IN THE SUPREME COURT OF FLORIDA

SAMMY LEE LAWSON,	)	
	)	
Petitioner,	)	
	)	FSC CASE NO. SC06-2423
vs.	)	
	)	FIFTH DCA CASE NO. 5D05-2312
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On April 5, 2004, the State filed Informations in separate cases charging Petitioner with one count of Possession of Cannabis with Intent to Sell, and one count of Sale of Cannabis in each case (Record pages 11-12, 106-107).

On June 1, 2004, Petitioner signed a Waiver of Rights and Agreement to Enter Plea as to both cases (Record pages 23-27). Under the agreement, Petitioner plead nolo contendere to each count, each case, and was adjudicated guilty as to each count, each case, and received concurrent sentences of 5 years, Department of Corrections, suspended upon the successful completion of three years drug offender probation (Record page 23).

On June 11, 2004, the Honorable Mark J. Hill, Circuit Court Judge, signed the orders on both cases adjudicating Petitioner guilty on all counts, placing him on drug offender probation under the terms of the plea agreement, and assessing fines and costs (Record pages 35-39, 120-124). Condition 40 of Petitioner's probation read as follows, with none of the boxes checked:

> You must enter into, participate in, and successfully complete a **G** substance abuse **G** alcohol abuse **G** Drug Abuse **G** Other _____ evaluation and any treatment program subsequently prescribed by the treatment agency to which you are referred, including aftercare program, and be financially responsible for any treatment rendered. (**TASC**)

(Record, page 38).

On January 21, 2005, an Affidavit of Violation of Drug Offender Probation was filed with the court by Probation Officer John McSweeney (McSweeney) alleging that Petitioner had violated his probation by failing to pay the $50.00 per month cost of supervision and was $400.00 in arrears, and by failing to successfully complete or remain in the treatment program (Record pages 44-47).

On April 19, 2005, the State filed an Amended Affidavit of Violation of Drug Offender Probation, and a violation of condition 5, a new law violation, alleging Petitioner sold, and possessed with intent to sell, crack cocaine within 1,000 feet of a church (Record page 59).

On June 1, 2005, a violation of probation hearing was held before Judge Hill (Record Vol. II pages 152-166). The State first called McSweeney to testify.

McSweeney stated he supervised Petitioner, including instructing him on the conditions of his probation on July 16, 2004 (Record Vol. II, pages 152-153). McSweeney further testified Petitioner's probation included attending classes and completing the drug program at the Western Judicial Center (Western) under condition 40 (Record Vol. II page 153).

The Court took judicial notice of Petitioner's signature on the conditions of probation in each case (Record Vol. II page 154).

McSweeney was informed on November 23, 2004, that Petitioner had missed a session and was terminated from the program at Western (Record Vol. II page 154). McSweeney stated he then spoke to a representative from Western and had Petitioner reinstated under the condition that he miss no more classes (Record Vol. II page 154). McSweeney informed Petitioner of his reinstatement and the condition that he was to miss no more classes (Record Vol. II page 155). McSweeney also testified that the standards at Western called for termination after three absences (Record Vol. II page 155).

The court then questioned McSweeney regarding Petitioner's failure to pay costs of supervision (Record Vol. II page 156). McSweeney stated that Petitioner had not paid any money towards that, and that he had discussed it with Petitioner, who had, according to McSweeney, difficulty in obtaining employment (Record Vol. II pages 156, 158).

At that point in the hearing, the State announced that it would not be pursuing the violation of condition 5 at that time due to an ongoing police case related to the allegations against Petitioner (Record Vol. II pages 156-157).

The State then called Linda Carr (Carr), who testified that Petitioner was a client of Western, that he had enrolled in the program in August and had been

assigned to a substance abuse program (Record Vol. II pages 159-160).

Carr testified that Petitioner had several absences, related to transportation difficulties. She testified that he was terminated after nine absences in November, 2004, but that Western was trying to work with him, so he was reinstated with the agreement that he miss no more classes (Record Vol. II pages 160-161). According to Carr, Petitioner then attended seven classes consecutively before he was absent again, resulting in his termination on January 19, 2005, per the agreement (Record Vol. II page 161). Carr further testified that Petitioner knew that if he was terminated it would violate his probation (Record Vol. II page 161).

Carr testified under cross-examination that Petitioner's program was for a duration of twelve classes and that she was aware of his transportation problems (Record Vol. II page 162).

Petitioner then testified. As for his failure to pay the supervisory fees, Petitioner stated that he was unemployed due to a pending jail sentence of 120 days (Record Vol. II page 163). Petitioner also testified he missed the last class after attending seven consecutive because he was unable to find a ride, although he did try to call but was only able to get through to an answering machine (Record Vol. II page 164).

Under examination by the defense counsel, Petitioner was asked about his

earlier missed classes.

MR. NACKE: As far as missing those classes at Western Judicial, you made seven and missed one. What was the reason for that?

PETITIONER: I didn't have a ride. I called, but I kept getting an answering machine.

(Record Vol. II 165-164).

BY THE COURT: You missed nine classes.

PETITIONER: Yes, sir.

THE COURT: Tell me why you missed nine classes.

PETITIONER: Well, the first time I missed three classes, I figured they had already kicked me out. Then I talked to my probation officer. He said to call back to see if I could get back into the class. I called back, and they accepted me back into the program. I tried to like finish all of them. Every week - - I had one class a week. I was going to all my classes. I just missed one. I knew I had missed a class.

THE COURT: I'm asking you why you missed nine classes before you were given an extra chance.

PETITIONER: I have no idea, sir. No transportation.

(Record Vol. II 164).

Petitioner testified that after he initially missed three classes, he believed he had been dismissed from the program (Record Vol. II page 164). He further testified that his probation officer then instructed him that he would be readmitted, and attended seven weeks of classes, one per week, before his final absence

(Record Vol. II 164). He stated his earlier absences were from lack of transportation (Record Vol. II page 164).

Upon completion of Petitioner's testimony, counsel for Petitioner argued that there was no violation as no time limit had been set in the order of probation for completion of the class (Record Vol. II page 165). Counsel further argued that Petitioner t could have entered and completed another program, not just at Western, and that his failure to pay costs was due to an inability to pay.

The Court found in its oral pronouncement that Petitioner's testimony was not credible and he was in substantial violation of his probation (Record Vol. II page 165). The Court imposed the suspended sentences, with credit for time served and gain time (Record Vol. II pages 165-166). The Court's judgment and sentence was filed on June 9, 2005, and the order revoking drug offender probation was filed on June 28, 2005 (Record pages 72-75, 78, 143-146, 147).

On June 29, 2005, Petitioner filed a Motion to Mitigate Sentence with the Trial Court (Record page 79-80).

A timely Notice of Appeal was filed on June 27, 2005 and the Public Defender was appointed to represent Petitioner on appeal (Record pages 77, 148-149).

On November 3, 2006, the Fifth District Court of Appeal rendered its opinion in this case, holding that probation conditions were subject to common sense interpretation, and certifying conflict with the decision in other courts of the State. The Fifth District Court of Appeal certified its decision to be in direct conflict with Quintero v. State, 902 So.2d 236 (Fla. 2d DCA 2005); Singleton v. State, 891 So.2d 1226 (Fla. 2d DCA 2005); Davis v. State, 862 So.2d 1218 (Fla. 2d DCA 2004); Lynom v. State, 816 So.2d 1218 (Fla. 2d DCA 2002); O'Neal v. State, 801 So.2d 280 (Fla. 4th DCA 2001); Dunkin v. State, 780 So.2d 223 (Fla. 2d DCA 2001); Butler v. State, 775 So.2d 320 (Fla. 2d DCA 2000); and Salzano v. State, 664 So.2d 23 (Fla. 2d DCA 1995).

Additionally, the Fifth District Court of Appeal also certified the following question as being of great public important:

> DOES A TRIAL COURT ABUSE ITS DISCRETION IN FINDING A 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?

Lawson v. State, 941 So.2d 485, 490 (Fla. 5th DCA 2006).

The Fifth District did acknowledge that the State had not proven that Petitioners failure to pay costs was willful as they had not shows his inability to pay. Id. at 488.

It is the position of the Petitioner that the Fifth District Court of Appeal's ruling that it is within the court's discretion to determine how many chances a probation has to complete a program when no time is specified should be reversed.

SUMMARY OF ARGUMENT

Although probation conditions do not have to be spelled out to the minutest detail, due process requires that a probationer be on notice of the conduct that can result in a violation. In the instant case the condition relating to drug treatment was capable of different interpretations and thus vague.

Furthermore, the trial court was without authority to modify or enhance the terms of probation absent a violation hearing where the probationer has been shown to have willfully and knowingly violated a term(s) of his probation.

ARGUMENT

WHETHER A TRIAL COURT ABUSED ITS DISCRETION IN FINDING A 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?

Although in the State of Florida, probation is considered to be a sentencing alternative and a matter of grace, McArthren v. State, 635 So.2d 1005, 1006 (Fla. 5th DCA 1994) probation revocation proceedings must confirm to minimum standards of due process. Gagnon v. Sparpelli, 93 U.S. 778, 93 S.Ct. 1759, 36 L.Ed.2d 656 (1973).

The State's own witness testified that Appellant had attended seven consecutive weeks of the 12-week program during his last effort (R II 161). Therefore, the Appellant had completed well more than half of the sessions which were required, and it would be unreasonable to not consider this as a substantial percentage of the course work completed. This completion of a large number of classes successfully evidences the willingness of the Appellant to comply with the

terms of his probation and complete a drug treatment program. The Appellant's willingness to complete his program is further showed by his diligence in attending these classes after reinstatement.

THE CONFLICT

"It is an abuse of discretion to find a willful and substantial violation of probation where a defendant has expressed a willingness to complete or continue with a program and where the order of probation did not specify a date certain for compliance." O'Neal v. State, 801 So.2d 280 (Fla. 4th DCA 2001), citing Salzano v. State, 664 So.2d 23 (Fla. 2d DCA 1995). Other cases have held that the simple lack of a specified time for completion renders a failure to complete a treatment program insufficient to establish a willful and substantial violation. Quintero v. State, 902 So.2d 236 (Fla. 2d DCA 2005), citing Mitchell v. State, 871 So.2d 1040 (Fla. 2d DCA 2004); Butler v. State, 775 So.2d 320 (Fla. 2d DCA 2000); Salzano.

The case of Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001) is also telling on the issue of unsuccessful treatment attempts. In that case, the trial court specified a date by which sex offender treatment had to be completed, specifically, within the first three years of his supervision. But the Second District reversed the trial court's revocation of probation because the probation order failed to state that the treatment had to be successfully completed on the first try, or how many

chances the defendant would be given to complete the treatment successfully. Because the Appellant made reasonable attempts to comply with the terms of the probation order and because the order of probation failed to specify a date by which the special conditions of probation were to be completed, he respectfully requests this Honorable Court to hold that the trial court abused its discretion when it ruled that the Appellant willfully and substantially violated his probation.

Due Process And Notice

Despite the fact that probation revocation hearings are not a critical stage of a criminal proceeding, because they involve a loss minimum of liberty, and basic safeguards of due process. This notice requires that a probationer be appraised of that conduct that will result in violation. As this Honorable Court stated earlier:

> Fundamental fairness requires that a defendant be placed on notice as to what he must do or refrain from doing while on probation. A trial court has the authority to impose any valid condition of probation which would serve a useful rehabilitative purpose. Hines v. State, 358 So.2d 183, 85 358 So.2d 183, 185 (Fla. 1978).

As the Fifth District Court of Appeal stated in Rothery, It would be patently unfair to penalize a defendant for failing to follow a rule of a third party, the violation of which subjects him to revocation of his probation, where the third party does not clearly articulate the rule to the defendant. Id at 1259.

In explaining the confusion in the condition of the drug treatment program, it would be helpful to look at probation from a contract law point of view. Several courts in Florida interpret probation agreements as contracts. Bradley v. State, 727 So.2d 1001 (Fla 4th DCA 1999); Tal-Mason v. State, 515 So.2d 738 (Fla. 4th DCA 1986).

Accordingly to contract law, a term in an agreement is ambiguous when the provisions are fairly susceptible to more than one interpretation. Am. Quick Sign, Inc. v. Reinhardt, 899 So.2d 461, 465 (Fla. 5th DCA 2005); *see also* *532 Barnett v. Destiny Owners Ass'n, 856 So.2d 1090, 1092 (Fla. 1st DCA 2003) (stating that "[l]anguage in a document is ambiguous when it is uncertain in meaning and may be fairly understood in more ways than one and is susceptible of interpretation in opposite ways"). McInerney v. Klovstad, 935 So.2d 529 (Fla. 5th DCA 2006).

"Insofar as contract language may be deemed ambiguous, Florida law dictates that any ambiguity will be interpreted against the party who selected the language……" First Texas Sav. Ass'n v. Comprop Inv. Props. Ltd., 752 F.Supp. 1568, 1571 (M.D.Fla.1990), citing Consol. Dev. & Eng'g Corp. v. Ortega Co., 117 Fla. 438, 158 So. 94 (1934). However, the Court finds that the absence of the term "lump sum" in the lease does not create an ambiguity. Paragraphs 7 and 27 clearly provide that the residual purchase price must be paid in full at the time of the

exercise the purchase option. In re Pittman, 289 B.R. 448 Bkrtcy.M.D.Fla.,2003; January 17, 2003

Turning to the issue of enhancement or modification of probation absent a showing that probationer violated the terms of his probation. This Honorable Court has addressed the issue and found that it is a double jeopardy error to modify the terms of probation, as this Honorable Court mentioned:

> The trial judge even acknowledged that the new conditions would be an additional hardship. While such conditions could have been included in the initial probationary order had circumstances required, there is no question that the added conditions are more restrictive than those imposed by the initial order. Consequently, we find that the added conditions, including the no-contact condition, enhanced the terms of Lippman's original probationary sentence.

See J.C Nickens v. State, 547 So.2d 1289 (Fla. 4th DCA 1989), where the additional condition, while not stated in the probation order, that appellant may not even return to his own house to do yard work and maintenance was struck.

To the case at bar, we see that Petitioner was ordered to undergo a drug counseling evaluation *and any* program they recommend. It is certainly unclear from the testimony that Western Judicial was the *only* program that Appellant could have enrolled in. Given the vague article "any," Petitioner had all the reason to believe that he could pick and choose which program suited him better, unless,

of course, Western Judicial was the only game in town.

Furthermore, despite the Fifth District Court of Appeal's common sense ruling that Petitioner knew he needed to enroll right away, it took him two months, from June to August to start the program. Likewise, he was given two chances to complete the Western Judicial Program, and it is not apparent from the record that either his probation officer or his counselor at the program discussed any alternatives with him.

Given the facts of the case, it was unclear to Petitioner both by the language of Condition 40 of his probation as well as how it was implemented that he could have successfully enrolled in another more suitable program.

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CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, the Appellant respectfully requests that the order revoking his probation in this case be reversed, and the Appellant be restored to probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to Mr. Sammy Lawson, Inmate # U20623, Franklin Correctional Institution, 1001 West Highway # 98, Apalachicola, Florida 32320-1272, on this 10th day of January 2007.

CERTIFICATE OF FONT

I CERTIFY that the size and style of the type used in this brief is 14 point TIMES NEW ROMAN, a font that is proportionately spaced.

For: TOMISLAV DAVID GOLIK
Assistant Public Defender