

IN THE SUPREME COURT OF FLORIDA

KENNETH ADAMS,)
)
 Petitioner,)
)
 vs.) CASE NO. SC07-389
) DCA CASE NO. 4D05-4488
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER’S BRIEF ON DISCRETIONARY JURISDICTION

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PRELIMINARY STATEMENT

This is a petition for discretionary review of the decision of the Fourth 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 "A", 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. Adams' probation for failing to successfully complete a sexual offender treatment program. A1 Appellant had been willing to complete the program.¹ In affirming the revocation, the Fourth District Court of Appeal rejected the argument that it was error to revoke probation where there was no time period specified for him to complete the treatment program:

Kenneth Adams appeals the disposition order of the trial court revoking his probation. We find no merit in Adams's argument that the trial court erred in revoking his probation where there was no time period specified for him to complete sex offender treatment. We affirm

Like Adams, Mills argued on appeal before this court that the trial court erred in revoking his probation because of the absence of a specific time period within which he was to complete the program. *Id.* at 467. Although it found the issue unpreserved, this court specifically addressed and rejected Mills's argument. *Id.* (citing *Archer v. State*, 604 So. 2d 561, 563 (Fla. 1st DCA 1992) (rejecting argument that no violation of probation occurred because court had not assigned a specific time period for probationer to complete therapy)).

A1, 4.

SUMMARY OF THE ARGUMENT

¹ Appellant was deemed not to have successfully completed the program due to two unexcused absences A1. Even after termination from the program there was

The decision below, that revocation is warranted where a probationer enters but fails to successfully complete a program without the order specifying a time limit for completing the program is in express and direct conflict with *Yates v. State*, 909 So. 2d 974 (Fla. 2d DCA 2005); *Bingham v. State*, 655 So. 2d 1186 (Fla. 1st DCA 1995); *Dunkin v. State*, 780 So. 2d 223 (Fla. 2d DCA 2001); *Mitchell v. State*, 871 So. 2d 1040 (Fla. 2d DCA 2004).

sufficient time to successfully complete the program and "Adams stated at revocation hearing that he wanted to continue with the treatment program and probation" A3.

ARGUMENT

THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH *YATES v. STATE*, 909 So. 2D 974 (FLA. 2d DCA 2005); *BINGHAM v. STATE*, 655 SO. 2D 1186 (FLA. 1ST DCA 1995); *DUNKIN v. STATE*, 780 So. 2D 223 (FLA. 2D DCA 2001); *MITCHELL v. STATE*, 871 So. 2D 1040 (FLA. 2D DCA 2004).

The law within the first and second districts is that probation cannot be revoked for failure to successfully complete a program where the probationer has not been given notice that the program must be completed within a specific time. This holding is sensible, because a probationer can be terminated from a program for reasons which would not independently warrant revocation. Also, where one is not put on notice that he is required to successfully complete the program by a certain date or on the first attempt the conduct would not be within the meaning of Section 948.06, Fla. Stats., "willful" and "substantial."

Where a sentencing court intends that a probationer successfully complete a program within a certain time period it knows how to say so. In this case, the sentencing court did not say so. 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 and Second District Court of Appeal.

Yates v. State, 909 So. 2d 974 (Fla. 2d DCA 2005) (dismissal from a court ordered

treatment program did not amount to willful and substantial violation of community control where order did not require completion within a specified time or limit the number of chances probation had to succeed.)

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 "submitted to six sessions of psychosexual counseling before he was terminated for unsatisfactory attendance," revocation reversed because condition "did not include a requirement of completion or some other time limit...").

Dunkin v. State, 780 So. 2d 223 (Fla. 2d 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 "did not specify that treatment had to be successfully completed on the first or how many chances the appellant would be given to complete it successfully.")

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

² See, e.g., *Gurganus v. State*. 391 So. 2d 706, 807 (Fla. 5th DCA 1980) (“[E]ven a judge cannot extend the probationary term without a hearing, with due process, and

having the accused violator before the court.”)

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 Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner’s Brief On Discretionary Jurisdiction has been furnished to: Georgina Jimenez-Orosa, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of March, 2007.

Attorney for Kenneth Adams

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this Brief has been prepared with 14 point Times New Roman type, in compliance with *Fla. R. App. P.* 9.210(a)(2), this _____ day of March, 2007.

JEFFREY L. ANDERSON
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