have to prove that Defendant failed to file any monthly report after September 9, 2003 as interpreted by Defendant. The State was required to submit evidence, which it did, that Defendant had not filed a report on time. Again, Defendant's late filing is factor to be considered by the trial court in its determination of Defendant's willful and substantial violation of a condition of probation.

**B. Defendant's Issue that the Trial Court was a Biased Arbiter was not Presented to the Trial or Appellate Court and is not Properly Reviewable in this Court. In Addition, the Issue is Meritless.**

Defendant argues that the trial judge overcame his proper role of a neutral factfinder. The State argues that this issue was not raised in the trial or appellate court and is not preserved for appellate review.

Defendant's claim has not been properly preserved for appellate review. Defendant did not make an objection in the trial court at any time that the court had abandoned its role of neutrality, the claim which Defendant makes in this appeal. Jones v. State, 582 So. 2d 110, 111 (Fla. 3d DCA 1991)(stating that "in order to preserve for appellate review alleged improprieties of a trial judge, an objection must be made contemporaneously with the prejudicial conduct or comments").

See also Pope v. Wainwright, 496 So. 2d 798, 801 (Fla. 1986); McMullen v. State, 876 So. 2d 589 (Fla. 5th DCA 2004)(denying relief and noting that the complained of actions by the trial judge were not objected to by defense counsel). As the record in the instant case is void of any contemporaneous objection, the actions of the trial court warrant reversal only if they constitute fundamental error. Mathew v. State, 837 So. 2d 1167, 1170 (Fla. 4th DCA 2003). Although departure from judicial neutrality is fundamental error in some cases, not every act of judicial impartiality will qualify as fundamental error. Williams v. State, 901 So. 2d 357, 359 (Fla. 2d DCA 2005). Where the trial court's conduct did not vitiate the validity of the entire trial, harmless error review is appropriate. Id. at 359.

During the probation revocation hearing, the trial court interrupted the prosecutor's direct examination of the probation officer and proceeded to question the probation officer for the remainder of the direct examination. (R. 48-54). At no time did Defendant object. Preservation is a necessity in all appeals, except cases of fundamental error; however, in a case where the allegation is against the trial court's neutral role, an objection is very important because it establishes that the party(s) participating in the proceeding felt that the trial court lacked neutrality. It is difficult enough for an appellate court to review a cold record on appeal and make legal decisions; however, when the decision to be made by the appellate court rests upon the perceived bias in the trial court, a verbal indication must be

created on the record. Defendant failed to make any objection to the trial court's actions in the case at bar, which should negate that at the time of the trial court's actions, there was a sense that the trial court had departed from being a neutral arbiter.

Also, any error in the trial court's action of questioning the State's witness is harmless. First, the proceeding was a bench trial and not a jury trial where the trial court's action could influence the trier of facts. See Dykes v. State, 264 So. 2d 65 (Fla. 3d DCA 1972). The issue of the trial court becoming a biased arbiter is related to the influence the trial court's role will have on the jury, but when the jury is the court there is no assumption of influence. Second, the trial court also interrupted and assisted the defense's examination in eliciting answers from the witness. (R. 64, 66, 67-68, 69). See Dykes, 264 So. 2d at 67. There can be no finding that the trial court was an arbiter for a particular side; therefore, there is no established bias. Thirdly, the trial court's action should not result in a conclusion that the actions affected the outcome of the proceedings, because the trial court remained a neutral arbiter as demonstrated by its action of immediately dismising three of the nine allegations of probation.

### C. The Case Need Not be Remanded for Consideration of Whether the Violation of Failing to Appear on October 7, 2003 was Sufficient to Revoke Probation.

Based on Defendant's argument that the only allegation proven was failure to report as directed on October 7, 2003, Defendant argues that the trial court must determine if this one violation was sufficient. As discussed above, Defendant admitted that he lied to his probation officer as to the reason for his failure to appear on October 7. Also, Defendant admitted he failed to appear because he willfully smoked marijuana three days before reporting was scheduled. The State submits that Defendant's admission of his willful violation and Defendant's lack of credibility based upon his admission that he failed to be truthful was sufficient evidence to sustain a willful violation. One violation is sufficient to sustain a revocation. See Carter, 835 So. 2d at 259 (a failure to file a single report may justify revocation of probation).

## CONCLUSION

Based upon the arguments and authorities cited herein, Respondent respectfully requests that this Court:

(1) decline to review any issues other than the conflict upon which review was granted; and

(2) approve the decision of the Third 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 Brief of Respondent on Jurisdiction was mailed this 5th day of March, 2007, to Robert Godfrey, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

_____
LUCRETIA A. PITTS
Assistant Attorney General

## CERTIFICATION OF FONT AND TYPE SIZE

I HEREBY CERTIFY that the font and type size in this Brief of Respondent on Jurisdiction comply with Florida Rules of Appellate Procedure requirements in that Times New Roman 14-point was utilized.

_____
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