IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2198
DCA CASE NO. 3D09-1543

LAZARO FLORES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW TO THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, Lazaro Flores, was the Appellant below, and the Respondent, the State of Florida, was the Appellee below. In this brief, Lazaro Flores will be referred to as "Petitioner", and the State of Florida will be referred to as "Respondent." The symbol "R." refers to the record on appeal in the Third District Court of record on appeal in Case No 3D09-1543.

STATEMENT OF THE CASE AND FACTS

On December 13, 2006, Petitioner was charged by information with robbery, using a deadly weapon or firearm in violation of § 812.13(2)(A), Fla. Stat., a first degree felony under Case No. F06-37831 (B). (R. 7-11). On December 14, 2006, Appellant was charged with burglary of an unoccupied dwelling in violation of § 810.02(3)(B), Fla. Stat., a second degree felony, under Case No. F06-37832(B). (R. 75-79). Also, on December 14, 2006, Petitioner was charged by information with burglary of an unoccupied dwelling in violation of § 810.02(3)(B), Fla. Stat., a second degree felony, under Case No. F06-37835. (R. 112-114). On June 20, 2007, after the entry of a guilty plea, the trial court entered Orders of Supervision, wherein Petitioner was placed on community control for a period of two years, followed by probation for a period of five years as a youthful offender. Additionally, three hundred sixty four days at the Dade County Jail were to be mitigated to the boot camp program (among various other conditions). (R. 17-20; 27-29; 215-235). Also on June 20, 2007, the trial court entered an order for Petitioner's placement in Miami-Dade Corrections and Rehabilitation Department Boot Camp Program. (R. 21-24). Petitioner executed a Volunteer Agreement regarding participation in the Boot Camp Program on that same date. (R. 25-26).

The Department of Corrections filed an Affidavit of Violation of Probation/CC alleging that Petitioner violated the law on or about October 3, 2008, by committing the offense of cocaine possession. (R. 32). The Department of Corrections filed Amended Affidavits of Violation of Probation on October 10, 2008, March 4, 2009 and March 17, 2009. These amended affidavits added violations of failure to pay restitution, failure to obtain full time employment, GED, or enroll in school, failure to allow officer to visit at home, employment, or elsewhere, failure to comply with instructions and failure to complete public service hours. (R. 33-42).

Case No. F06-37836: On June 20, 2007, after the entry of a guilty plea, the trial court entered Orders of Supervision, wherein Petitioner was placed on community control for a period of two years, followed by probation for a period of five years as a youthful offender. Additionally, three hundred sixty four days at the Dade County Jail were to be mitigated to the boot camp program (among various other conditions). (R. 147-150; 215-235).

The Department of Corrections filed an Affidavit of Violation of Probation/CC alleging that Petitioner violated the law on or about October 3, 2008, by committing the offense of cannabis/sale/school. (R. 155). The Department of Corrections filed Amended Affidavits of Violation of Probation on

March 4, 2009 and March 17, 2009. These amended affidavits added violations of failure to pay restitution, failure to obtain full time employment, GED, or enroll in school, failure to allow officer to visit at home, employment, or elsewhere, failure to comply with instructions and failure to complete public service hours. (R. 156-157).

On July 31, 2008, the trial court entered an Order of Modification of Community Control that converted the remainder of community control to probation; Petitioner was to pay $200 total a month towards restitution to be disbursed amongst victims in all cases and could transfer supervision to Texas. All previous conditions were to remain in effect. (R. 151). On February 17, 2009, the trial court entered an Order of Modification of Probation converting the remainder of probation to drug offender probation. All prior terms and conditions were to remain the same. (R. 154).

Hearings regarding all cases.

On February 17, 2009, the trial court held a hearing wherein Petitioner admitted to the probation violation of possession of cocaine. (R. 239-240). Petitioner was sentenced to five years probation to run concurrent. Petitioner was advised, "if you took this plea, you would be adjudicated a felon in all the cases that got you onto probation. Including armed robbery with a firearm. Burglary of

an unoccupied dwelling. Another burglary of an unoccupied dwelling. Another burglary of an unoccupied dwelling. And the possession of cocaine." (R. 240 - 241). The court found Petitioner in violation and Petitioner's probation was modified/converted to drug offender probation. All of the cases were to run concurrent. (R. 241). The State responded that a probation plea would be over the State's objection. (R. 243). The court then decided not to adjudicate Petitioner on the probation matters, only on the cocaine possession case. (R. 244). Petitioner was then administered a plea colloquy. (R. 245-252).

On May 22, 2009, the trial court held a probation violation hearing. (R. 254). The trial court heard evidence and ruled that the State presented several witnesses regarding the marijuana possession charge. (R. 260-275; 276-285; 289-297; 298-309).

The judge found by a preponderance of the evidence that Petitioner sold two bags of marijuana on August 20, 2008, in violation of paragraph 4F on all of the previously entered probation orders. (R. 326). The trial court went on to revoke Petitioner's youthful offender status because of his conviction of this probation violation. The court further took judicial notice of the information filed. The trial court added, "I find it to be beyond any reasonable doubt that his occurred." The trial court noted that the state abandoned or chose not to pursue the other

violations. (R. 327). Petitioner was then sentenced to life for case number 06-37831B, youthful offender status having been revoked; and fifteen years each, to run consecutive for case numbers 06-37832B, 06-37835 and 06-37836, youthful offender status also revoked. The trial judge went on to state that, "In the event that I am wrong, on the failure to revoke - that I cannot revoke the youthful offender status, at this time. Alternatively, if that is found to [b]e an illegal sentence, his alternative sentence will be I guess it is the six, plus six, plus six, plus six, plus six consecutive." (R. 329). "So they don't have to send it back for re-sentencing if I am wrong." "So one way is life, plus all those 15's. The other way is 24. Four six-year sentences consecutive, with credit." (R. 330). The defense argued that Petitioner could only be sentenced to one six year term. (R. 331).

Petitioner appealed his conviction and sentence to the Third District Court of Appeal and raised the following ground (verbatim):

> A defendant's youthful offender status may only be revoked when he is convicted of a new crime while under supervision. The trial court erroneously revoked Mr. Flores's youthful offender status and sentenced him to life imprisonment despite the fact that he had not been convicted of the new, alleged offense.

(R. TAB A).

On October 6, 2010, the Third District Court of Appeal affirmed Petitioner's

conviction based upon the following reasoning:

> Florida's Youthful Offender Act, sections 958.011, .15, Fla. Stat. (2008), provides that "no youthful offender shall be committed . . . for a substantive violation [of probation] for a period longer than the maximum sentence for the offense for which he or she was found guilty, . . . or for a technical or nonsubstantive violation for a period longer than 6 years." § 958.14. "[A] 'substantive violation,' as the phrase is used in section 958.14, refers exclusively to a violation premised on the commission of a separate criminal act." State v. Meeks, 789 So. 2d 982, 989 (Fla. 2001).
>
> Accordingly, Florida courts have held that the statute provides a six-year cap for technical violations, but not for the commission of a new criminal act. See Thompson v. State, 945 So. 2d 627 (Fla. 4th DCA 2006); Swilley v. State, 781 So. 2d 458 (Fla. 2d DCA 2001); Willis v. State, 744 So. 2d 1265 (Fla. 1st DCA 1999); Johnson v. State, 678 So. 2d 934 (Fla. 3d DCA 1996). This is true even when the new charges are nolle prossed or dismissed. See Morency v. State, 955 So. 2d 67, 68 n. 1 (Fla. 3d DCA 2007); Swilley, 781 So. 2d at 460 ("The filing of a nolle prosequi does not mean that the trial court cannot find that [the defendant] substantively violated his community control by committing new offenses.")
>
> Moreover, a conviction in the new case need not precede sentencing on the probation violation as long as the court determining the violation has sufficient evidence that the defendant committed the new offense. In Swilley, the court reversed the trial court's order because the record did not establish that the defendant had committed the new offenses. The court, however, recommended that the trial court hold an evidentiary hearing for the State to prove the substantive violation. 781 So. 2d 461. In Thompson, the court accepted the lower court's conclusion that the defendant committed the crime of possession of cannabis based on a positive drug test. 945 So. 2d at 628.
>
> The defendant relied on Rogers v. State, 972 So. 2d 1017 (Fla. 4th DCA 2008), for the proposition that a conviction on the new offenses

is required to revoke a youthful offender sentence and exceed the statutory cap. In Rogers, the Fourth District wrote:

Youthful offender status may be revoked when the defendant is charged and convicted with a new, substantive offense. See Boynton v. State, 896 So. 2d 898, 899 (Fla. 3d DCA 2005). However, if the defendant is not charged by information with a new, substantive offense, but rather is charged by way of a violation of the defendant's youthful offender commitment, the defendant's youthful offender status may not be revoked. Id.

972 So. 2d at 1019. Because of this language, the defendant argues that he was improperly sentenced in excess of the statutory six-year cap.

We disagree for two reasons. First, although the Fourth District stated that without a conviction the youthful offender status may not be revoked, the court nevertheless affirmed the fifteen-year sentence the lower court imposed. 972 So. 2d at 1020 ("Appellant, therefore, was properly sentenced to 15 years in prison for [five counts of second-degree] felonies, but he should retain his youthful offender status. . . .") Thus, the Fourth District did not equate retaining youthful offender status with sentencing within the six-year cap.

Secondly, we respectfully disagree with the Fourth District's expansive reading of Boynton. After escaping from a correctional facility where he was committed as a youthful offender, Boynton committed two new crimes, and was convicted and sentenced to a forty-year imprisonment in the new cases. On appeal from the denial of his postconviction relief motion from the new convictions, Boynton argued that he should have been sentenced as a youthful offender. This Court affirmed the denial of postconviction relief. 896 So. 2d at 899.

Regrettably, the Boynton court additionally stated "a defendant previously classified as a youthful offender who is subsequently charged with substantive offenses, and not with a mere violation of probation/community control, is not entitled to be sentenced as a

> youthful offender upon conviction of the new, substantive offenses." 896 So. 2d at 899 (emphasis added). Because Boynton did not involve a probation revocation, this language is *dicta* and of no precedential value. Thus, neither Rogers nor Boynton stand for the proposition that a defendant must first be convicted on new offenses before he or she may be sentenced in excess of the six-year statutory cap.
>
> Here, the trial court heard from several witnesses, including the undercover police officer who purchased marijuana from the defendant. Therefore, the trial court had proof of the defendant's guilt on the new offense. Based on this finding, the trial court correctly revoked the defendant's probation and was not limited in sentencing by the youthful offender statutory cap of six years.

Flores v. State, 46 So. 3d 102 (Fla. 3d DCA 2010).

Thereafter, Petitioner filed a brief on jurisdiction and initial brief on the merits in this Court.

Respondent's brief follows.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal did not err in affirming the trial court's decision to revoke Petitioner's probation and sentence him beyond the six year statutory cap contained in the Youthful Offender Sentencing Statute. Neither Florida Statute § 958.14, nor cases from this Court or any other District require that in order to sentence a defendant beyond the six year Youthful Offender Sentencing Statute, they must be found guilty by a jury or plead guilty to a substantive violation of probation.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DECISION TO REVOKE PETITIONER'S PROBATION AND SENTENCE HIM BEYOND THE SIX-YEAR STATUTORY CAP CONTAINED IN THE YOUTHFUL OFFENDER SENTENCING STATUTE.

Petitioner argues that prior to subjecting a defendant previously sentenced under the Youthful Offender Sentencing Statute to a sentence above the six-year statutory cap contained therein, a new law violation should be established by a jury trial, or plea based on a reasonable doubt standard.

§ 958.14, Florida Statute reads as follows:

> A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of s. 948.06. However, no youthful offender shall be committed to the custody of the department for a substantive violation for a period longer than the maximum sentence for the offense for which he or she was found guilty, with credit for time served while incarcerated, or for a technical or nonsubstantive violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he or she was found guilty, whichever is less, with credit for time served while incarcerated.[1]

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[1] This statute was amended by The Laws of Florida Chapter 90-208 § 19. The prior version of the statute,) § 958.14, Fla. Stat. (1989), read as follows:

A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of s. 948.06(1). However, no youthful offender shall be committed to the custody of the department for such violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he was found guilty,

The narrow issue being presented to this Court is whether the term "substantive violation," as used in § 958.14, Fla. Stat., requires an actual conviction for a new offense. The statute clearly states, "no youthful offender shall be committed to the custody of the department for a substantive violation for a period longer than the maximum sentence for the offense for which he or she was found guilty." Id. The statute does not say "conviction of a new offense."

> The Legislature's intent must be determined primarily from the language of the statute. See Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank, 609 So. 2d 1315, 1317 (Fla. 1992). Accordingly, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Modder v. American Nat'l Life Ins. Co., 688 So. 2d 330, 333 (Fla. 1997) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)). "Ambiguity suggests that reasonable persons can find different meanings in the same language." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992).

Rollins v. Pizzarelli, 761 So. 2d 294, 297 (Fla. 2000).

> Fortunately, the legislature spelled out its intent as to the treatment of youthful offenders in Florida Statute 958.021. Relevant to the issue before the Court is that part of Florida Statute 958.021 which states:
>
> The purpose of this act is to improve the chances of correction and successful return to the community of youthful offenders sentenced to

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whichever is less, with credit for time served while incarcerated.

> imprisonment by providing them with vocational, educational, counseling, or public service opportunities and by preventing their association with older and more experienced criminals during the terms of their confinement ... [sic] It is the further intent of the Legislature to provide an additional sentencing alternative to be used in the discretion of the court when dealing with offenders who have demonstrated that they can no longer be handled safely as juveniles and it will require more substantial limitations upon their liberty to insure the protection of society.

Johnson v. State, 586 So. 2d 1322, 1324 (Fla. 2d DCA 1991).

Thus, Petitioner was originally sentenced as a Youthful Offender in order to improve his chances of correction and successful return to the community. The legislature contemplated that a youthful offender would possibly violate probation, and included a provision for any such occurrence in § 958.14, Florida Statute. The legislature did not intend to preclude sentencing beyond the six-year cap only when a youthful offender is found guilty beyond a reasonable doubt and convicted.

§ 948.06, Florida Statute, the comparable adult statute regarding revocation of probation, reads in pertinent part:

> (d) If such charge is not at that time admitted by the probationer or offender and if it is not dismissed, the court, as soon as may be practicable, shall give the probationer or offender an opportunity to be fully heard on his or her behalf in person or by counsel.
>
> (e) After such hearing, the court may revoke, modify, or continue the probation or community control or place the probationer into community control. If such probation or community control is

> revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he or she has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control.

When a probationer is before the court accused of violating probation by committing an unlawful act, the judge may revoke probation upon finding that such unlawful act was committed by the probationer; it is not necessary that there be a conviction of the unlawful act. Maselli v. State, 446 So. 2d 1079, 1080 (Fla. 1984) citing Russ v. State, 313 So. 2d 758 (Fla. 1975), cert. denied, 423 U.S. 924, 96 S. Ct. 267, 46 L.Ed.2d 250 (1975). In the instant case, the judge conducted a probation violation hearing and revoked Petitioner's probation upon making a finding that the unlawful act alleged in the affidavit had been committed by Petitioner.

If the legislature had intended for youthful offender status to be revoked solely upon a "conviction" based upon being found guilty "beyond a reasonable doubt," it would have put this language into the statute. Many statutes contain definitions for conviction as used within that particular statute. For example: (1) § 316.191, Fla. Stat. , Racing on Highways; (2) § 322.01, Fla. Stat. , motor vehicle violations; (3) § 379.40, Fla. Stat. , Fish and Wildlife penalties and violations and (4) § 943.0435, Fla. Stat., Sex Offender Registration, among others.

In Robinson v. State, 702 So. 2d 1346 (Fla. 5th DCA 1997), the Fifth District held that § 958.14, Fla. Stat., permits a youthful offender to be sentenced to a term longer than 6 years, after the revocation of probation if the violation is substantive. Id. at 1347. The Fifth District further held that *committing a new criminal offense* is a substantive violation of probation. Id. (Emphasis added). This Court in State v. Meeks, 789 So. 2d 982, 985 (Fla. 2001) also held that violations which are based on *the commission of a new criminal* offense are consistently classified as "substantive" violations. This is true even when the new charges are nolle prossed or dismissed. (emphasis added). See Morency v. State, 955 So. 2d 67, 68 n.1 (Fla. 3d DCA 2007); Swilley v. State, 781 So. 2d 458, 460 (Fla. 2d DCA 2001) ("The filing of a nolle prosequi does not mean that the trial court cannot find that [the defendant] substantively violated his community control by committing new offenses."); see also Flores, 46 So. 3d at 104. The State emphasizes that the term used is "commission of a new criminal offense" and not a conviction for said offense.

The Meeks opinion cited to several District Court cases that have all held that probation can be revoked and a defendant who was previously sentenced as a Youthful Offender can be sentenced beyond the six-year statutory cap.

In Escutary v. State, 753 So. 2d 650 (Fla. 3d DCA 2000), the defendant

argued that he could not be sentenced for more than six years when his probation was revoked. Relying upon Johnson v. State, 678 So. 2d 934, 935 (Fla. 3d DCA 1996), the Third District recognized that "under amended section 958.14, a youthful offender can be sentenced in excess of six years after a revocation of probation if the violation is substantive rather than technical." In the present case, it is clear that the trial judge revoked the Petitioner's probation for both technical violations and the commission of new criminal offenses. Id. at 651.

The Fourth District Court of Appeal held in Thompson v. State, 945 So. 2d 627 (Fla. 4th DCA 2006) that the defendant substantively violated his probation by committing the crime of cannabis, as evidenced by a positive drug test. The Thompson court further held that sentencing the defendant to an eleven-year prison term was proper. Thus, this defendant was found to have substantively violated his probation based upon a positive drug test and not a trial by jury. The Third District relied upon Thompson in its opinion in the instant case.

The Petitioner relies upon Rogers v. State, 972 So. 2d 1017 (Fla. 4th DCA 2008), for the proposition that a conviction on the new offenses is required to revoke a youthful offender sentence and exceed the statutory cap. In its opinion, the Third District Court of Appeal stated that it disagreed with the Fourth District's expansive reading of Boynton v. State, 896 So. 2d 898, 899 (Fla. 3d

DCA 2005). The Third District went on to state that "[b]ecause Boynton did not involve a probation revocation, this language is dicta and of no precedential value. Thus, neither Rogers nor Boynton stand for the proposition that a defendant must first be convicted on new offenses before he or she may be sentenced in excess of the six-year statutory cap." Flores v. State, 46 So. 3d 102, 105 (Fla. 3d DCA 2010). The State agrees that neither Boynton nor Rogers apply because they did not involve a revocation of probation as the instant case does. Petitioner also cites to Mendez v. State, 835 So. 2d 348 (Fla. 4th DCA 2003) which also does not involve a revocation of probation proceeding. The issue in Mendez was whether the trial court could impose a mandatory minimum and a fine upon a youthful offender, as the youthful offender statute does not provide for mandatory minimum terms or the imposition of fines in sentencing youthful offenders.

Neither § 958.14, Florida Statute, nor cases from this Court or any other District, require that in order to sentence a defendant beyond the six-year Youthful Offender Sentencing Statute, they must be found guilty by a jury or plead guilty to a substantive violation of probation, nor is the State required to prove the substantive violations beyond a reasonable doubt. The trial court correctly found, and the Third District Court correctly affirmed, that Petitioner committed a substantive violation of probation and could be sentenced to the maximum

sentence for the offense. See also Hill v. State, 692 So. 2d 277, 278 (Fla. 5th DCA 1997) (footnote omitted) (emphasis added) ([S]ection 958.14, Florida Statutes (1991), permits sentences in excess of the six-year cap for youthful offenders who *commit* substantive violations of probation.); Willis v. State, 744 So. 2d 1265, 1266 (Fla. 1st DCA 1999) (emphasis added) (Under section 958.14, Florida Statutes (1997), a trial court may impose a non-youthful offender sentence on a youthful offender who *commits* violations of probation that involve new substantive offenses); Dunbar v. State, 664 So. 2d 1093 (Fla. 2d DCA 1995) (A youthful offender can be sentenced in excess of six years after revocation of probation if the violation was substantive.).

The lower court reached the correct result in the instant case. The language utilized in the statute does not equate "substantive violation" with convictions for new offenses. In other instances where the legislature has required a "conviction" to serve as a requirement, it has shown its ability to articulate that requirement in clear language. No such requirement exists in the Youthful Offender Act.

CONCLUSION

Based on the foregoing, this Court should affirm the decision of the Third District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 1st day of June, 2011, to Manny Alvarez, Esq., Office of the Public Defender, 1320 NW 14th Street, Miami, Florida 33125.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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