IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant on appeal and the Respondent was the Appellee on appeal in the trial court and the prosecution in the Criminal Division of Circuit Court of the Fifteenth Judicial Circuit, In and for Palm Beach County, Florida. In this brief, the parties will be referred to as they appear before this Court.

"R" indicates the record on appeal and "T" indicates the transcripts.

"SR" indicates the supplemental record on appeal.

STATEMENT OF THE CASE AND FACTS

On September 1, 2004, Petitioner pleaded guilty to one count of Lewd or Lascivious Molestation and one count of Lewd or Lascivious Exhibition R37. Petitioner was placed on 2 years community control R37. On November 23, 2004, Petitioner's community control was revoked and 6 years sexual offender probation was imposed with a condition that Petitioner served 364 days in the Broward County Jail R52-53. On August 1, 2005, Petitioner was charged with a violation of probation R58-59.

A violation of probation hearing was held on September 12, 2005 T1-45. Willie Jenkins testified that Petitioner was being violated for not successfully completing a sexual offender program T5-6. Petitioner had been advised of this requirement T-5-6. Petitioner told Jenkins that he didn't have money for the program so he didn't go T10. Petitioner complied with other conditions T8.

Dr. Rambo operates the sex offender program T11. Rambo testified that Petitioner went to the first group session on July 9 T14. Petitioner was terminated from the program due to the two unexcused absences T16. Petitioner had been made aware of the fee schedule T14. The group session cost $25.00 per session the first two months T15. Petitioner did not make his payments T15. Dr. Rambo does not terminate due to inability to pay T19. Dr. Rambo cannot say whether Petitioner was told he would be allowed to attend without paying T20, Lines 22-25.

Petitioner testified that he was released from jail on June 22, 2005 T25. He was living with his mother under an agreement that he would contribute to living expenses

T26. She was retired T26. Her rent was $750.00 per month T26. He worked at a car wash for $28.00 plus tips T26. He was not given work every day and had no expectations whether he worked on a particular day T28. He probably worked 15 days in June and July T29. Petitioner gave ½ the money to his mother T29. Petitioner also needed money for clothes and food because he was just out of jail T33. Petitioner stopped attending the program because he didn't have the money to pay for it T30. No one told Petitioner he could attend with paying T31. Petitioner would not have violated if he could go to class without paying T31. Petitioner wants to continue classes and the sexual offender probation T31.

Petitioner's probation was revoked for his failure to successfully complete the sexual offender program T39, R66. On September 12, 2005, Petition was sentenced to 11 years in prison to be followed by probation R75-77. On September 16, 2005, Petitioner timely filed his notice of appeal R78.

The district court affirmed Adams v. State, 946 So. 2d 583 (Fla. 4th DCA 2006). Petitioner filed a notice for discretionary review. The cause follows.

SUMMARY OF THE ARGUMENT

It was an abuse of discretion to revoke Petitioner's probation for not successfully completing a condition of probation in a sexual offender program where the probation order did not specify the time period for completion of a sexual offender program or how many chances Petitioner had to complete a sexual offender program. Petitioner was willing to continue a sexual offender program. Also it was improper to revoke where it was not proven that Petitioner had the ability to pay for the sexual offender program. This cause must be reversed and remanded for reimposition of probation.

ARGUMENT

IT WAS ERROR TO REVOKE PROBATION FOR FAILING TO COMPLETE A CONDITION OF PROBATION WHERE THE PROBATION ORDER DID NOT REQUIRE A TIME LIMIT OR NUMBER OF ATTEMPTS FOR COMPLETION OF THE CONDITION OF PROBATION.

Petitioner submits it is not a violation of probation for a probationer to fail to complete a condition of probation where the probation order does not require a parameter for completing the condition. Yates v. State, 909 So. 2d 974 (Fla. 2d DCA 2005) (order did not require specific time, or number of attempts for drug treatment program); Bingham v. State, 655 So. 2d 1186 (Fla. 1st DCA 1995) (revocation reversed because order directing psychosexual treatment did not include requirement of time limit); Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001) (requirement of completing sex offender program was reversed, despite 3 consecutive absences from program, where condition did not require "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) (sex offender treatment); Lynom v. State, 816 So. 2d 1218 (Fla. 2d DCA 2002) (defendant missed 2 of first 4 meetings for sexual offender probation).

On the other hand, Petitioner recognizes that the appellate court in this case rejected his position. Adams v. State, 946 So. 2d 583, 586 (Fla. 4th DCA 2006). (Like Adams, Mills argued on appeal before this court that the trial court erred in revoking

probation because of the absence of a specific time period within which he was to complete the program...this court specifically addressed and rejected Mill's argument...Adams willfully and substantially violated his probation"); Lawson v. State, 941 So. 2d 485 (Fla. 5th DCA 2006).

In covering this issue Petitioner will discuss the defining of conditions of probation and the requirement of notice especially in light of the statutory individual treatment program involved.

There are two types of conditions of probation - (1) those that prohibit certain acts and (2) those that require certain acts. Once the prohibited act occurs the probation becomes ripe for violation of probation. However, the same simple analysis does not make sense for a required act. Of course, doing a required act does not violate probation. Is not doing a required act within the first week of probation constitute a violation? Or the first month? Or the first year? Or the second year of a six year term of probation? It depends. If on the first attempt, 2nd attempt, 3rd attempt, etc. the trial court believes there should be a limit of time, or limit of attempts, it has the discretion to make that limit part of the condition of probation. However, the probationer must be informed of the limit part of the condition of probation.

Because of the notice requirement, it is well-settled that the violation "must mirror the language of the condition of probation allegedly violated" Stanley v. State, 922 So. 2d 411 (Fla. 5th DCA 2006). In this case Appellant was charged and found to be in violation of probation for failing to complete the sexual offender program on August 1, 2005,

which does not mirror his condition of probation which contains no specific time requirement.

Due process "mandates" that a defendant "be given notice of the conditions of probation to be imposed," State v. Williams, 712 So. 2d 762, 764 (Fla. 1998).

"Fundamental fairness requires that a defendant be placed on notice what he must do or refrain from doing while on probation," Hines v. State, 358 So. 2d 183, 185 (Fla. 1978).

Petitioner was never given notice that his first attempt at the treatment program had to be successful. If the trial court was requiring the treatment be successfully completed on the first attempt it was required to notify Appellant of this condition.

Again, the trail court has the discretion to order time parameters (1st attempt, 2nd attempt, etc.) of treatment. This gives the trial court flexibility regarding individual programs. But the trial court cannot keep time parameters secret from the probationer.

This is not a question of the probationer setting conditions of probation. The trial court sets the conditions, but it must notify the probationer so the probationer knows what he must do to comply with probation.

The conditions of probation, including the time requirements, cannot be set by the probation officer. See Patterson v. State, 612 So. 2d 692, 694 (Fla. 1st DCA 1993) (trial court's condition that probationer not use intoxicants did not authorize probation officer to require urinalysis test); Morales v. State, 518 So. 2d 964 (Fla. 3d DCA 1988) (probation officer's directive that probationer set up appointment for counseling cannot be

considered a condition of probation).

It could be argued that the sex offender/drug treatment programs are individualized and thus are different. However, the more individualized a program is - the more important to notify the probationer of the requirements of what he must do while on probation.

Respondent will probably claim the legislature intended immediate compliance with sex offender/drug treatment programs. This claim may be true. However, the legislature has not set time that the probationer succeed on the first attempt. Even if this is intended notice must be given. Furthermore, constructions of prohibitions must be viewed in light of the need for fair warning and legislative history cannot be used to broaden the construction of the prohibition. Crandon v. U.S., 494 U.S. 152, 160 (1990). Also, when looking at an order or legislation one looks at the plain language of the decree. Only if the decree is ambiguous does one look at the background or history of the decree. Of course, if a prohibition, whether it be a criminal statute or a condition of probation, is ambiguous or silent - one cannot be found to have violated the prohibition. Schneck v. State, 764 So. 2d 898, 900 (Fla. 5th DCA 2000) (condition of probation must be clear and not ambiguous); Burse v. State, 724 So. 2d 596, 598 (Fla. 2d DCA 1998) (where a duty is not clearly established in condition of probation the violation is not willful). See e.g. McGhee v. State, 847 So. 2d 498, 503 (Fla. 4th DCA 2003) (ambiguities must be construed in favor of defendant).

The legislature did not mandate sex offender probation as an arbitrary act of grace.

It has a serious purpose. It avoids the high cost warehousing. It was not designed to wash out probationers because the conditions of probation were silent that the program had to be completed on the first try.

This case demonstrates why probation should not be violated where the probationer is not given notice that he had to complete his treatment program on his first attempt. Due to financial circumstances Petitioner did not believe he could do the program on the first attempt. If his financial condition was to improve, or if he knew he would not be dismissed from treatment for failing to pay, Petitioner likely would continue in the program.

Petitioner testified that he was living with his mother under an agreement that he would contribute to living expenses T26. She was retired T26. He was not given work every day and had no expectations whether he worked on a particular day T28. He probably worked 15 days in June and July T29. Petitioner gave ½ the money to his mother T29. Petitioner also needed money for clothes and food because he was just out of jail T33. Petitioner stopped attending the program because he didn't have the money to pay for it T30. No one told Petitioner he could attend without paying T31. Petitioner would not have violated if he could go to class without paying T31. Petitioner wants to continue with classes and the sexual offender probation T31.

Petitioner's reaction to the treatment program was not due to arrogance but due to a financial condition. If Petitioner had been given notice of the condition that he had to

complete the program on his first attempt things might have been different. The bottom line is that Petitioner should not be violated where he was not given notice.

CONCLUSION

Petitioner respectfully requests this Court to quash the decision of the district court and to remand this cause for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Brief on the Merits has been furnished to: HEIDI L. BETTENDORF, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this _____ day of October, 2007.

_____
Counsel for Petitioner

CERTIFICATE OF FONT SIZE

Counsel for Petitioner hereby certifies that the instant brief has been prepared with 14 point Times New Roman.

_____
Attorney for Kenneth Adams

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APPENDIX

PETITIONER'S BRIEF ON THE MERITS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Appendix to Petitioner's Brief on the Merits has been furnished to: HEIDI L. BETTENDORF, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this _____ day of October, 2007.

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