

IN THE SUPREME COURT OF FLORIDA

SAMMY LEE LAWSON,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

FSC CASE NO. SC06-2423

FIFTH DCA CASE NO. 5D05-2312

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
Chief, Appellate Division
Assistant Public Defender
Florida Bar No. 249238
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
Phone: (386) 252-3367

COUNSEL FOR PETITIONER

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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 as to the timing of the defendant's successful attendance at and completion of a drug treatment program. The Fifth District Court's ruling that due process is not violated where the probation order does not specify the when and how of the drug treatment condition is contrary to Florida law. Contrary to the state's assertion, it was absolutely NOT "apparent that Petitioner is not amenable to treatment or supervision." The court erred in denying the defendant the opportunity, in accordance with the probation order, of successfully completing some other drug treatment program by the end of his probationary period.

ARGUMENT

THE TRIAL COURT ABUSED ITS
DISCRETION IN FINDING THE 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?

The state erroneously argues that the issue presented to this Court by the certified question of the District Court of Appeal and by the notation of conflict with other district courts somehow was not preserved for review by this Court. (Respondent's Brief, pp. 11-12.) Below (at both the trial court and district court levels), the defendant specifically contended that the trial court's probation order failed to specify a time frame in which the drug treatment program would be successfully completed, and thus, the court could not revoke his probation for his failing in his initial attempt at such a program. *Lawson v. State*, 941 So.2d 485 (Fla. 5th DCA 2006). The Fifth District supposed that the conflicting decisions were premised on the principles of due process and a lack of notice. *Id.* at 489. This is precisely the same issue being presented here to this Court: the trial court

erred in revoking the defendant's probation where the probation order did not specify when and how defendant was to complete the drug program. He was never given notice that it had to be immediately upon entering probation or that he could have no unsuccessful attempts at one of the programs before successfully completing another one. Lawson thus did not wilfully and substantially violate his probation where he still had the necessary time remaining on his probation to enter another drug program and successfully complete it.

Further, the state complains that Lawson evidenced a refusal to comply with the condition of probation. (Respondent's Brief, pp. 10-12, 16) This is patently false: the defendant attended seven of the twelve required meetings in a row, before missing because of his inability to obtain the necessary transportation to the meeting. Such poverty of not having the necessary transportation to move about freely does not show such an unwillingness or refusal, especially when he attended over half of the required meetings without an absence. The state also maintains that the drug treatment program necessarily had to be successfully undertaken immediately upon entering probation in order to satisfy the purposes of probation that the defendant be rehabilitated, society protected, and crime victims protected. But the simple initial failure at this particular drug treatment program in no way impacts those goals nor does it show an unwillingness or inability to comply and

complete some other drug treatment program. This simple undisputed fact remains: there never was an allegation against the defendant that he in any way violated his probation by using drugs. Thus, the simple failure to complete this one particular drug treatment program does not support a claim that the defendant has refused any rehabilitative efforts.

The defendant is not contending, and never has, as the state and DCA claim (Respondent's Brief, pp. 16-17), that a defendant is the one who gets to decide through his whim or caprice how many attempts he will have to complete a drug treatment program and when it will be completed. Instead, the clear, plain reading of this particular condition of probation, as specified in this probation order, is simply that a defendant must successfully complete his treatment program during the term of his probation. If the lower courts are concerned about permitting a defendant multiple attempts throughout the course of their probationary term to enter and complete such a program, it is a simple matter for trial courts to place defendants on notice of the intended immediacy of the requirement by denoting in the condition that it must be undertaken immediately. But this was simply not the case here; no such qualifications were made on this condition.

Finally, the state is unable to sufficiently distinguish the conflict cases cited

by the district court and petitioner,¹ simply arguing that there exist insufficient facts to distinguish them or that they do not accurately reflect Florida law. The state cites to *State v. Carter*, 835 So.2d 259 (Fla. 2002), for the supposed contrary authority. *Carter*, however, merely holds that there is no per se rule that the failure to file a single monthly report is or is not a substantial violation of probation; nothing more, nothing less. It thus has no applicability in the instant context of when a probationer must complete some requirement of his probation when that time requirement is not specified in the probation order.

The cases cited for conflict (*see* Initial Brief of Petitioner, pp. 11-12), on the other hand, are clear, plain, and on point: it is not a willful violation of probation for a probationer to fail to complete a required condition of probation where the probation order does not provide a time certain for completion of such requirement other than the term of probation. There was no willful or substantial violation of the defendant's probation proven here by his initial failure to complete the first treatment program in which he was enrolled. Lawson did not merely through "whim or caprice" refuse such treatment. Rather, he had specific difficulties with this, the first program, he attempted with arrangements for transportation to the

¹ The district court, too, was unable to rectify the conflicting law of these cases, simply choosing not to follow it. *Lawson v. State, supra* at 489.

meetings, although he did manage to attend the majority he was required to under this program. Lawson still had ample time prior to completion of the probationary term to enter and be successful at a treatment program that he had the means and ability to attend.

The trial court thus erred in revoking Lawson's probation. Reversal is required.

CONCLUSION

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

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
Chief, Appellate Division
Assistant Public Defender
Florida Bar # 249238
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
Phone: (386) 252-3367

COUNSEL FOR PETITIONER

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 7th day of March, 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.

JAMES R. WULCHAK
Assistant Public Defender