IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY K RUSSELL,

Petitioner,

v.

Case No. SC06-335
5th DCA No. 5D05-2630

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent relies upon the following:

Petitioner Anthony K. Russell (Russell) was charged with one count of carrying a concealed firearm in case number 01-3151-CF on August 29, 2001, and one count of lewd and lascivious battery in case number 03-172-CF, on January 31, 2003. (R1-2). Russell entered a plea to carrying a concealed firearm; adjudication of guilt was withheld, and Russell was sentenced on December 18, 2002, to two years probation. (R14-23). He later pled to the lewd and lascivious battery charge and, on November 18, 2003, received an adjudication of guilt, one year in the county jail followed by five years sex offender probation as a youthful offender, to run concurrent with any active sentence. (R33-38).

An affidavit of violation of sex offender probation was filed on April 19, 2004, alleging one violation, i.e., that Russell had not complied with his mandatory curfew. (R42). His sex offender probation was reinstated and modified on June 30, 2004, after Russell admitted violating his probation. (R56,69).

On October 1, 2004, a violation report was filed alleging that in case number 01-3151, Russell had not completed his community service hours and had made no payments toward his court costs or fines. (R55). In case number 03-172, it was alleged that he was in arrears for costs of supervision and

court costs, and had not submitted his written monthly reports in July or August of 2004. Id. An amended affidavit of violation was issued with an allegation of a violation of condition (5), in that Russell was arrested on October 14, 2004, for an aggravated battery upon a pregnant woman. (R84-85).

An evidentiary hearing was held on July 15, 2005, on the violations before Circuit Court Judge Brian D. Lambert (Judge Lambert). (T111). Russell's probation officer, Gerald Reed (Reed), testified that Russell's monthly reports were due by the third week of the month, and his office did not receive either a July or August report from Russell.[1] (T119-120). Moreover, Reed explained that Russell was directed to pay fifty-two dollars a month toward his costs. (T120). In April of 2004, Russell signed an agreement to pay $229.00 per month; however, Russell had only made one payment of $260.00, in April of 2004, and had made no further payments. (T120-121).

Reed explained that Russell had been assigned to another probation officer, a Mr. Winfree (Winfree). However, whenever Winfree went on leave for National Guard duty, Reed would take on Winfree's probationers, including Russell. (T122-123). In fact, regarding the failure to file monthly reports, Reed had visited Russell at his home that same July and advised Russell

[1] Reed explained that Russell's July and August reports should have been submitted in August and September, respectively. (T123).

to notify Winfree regarding Russell's new job. (T124). When asked by defense counsel if Russell could have filed the monthly report with Winfree, Reed did not think it possible since Winfree was gone in August due to the hurricanes, and Reed was officially assigned to supervise Russell on August 23rd. (T122,125-126). At the time of the hearing, Winfree was on hurricane duty after Hurricane Dennis. (T128).

Deputy Raymond Torrellas (Torrellas), with the Marion County Sheriff's Office, testified at the hearing that he responded on October 4, 2004, to the BP gas station in the Shores in reference to a battery. (T129). Torrellas made contact with the victim of the aggravated battery, Nicole Dalesandro, approximately ten minutes after the 911 call was received. (T129,138). The victim appeared to be very nervous and scared. (T136). Torrellas observed a red mark on the victim's left side of her neck, near her back, which appeared to have been made by a fist. (T130,132). When the State asked Torrellas about the victim's statement, defense counsel objected on the basis of hearsay, but Judge Lambert overruled the hearsay objection, finding hearsay to be admissible at a violation hearing, although Judge Lambert noted that hearsay cannot be the sole basis for conviction. Id. The victim told Torrellas that she and Russell, who was her boyfriend, had gotten into a verbal argument because she did not want him to take her vehicle to his

sex offenders' class. (T131). Russell also wanted money and during the argument which occurred in front of the gas station, Russell struck her in the back side of her neck. (T131-132). She also advised Torrellas that Russell grabbed her by the hair to pull her back into the vehicle, but she was able to get away and call police. (T132). Torrellas agreed that the injuries he observed on the victim corresponded with her statement. Id.

When the State moved to introduce the victim's written statement taken by Torrellas, defense counsel again objected on the basis of double hearsay. (T133). Defense counsel also argued that permitting this statement to be introduced would violate Russell's Sixth Amendment confrontation right. (T134). Judge Lambert allowed the written statement to be introduced, again noting that hearsay is admissible at a violation hearing. (R96, T135-136). The content of the victim's written statement is as follows:

> Anthony Russell (my boyfriend) & me Nicole Dalessandro were going to vacuum my car before I take him to his sex offenders class. We were fighting [at the BP] about me not dropping him off. He wanted to go by himself and I said no because I had things to do. So we kept fighting and as I told him no as I turned around and he hit me in the back of the neck and I went to grab my key out the car & he pulled me back & pulled my hair. So I got away & ran to the BP & he pulled off with my car.

(R96). Photographs of the victim's injuries were also admitted. (R97).

Upon making contact with Russell, Torrellas recalled that he was uncooperative and tried to walk away, so Torrellas arrested Russell. (T141). Russell was advised of his rights pursuant to Miranda,[2] and refused to talk about the battery, so all questioning ceased. (T136,140-141). However, on the way to the jail, Russell spontaneously admitted he knew the victim was pregnant, but that he was not sure the baby was his since she messed around on him. (T137). Russell also told the deputy that he does not hit the victim, "he just roughs her up." Id. Torrellas could easily recall the circumstances of this call because of Russell's actions when Torrellas made contact with him, as well as the fact that Russell cried all the way to the jail. (T142).

Russell testified regarding his financial situation, but refused to answer any questions regarding the violation of condition (5). (T143-151). Russell also contended that while he knew he was to submit a monthly report, he was never directed to complete a monthly report for July by Reed. (T147-148).

After the presentation of evidence and closing arguments, Judge Lambert made the following findings:

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

> As to...condition (1), (2) and (68); not guilty....As to condition (5)], [n]o ifs, ands, or buts in my mind that he did that. There's hearsay and non-hearsay statements that are used to convince me. I gave absolutely - I'll say it again. I gave absolutely no weight to the statement given by...the victim that contained statements of the...defendant in there. That to me is irrelevant.
>
> We have the statements from the victim to the officer. I believe the officer's testimony. I find it credible. I find that the - the aggravated battery did occur on a pregnant victim. He's adjudicated guilty.....
>
> And the State clearly met the - for any question of the Fifth DCA, it's the greater weight of the evidence standard. I'm convinced beyond a greater weight of the evidence based upon my review of the evidence here today. And I'm the one who observed the demeanor and the testimony....
>
> He's on probation for sexual battery upon a child under sixteen years of age, which is a second degree felony. He's adjudicated guilty on that case for violating his probation on that case. Probation is terminated in that case....He's sentenced to fifteen years Department of Corrections. Credit for time served, whatever amount of time he gets.
>
> ...[H]e's on probation for carrying a concealed weapon, five years probation. Five years is the maximum sentence. He is sentenced to five years Department of Corrections consecutive to the first one, with credit for time served. The probation is terminated. That's all.

(T160-162).

On July 26, 2005, Judge Lambert entered a written order with his findings on the violations of probation. (R164-166). A motion to mitigate sentence was filed by Russell, which was denied by Judge Lambert in an order rendered on August 11, 2005. (R183-184,185-186).

The Fifth District Court of Appeal issued an opinion on January 20, 2006, affirming the trial court's revocation of Russell's probation. Russell v. State, 920 So. 2d 683 (Fla. 5th DCA 2006). In that opinion, the Fifth District Court of Appeal held that the hearsay statements of the battery victim, coupled with the officer's observation of injury, were sufficient to prove a probation violation. Id. at 684. Russell sought discretionary review of the Fifth District Court of Appeal's opinion affirming the revocation of Russell's probation, and this Court accepted jurisdiction in an order dated May 5, 2006.

SUMMARY OF THE ARGUMENTS

ISSUE I: While conflict was essentially acknowledged by the Fifth District Court of Appeal in the instant opinion, this Court should refuse to accept jurisdiction since this issue has been adequately addressed by the district court of appeal. Moreover, the trial court properly revoked Russell's probation based upon non-hearsay (Russell's statement that he roughs up his girlfriend a bit and the officer's independent corroborative observations) and hearsay (the victim's statements) evidence. Moreover, even setting aside Russell's statement, Russell's advocation of a *per se* rule that the trial court can never find a willful and substantial violation based upon hearsay statements which are corroborated by a testifying witness's independent observations is not in accord with Florida law. The Fifth District Court of Appeal properly sustained Russells' revocation of probation.

ISSUE II: Russell contends that the admission of the victim's hearsay statements at his violation hearing violated his Sixth Amendment right to confront witnesses against him, pursuant to Crawford v. Washington, 541 U.S. 36 (2004). Russell is mistaken, as the courts which have addressed this issue have overwhelmingly found Crawford does not apply to revocation proceedings.

ARGUMENTS

ISSUE I

THIS COURT SHOULD DENY REVIEW OF THE DISTRICT COURT'S OPINION BECAUSE THE ISSUE WAS ADEQUATELY ADDRESSED BY THE DISTRICT COURT OF APPEAL; MOREOVER, THE TRIAL COURT PROPERLY REVOKED RUSSELL'S PROBATION.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv). Conflict was essentially acknowledged by the Fifth District Court of Appeal in the instant opinion; however, this Court should refuse to accept jurisdiction since this issue has been adequately addressed by the district court of appeal.

As to the merits, Russell's complaint is that the trial court erred by finding he had revoked his probation based upon the victim's hearsay statements and the officer's observations of the victim which corroborated her statements. It is well established in Florida that "[p]robation is a matter of grace rather than right. The trial judge has broad discretionary power to grant as well as revoke probation." Diller v. State, 711 So. 2d 54, 55 (Fla. 5th DCA)(citing Robinson v. State, 442 So. 2d 284, 286 (Fla. 2d DCA 1983), rev. denied, 719 So. 2d 892 (Fla. 1998)). The evidence for revocation of probation need only be sufficient to satisfy the conscience of the court that the violation occurred. Rock v. State, 749 So. 2d 566, 567 (Fla. 3d

DCA 2000). “Before a trial court can revoke a defendant's probation, the state must prove by a preponderance of the evidence that the defendant willfully violated a substantial condition of his probation." Crume v. State, 703 So. 2d 1216, 1217 (Fla. 5th DCA 1997)(citing Van Wagner v. State, 677 So. 2d 314, 316 (Fla. 1st DCA 1996)); see also Davis v. State, 704 So. 2d 681, 684 (Fla. 1st DCA 1997); Kolovrat v. State, 574 So. 2d 294, 297 (Fla. 5th DCA 1991).

Whether a defendant’s violation of probation was willful and substantial is a question of fact, and will not be reversed on appeal unless an abuse of discretion is shown. Robinson v. State, 689 So. 2d 1147, 1149 (Fla. 4th DCA 1997)(citing Molina v. State, 520 So. 2d 320 (Fla. 2d DCA 1988)). An abuse of discretion is found "only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1204 (Fla. 1980).

The applicable facts here are not in dispute. Russell was found in violation of condition (5), new law violation, upon being charged with aggravated battery upon a pregnant woman. The essential elements of that offense include (1) those elements required to establish a simple battery--that the defendant either "actually and intentionally touched or struck another

person" against the latter's will, or "intentionally caused bodily harm to another person (§ 784.03(1)(a), Fla. Stat. (2005))--plus (2) that the victim was pregnant at the time of the battery, and (3) that the defendant either knew or should have known at the time of the battery that the victim was pregnant. § 784.045(1)(b), Fla. Stat. (2005).

In his appeal, Russell contended, *inter alia*, he was improperly found guilty of violating his probation based solely upon hearsay evidence. As the State pointed out, upon his arrest for aggravated battery upon a pregnant woman, Russell spontaneously stated that he does not hit his girlfriend, he "just roughs her up." The State argued in response to the hearsay complaint that Russell had been found to be in violation upon not only hearsay evidence, but also his admission by a party opponent, which falls under section 90.804, Florida Statutes, exceptions to the hearsay rule.

Russell spontaneously admitted to Torrellas he "roughed up" his girlfriend. According to the American-Webster Dictionary, to "rough up" means "[t]o treat roughly or with physical violence...." American-Webster Dictionary of the English Language (4th ed. 2000). In other words, there is no "roughing up" without touching against another's will.

In its decision in this case, the Fifth District Court of Appeal found Russell's statement to the police upon his arrest -

that he does not hit his girlfriend, but roughs her up - to not be probative and to be exculpatory to the charge of aggravated battery upon a pregnant woman. Russell, 920 So. 2d at 684 n.1. The Fifth District Court of Appeal erroneously disregarded the statement in determining the sufficiency of the evidence against Russell. Id.

The victim informed police that Russell not only struck her, but also grabbed her by the hair to pull her back into the truck. As "roughing up" essentially and commonly means touching someone against their will, i.e., a battery, the fact that Russell admitted to roughing the victim up is probative to the charged violation, i.e. that he committed the crime of aggravated battery which is, essentially, touching a pregnant woman against her will. Thus, it is the State's position that the evidence in the instant case is sufficient to sustain a probation revocation, as well as distinguishable from the case law alleged to be in conflict by Russell based on the additional evidence presented by the State, i.e, the admission by a party opponent.

Even if this Court agrees with the Fifth District Court of Appeal that Russell's statement by a party-opponent is not probative and is exculpatory, then it is the State's position that the Fifth District Court properly sustained the trial court's finding of a probation violation which was established

by hearsay testimony corroborated by another witness's independent observations.

In sustaining the violation finding in Russell, the Fifth District Court of Appeal relied upon its prior decision in Arndt v. State, 815 So. 2d 674 (Fla. 5th DCA 2002), wherein the district court had determined that a hearsay statement corroborated with direct evidence concerning the victim's reddened face and ear was sufficient to establish a violation of probation. Id. at 675. In turn, the Arndt court relied upon Young v. State, 742 So. 2d 418 (Fla. 5th DCA 1999), rev. denied, 751 So. 2d 1255 (Fla. 2000). In Young, the Fifth District Court of Appeal had sustained the finding of a probation violation based upon the hearsay testimony of the victim and supporting photographs of the victim's injuries. Id. at 419. The Fifth District Court of Appeal in Young had relied upon its decision in Morris v. State, 727 So. 2d 975 (Fla. 5th DCA 1999), wherein the district court had upheld a violation finding based upon the victim's hearsay statements along with the deputies' testimony regarding their observation of the disarray of the trailer, the bite mark and bruise seen on the victim, the fact that the victim and her daughter were crying and terrified, and the defendant's belligerence toward the deputies. Id. at 976.

In these line of cases, the Fifth District Court of Appeal acknowledged that hearsay evidence, which is admissible at

violation hearings, could not by itself sustain a violation finding. Morris, 727 So. 2d at 976; Young, 742 So. 2d at 418; Arndt, 815 So. 2d at 675. However, when that hearsay was corroborated by direct evidence, such as the testimony of an officer who observed injuries consistent with the claims of the victim, such evidence can sustain a violation finding. Morris, supra; Young, supra; Arndt, supra.

The district court opinions which have held otherwise, such as Colina v. State, 629 So. 2d 274 (Fla. 2d DCA 1993), Colwell v. State, 838 So. 2d 670 (Fla. 2d DCA 2003), and Santiago v. State, 889 So. 2d 200 (Fla. 4th DCA 2004), have found that the corroborative testimony was insufficient, essentially by reweighing the evidence. Colwell, 838 So. 2d at 672; Santiago, 889 So. 2d at 203. Obviously, it is improper for an appellate court to reweigh evidence considered by a trial court. Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981)("Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal."), aff'd, 457 U.S. 31 (1982).

It should be recalled that the burden of proof at a violation hearing is that the evidence satisfies the conscience of the court that a violation has occurred. Rock, supra. Moreover, the standard on appeal is whether the trial court abused its discretion by finding a violation. Robinson, supra. It simply seems illogical to conclude that no reasonable person

would find that the evidence in this case, or any case involving hearsay testimony which is corroborated by direct evidence, could not satisfy the conscience of the court that a violation occurred. Rock, supra; Canakaris, supra.

Russell's position is that a hearsay statement combined with a testifying witness's independent corroborative observations is insufficient as a matter of law to find a violation of probation. Besides the fact that appellate courts essentially are reweighing the evidence by dismissing the direct evidence as insufficient, the problem with Russell's position, and the authority he relies upon, is that it would establish a very broad *per se* rule. However, such a *per se* rule does not comport with Florida law.

In State v. Carter, 835 So. 2d 259 (Fla. 2002), this Court explained that:

> In the instant case, the district court improperly applied a *per se* rule when it relied on Moore and Sanders in reaching its conclusion that the failure to file a single monthly report as a matter of law is not a substantial violation, and thus not sufficient to justify a probation revocation. Such a holding means that under no circumstances could a failure to file a single report justify a revocation of probation. **Such 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**. In other words, the trial court must review the evidence to determine whether the defendant has made reasonable efforts to comply with the terms and conditions of his or her probation.

Id. at 261 (emphasis added). It is to the trial court that the discretion to find a willful violation is granted as "[t]he trial court is in a better position to identify the probation violator's motive, intent, and attitude and assess whether the violation is both willful and substantial." Carter, 835 So. 2d at 262.

Thus, a *per se* rule prohibiting a trial court from finding a willful violation based upon hearsay statements combined with independent corroborative observations of a testifying witness in every case is inconsistent with the requirement that a trial judge consider each violation on a case-by-case basis for a determination that a particular violation is willful and substantial. Here, it was established by a greater weight of the evidence that Russell willfully and substantially violated condition (5) by the commission of a new law violation. Accordingly, the Fifth District's decision sustaining the violation of probation in this case should be affirmed.

Based on the foregoing facts and authorities, this Court should not accept jurisdiction. Although conflict was essentially acknowledged by the Fifth District Court of Appeal

in the instant opinion, this Court should refuse to accept jurisdiction since this issue has been adequately addressed by the district court of appeal. Additionally, the evidence in instant case is sufficient to establish a violation of probation and distinguishable from the cases Russell relies upon for conflict as the State not only had the victim's statements and the officer's independent corroborative observations, but, also, Russell's statement by a party opponent that he roughed up his girlfriend. Moreover, even setting aside Russell's statement, in reversing such violation findings, the appellate courts are essentially improperly reweighing the evidence. Further, Russell's advocation of a *per se* rule that the trial court can never find a willful and substantial violation based upon hearsay statements which are corroborated by a testifying witness's independent observations is not in accord with Florida law. The Fifth District Court of Appeal properly sustained Russells' revocation of probation.

ISSUE II

HEARSAY EVIDENCE WAS PROPERLY ADMITTED AT RUSSELL'S VIOLATION HEARING AS CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004), DOES NOT APPLY TO VIOLATION OF PROBATION HEARINGS.

Russell contends that the Fifth District Court erred by concluding that the admission of the victim's hearsay statements at his violation hearing did not violate his Sixth Amendment right to confront witnesses against him, pursuant to Crawford v. Washington, 541 U.S. 36 (2004). Russell, 920 So. 2d at 684-685. First, the State would contend any Crawford challenge to the admission of the oral statements of the victim is unpreserved as Russell made only a general hearsay objection below to the officer's testimony regarding the victim's oral statements. See, e.g., Knight v. State, 746 So. 2d 423, 430 (Fla. 1998) (Confrontation Clause argument was procedurally barred because a specific objection had not been made in the trial court).

Even assuming it was preserved, and considering the written statement also, Russell's contention that the admission of these statements violated Crawford is without merit, as the courts which have addressed this issue have overwhelmingly found Crawford does not apply to revocation proceedings.

Crawford held that out-of-court testimonial statements are barred under the Confrontation Clause of the Sixth Amendment. Id. at 37, 68. However, it is well settled that probation violation

hearings are not criminal prosecutions to which the Confrontation Clause of the Sixth Amendment applies. See Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)(while probationers are entitled to same rights as those given to parolees in Morrissey v. Brewer, 408 U.S. 471 (1972), "probation revocation, like parole revocation, is not a stage of criminal prosecution."); see also Minnesota v. Przyborowski, 2004 Minn. App. Lexis 835, *5-6 (Minn. Ct. App. July 20, 2004)(Gagnon and Morrissey do not hold that the Sixth Amendment Confrontation Clause bars the state from presenting hearsay evidence in a probation revocation proceeding, as the defendant's right to confront witnesses is one involving a due process balancing)(unpublished); California v. Johnson, 18 Cal. Rptr. 3d 230 (Ca. Ct. App. 2004)(same); Colorado v. Turley, 109 P.3d 1025 (Colo. Ct. App. 2004)(same); New York v. Brown, 800 N.Y.S.2d 352 (N.Y. Co. Ct. 2005)(same).

On the contrary, a probation violator is conferred certain due process rights to confront witnesses at violation proceedings, rather than a right of confrontation based upon the Sixth Amendment's Confrontation Clause. See United States v. Aspinall, 389 F.3d 332, 342-43 (2d Cir. 2004), abrogation on other grounds recognized, United States v. Fleming, 397 F.3d 95, 99 n.5 (2d Cir. 2005)(Crawford, which involved criminal proceedings, neither altered the requirements under Morrisey or Scarpelli, nor suggested that the principles of the Confrontation

Clause, as enunciated in Crawford, were applicable to probation revocation proceedings); United States v. Kirby, 418 F.3d 621, 626 (6th Cir. 2005)("We agree with the Second and Eighth Circuits and hold that Crawford does not apply to revocation of supervised release hearings."); United States v. Martin, 382 F. 3d 840, 844 n.4. (8th Cir. 2004)(Crawford "involves the contours of the confrontation right in criminal prosecutions," and, thus, does not apply to a revocation of supervised release); United States v. Morris, 140 Fed. Appx. 138, 143 (11th Cir. 2005)("To the extent that Morris relies upon the Supreme Court's Crawford decision, that decision is inapplicable to his situation. Crawford dealt with an initial criminal proceeding, not a revocation of probation or supervised release, and was based upon the defendant's Sixth Amendment Confrontation Clause right....As Appellant's right to confront witnesses at his violation hearing was not based upon the Sixth Amendment, but rather the Due Process Clause, Crawford does not apply and the trial court properly admitted the victim's statement.")(unpublished); Peters v. State, 919 So. 2d 624, 626 (Fla. 1st DCA 2006)("While due process requires that certain rights be recognized in such revocation proceedings, our supreme court has held that 'evidence which may not be admissible in an adversary criminal trial would be admissible in probation or parole revocation proceedings.'")(quoting from Bernhardt v. State, 288 So. 2d 490,

500 (Fla. 1974)); Washington v. Abd-Rahmaan, 154 Wn.2d 280, 111 P.3d 1157, 1160-1161 (Wash. 2005)("We find nothing in Crawford to support Abd-Rahmaan's argument that the United States Supreme Court intended to overrule Morrissey and Scarpelli, and we will not find it by implication. Since sentence modification hearings are not criminal prosecutions, the more flexible confrontation requirements under the due process clause of the Fourteenth Amendment still control.")

As established by the foregoing, hearsay has commonly been admissible at violation of supervision hearings. Since the Confrontation Clause and, thus, Crawford, apply only to criminal prosecutions, the victim's hearsay statements, both oral and written, were properly admitted at Russell's violation of probation hearing.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Honorable Court deny review of the opinion below or, in the alternative, affirm the Fifth District Court's opinion upholding the revocation of Russell's probation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Respondent has been served by basket delivery to David S. Morgan, Assistant Public Defender, counsel for Russell, at 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, this _____ day of July, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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