IN THE SUPREME COURT OF FLORIDA

CASE NO.
THIRD DISTRICT CASE NO. :04-78

EVER NAHON ORTIZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal, on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as AA,@ followed by the page numbers(s). All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The trial court revoked Mr. Ortiz= probation for, *inter alia*, failing to successfully complete a TASC program to which he had been ordered only to submit. (A. 1). In affirming the revocation, the Third District Court of Appeal held that a probationer is required to Asuccessfully complete@ a program even if the Order of probation requires only that he enter but not that he complete it:

> [C]ontrary to Appellant=s suggestion that probation was not violated where he submitted to TASC evauation 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 Asuccessfully complete@ the program**. (A. 1) (e.s.).

The Court cited no authority at all in support of this holding.

SUMMARY OF ARGUMENT

The decision below, that revocation is warranted where a probationer enters but fails to successfully complete a program which he has been ordered only to enter, is in express and direct conflict with ***Bingham v. State***, 655 So.2d 1186 (Fla. 1st DCA 1995); ***Bell v. State***, 643 So.2d 674 (Fla. 1st DCA 1994); ***Dunkin v. State***, 780 So.2d 223 (Fla. 2d DCA 2001); ***Mitchell v. State***, 871 So.2d 1040 (Fla. 2d DCA 2004); ***Larangera v. State***, 686 So.2d 697 (Fla. 4th DCA 1996); and ***Carter v. State***, 763 So.2d 1091 (Fla. 4th DCA 1999).

ARGUMENT

THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH ***BINGHAM V. STATE***, 655 SO.2D 1186 (FLA. 1ST DCA 1995); ***BELL V. STATE***, 643 SO.2D 674 (FLA. 1ST DCA 1994); ***DUNKIN V. STATE***, 780 SO.2D 223 (FLA. 2D DCA 2001); ***MITCHELL V. STATE***, 871 SO.2D 1040 (FLA. 2D DCA 2004); ***LARANGERA V. STATE***, 686 SO.2D 697 (FLA. 4TH DCA 1996); AND ***CARTER V. STATE***, 763 SO.2D 1091 (FLA. 4TH DCA 1999).

The law is well-settled within the first, second and fourth districts[1] that probation cannot be revoked for failure to successfully complete a program which the probationer has been ordered only to enter. This holding is sensible, because a probationer can be terminated from a program for reasons which would not independently warrant revocation: What if the program determined that the probationer did not belong there, because, upon evaluation, he did not present with the problem the program is designed to address? What if the program determined that, despite the probationer=s best efforts, he was not amenable to the treatment provided there? What if the program=s protocol required termination for conduct that was not, within the meaning of Section 948.06, Fla.Stats., Awillful@ and

[1]Indeed, until this case, the law had been settled in the Third District Court of Appeal as well. *See* ***Rial v. State***, 835 So.2d 291 (Fla. 3d DCA 2002) (where terms of probation required that appellant enter but not complete program, trial court erred in revoking probation where appellant absconded from program, *citing* ***Carter v. State***, *supra*, ***Bell v. State***, *supra*, ***Bingham v. State***, *supra*.).

Asubstantial@?

Where a sentencing court intends that a probationer successfully complete a program, it knows how to say so. In this case, the sentencing court did not say so. The opinion below interlineates a Asuccessful completion clause@ into an Order which was silent in this respect, thereby modifying and enhancing the conditions of probation denoted in the plain language of the Order itself. The lower court=s opinion violates not only the probationer=s federal and state due process rights to notice[2], but is also in conflict with the following cases from the First, Second and Fourth District Courts of Appeal:

Bingham v. State, 655 So.2d 1186 (Fla. 1st DCA 1995) (where probationer was required to submit to psychosexual evaluation and treatment as directed, and he Asubmitted to six sessions of psychosexual counseling before he was terminated for unsatisfactory attendance,@ revocation reversed because condition Adid not include a requirement of completion or some other time limit. . .@).

Bell v. State, 643 So.2d 674 (Fla. 1st DCA 1994) (where probationer ordered to A>submit to= psychosexual counseling - a requirement which he satisfied by attending eight weekly counseling sessions before being terminated therefrom by his counsel for refusing to admit to the underlying charges,@ revocation reversed, because order Adid not require that he

[2]*See, e.g.*, ***Gurganus v. State***, 391 So.2d 806, 807 (Fla. 5th DCA 1980) (A[E]ven a judge cannot extend the probationary term without a hearing, with due process, and having the accused violator before the court.@).

admit to the underlying charges or that he complete the counseling at issue.@).

Dunkin v. State, 780 So.2d 223 (Fla. 2nd DCA 2001) (where probationer was required to enter and successfully complete outpatient sex offender treatment program within first three years of supervision, and he was violated for being absent without permission for three consecutive sessions, revocation reversed, because condition Adid not specify that treatment had to be successfully completed on the first try or how many chances the appellant would be given to complete it successfully.@).

Mitchell v. State, 871 So.2d 1040 (Fla. 2nd DCA 2004) (where sex offender treatment condition required that probationer needed to complete program, but Adid not specify that treatment had to be successfully completed on the first try or how many chances he would be given to complete the program,@ revocation for termination Adue to unexcused absences@ reversed.).

Larangera v. State, 686 So.2d 697 (Fla. 4th DCA 1996) (trial court erred in revoking probation where probationer attended counseling for a number of months and then voluntarily stopped, but condition did not require completion or contain some other time limit).

Carter v. State, 763 So.2d 1091 (Fla. 4th DCA 1999) (revocation reversed where probationer began but did not continue weekly counseling sessions, where order Adid not require completion or have a time limit@).

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this 31st day of August, 2006.

_____
VALERIE JONAS
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____
VALERIE JONAS
Assistant Public Defender