IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ANTWAN JENKINS,

Respondent.

SC07-1738

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner or the State. Respondent, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the First District Court of Appeal in Jenkins v. State, attached in slip opinion form [hereinafter referenced as "slip op."]. It can also be found at 32 Fla. L. Weekly D1753. The majority's opinion states, in total:

> PER CURIAM.
>
> Appellant challenges the revocation of his probation based on his failure to complete a residential drug treatment program. We reverse.
>
> The only evidence of the conduct that purportedly led to appellant's discharge from Phoenix House was hearsay. Hearsay cannot be the sole basis for finding a violation of probation. See Stewart v. State, 926 So. 2d 413, 415 (Fla. 1st DCA 2006)(reversing revocation of probation where the only evidence that conduct which led to discharge from drug treatment amounted to a "willful" or "substantial" violation of condition of community control was hearsay testimony); Meade v. State, 799

So. 2d 430, 433 (Fla. 1st DCA 2001)("Finally, both the probation officer's testimony and the treatment counselor's report were hearsay and, because the probation officer neither prepared nor was the custodian of the treatment counselor's report, the report was not subject to the business record exception. Because this hearsay evidence was the only evidence Appellant was terminated unsuccessfully from the treatment program for willfully failing to participate, it is insufficient to support a finding of violation of probation.")(citations omitted).

The order placing the appellant on probation did not, moreover, specify the time within which he was to complete the treatment program or limit the chances he had to succeed. As we recently said in Campbell v. State, 939 So. 2d 242 (Fla. 1st DCA 2006): "Courts have held that 'evidence of the failure to complete a counseling program is insufficient to establish a willful and substantial violation of probation if the condition in question does not specify a time for completion.'" Id. at 244 (quoting Quintero v. State, 902 So. 2d 236, 237 (Fla. 2d DCA 2005)). See also Jones v. State, 744 So. 2d 537, 538 (Fla. 2d DCA 1999)("The community control order did not specify the period within which appellant was to complete the program or how many chances he would have to obtain success. Since the order was not specific and appellant has expressed a willingness to complete some form of drug treatment, we conclude that the trial court abused its discretion in revoking appellant's community control.")(citation omitted).

REVERSED.

BENTON and PADOVANO, JJ., CONCUR . . . .

(slip op. 1-3).

SUMMARY OF ARGUMENT

The decision of the First District Court of Appeal is in express and direct conflict with the decision of the Fifth District Court of Appeal in Lawson v. State, 941 So. 2d 485 (Fla. 5th DCA 2006), review granted, 954 So. 2d 27 (Fla. 2007), on the question of whether evidence of a probationer's failure to complete a drug treatment program, as required by a condition of probation, is insufficient to establish a willful and substantial violation of probation if the condition does not specify a time for completion of the program or limit the chances the probationer has to successfully complete the program. This Court should accept jurisdiction to resolve this conflict.

ARGUMENT

ISSUE

WHETHER THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.

This Court has discretionary jurisdiction to review the decision of the First District Court of Appeal because the decision "expressly and directly conflicts with a decision" of the Fifth District Court of Appeal "on the same question of law." Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict between decisions is "express and direct" and "appear[s] within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

The trial court revoked Respondent's probation based on his discharge from a residential drug treatment program (slip op. 1). Finding that the probation order did not "specify the time within which [Respondent] was to complete the treatment program or limit the chances he had to succeed," the First District Court of Appeal reversed (slip op. 2-3). The First District held that evidence of a probationer's failure to complete a treatment program, as required by a condition of probation, is insufficient to establish a willful and substantial violation of probation if the condition does not specify a time for

completion of the program or limit the chances the probationer has to successfully complete the program[1] (slip op. 2-3).

In contrast to the First District's decision, the Fifth District Court of Appeal, in Lawson v. State, 941 So. 2d 485 (Fla. 5th DCA 2006), review granted, 954 So. 2d 27 (Fla. 2007), affirmed the revocation of Lawson's drug offender probation, holding that a trial court does not abuse its discretion "in finding a willful and substantial violation of probation based on the defendant's dismissal from a court-ordered drug rehabilitation or treatment program due to nonattendance, when the sentencing judge did not specify the number of attempts the defendant would have to successfully complete the program and a time period for compliance." Id. at 487. Thus, the First District's decision expressly and directly conflicts with the Fifth District's decision in Lawson.

The State acknowledges that Lawson dealt with drug offender probation, whereas the First District's decision deals with regular probation. However, regardless of the type of supervision involved, the principles in conflict can arise

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[1] Although the First District also found that the only evidence of the conduct that purportedly led to Respondent's discharge form the treatment program was hearsay, (slip op. 1-2), it is clear that the First District would have reversed even if the evidence of Respondent's conduct was non-hearsay because the probation order did not limit the time for completion of the treatment program or limit the number of attempts at completion.

anytime a condition of supervision requires the successful completion of a treatment, counseling, or educational program.

In Lawson, the Fifth District certified that its decision directly conflicted with eight other district court decisions.[2] 941 So. 2d at 489, 492. These eight decisions dealt with various types of supervision and with various treatment, counseling, and educational programs. See Quintero v. State, 902 So. 2d 236 (Fla. 2d DCA 2005)(reversing revocation of probation for failure to complete domestic violence treatment program)[3]; Singleton v. State, 891 So. 2d 1226 (Fla. 2d DCA 2005)(reversing revocation of drug offender probation for failure to complete drug treatment program); Davis v. State, 862 So. 2d 931 (Fla. 2d DCA 2004)(reversing revocation of drug offender probation for failure to complete drug treatment program); Lynom v. State, 816 So. 2d 1218 (Fla. 2d DCA 2002)(reversing revocation of sex offender probation for failure to complete sex offender treatment program); O'Neal v. State, 801 So. 2d 280 (Fla. 4th DCA 2001)(reversing revocation of probation for failure to complete batterers intervention program); Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA

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[2] The Fifth District also certified a question of great public importance pertaining to the conflict. Lawson, 941 So. 2d at 492.

[3] The First District's majority opinion quotes from Quintero (slip op. 2).

2001)(reversing revocation of probation for failure to complete sex offender treatment program); Butler v. State, 775 So. 2d 320 (Fla. 2d DCA 2000)(reversing revocation of probation for failure to enroll in GED classes); Salzano v. State, 664 So. 2d 23 (Fla. 2d DCA 1995)(reversing revocation of community control for failure to complete drug treatment program).

This Court has accepted jurisdiction to review Lawson. See Lawson v. State, 954 So. 2d 27 (Fla. 2007). Briefing on the merits has been completed and oral argument has been held. Like the eight cases Lawson was certified to be in conflict with, the First District's decision expressly and directly conflicts with Lawson. This Court should accept jurisdiction to resolve the conflict.[4]

CONCLUSION

Based on the foregoing discussion, Petitioner respectfully requests that this Court exercise its discretion to take jurisdiction over this case.

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[4] Because briefing on the merits has been completed in Lawson and the First District's decision conflicts with the Fifth District's decision on the same basis as the eight cases Lawson was certified to be in conflict with, Petitioner suggests that, should this Court accepts jurisdiction, the case be stayed pending the outcome of this Court's review in Lawson.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Michael Ufferman, Esquire, Michael Ufferman Law Firm, P.A., 2022-1 Raymond Diehl Road, Tallahassee, Florida 32308, on September 28, 2007.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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