IN THE SUPREME COURT OF THE STATE OF FLORIDA

CANDIE ANDERSON,

Petitioner,

v.

Case No. SC11-3
5th DCA No. 5D09-4267

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

Petitioner's statement of the case and facts is substantially accurate; however, Respondent would make the following additions and/or corrections:

In Citrus County case number 2008-CF-0812, Petitioner, Candie Anderson, was charged with one count of falsification of ownership to pawn broker. (R 1, Vol. 1). It was alleged that the crime occurred on July 7, 2008. Id. In another case, 2008-CF-787, Petitioner was charged with burglary of a dwelling and grand theft. (R 22, Vol. 1). Petitioner entered an open plea to the court in both cases on December 8, 2008. (R 22-24, Vol. 1).

Petitioner was sentenced in both cases on December 8, 2008, to five years in the Department of Corrections, suspended, and two years community control followed by three years probation. (R 25, 26, Vol. 1). Restitution was ordered in both cases. (R 35, 37, Vol. 1).

At the violation hearing held on November 16, 2009, Petitioner's community control officer, Michelle Welch, testified that Petitioner was instructed on the terms of her community control on January 5, 2009. (T 6). Subsequently, Petitioner came to her office on June 15, 2009, to submit her weekly schedule and daily activity log. (T 7). Petitioner was arrested on June 15, 2009, on a violation of probation warrant

out of Hernando County, Florida, for failure to pay restitution. (T 7). When Petitioner was patted down after being placed under arrest, Ms. Welch found car keys. (T 7). Petitioner admitted she had driven herself to the probation office. (T 8). Ms. Welch explained she had previously verified that Petitioner's license had been suspended after the victim called to complain that Petitioner was driving on a suspended license. (T 8). Petitioner's certified driving record (CDR) was introduced by the State. (T 9). The CDR reflected that notice required by section 322.251 was sent to Petitioner at 17721 Oxenham Avenue, Spring Hill, Florida 34610, on May 7, 2009. (Supp. 1 Vol. 3). Also according to the CDR, Petitioner's license was suspended indefinitely on May 7, 2009, for "fail[ure] to pay ct financial obligation." Id.

Petitioner was transported to jail on the violation warrant and Ms. Welch filed a violation report with the trial court based on the new law violation of driving while license suspended or revoked. (T 10). When Ms. Welch advised Petitioner that her license was suspended, Petitioner claimed she was unaware of the suspension. (T 11). Petitioner was never charged with the crime of driving while license suspended or revoked. (T 11).

Petitioner moved to dismiss the violation arguing that the State had failed to prove that Petitioner had actual notice that her license had been suspended and had told Ms. Welch that she was unaware that her license had been suspended. (T 16). Petitioner argued that the State had to prove actual notice because her license had been suspended for failing to pay her financial obligations. (T 16-17). The trial court denied the motion, finding that the mailing address provided by Petitioner which was reflected in the court file, 17721 Oxenham Avenue, Spring Hill, 34610, corresponded with the address on the CDR. (T 17).

Petitioner admitted she was on community control in both Hernando County and Citrus County. (T 18). She resided in Pasco County. (T 18-19). Petitioner revealed she had resided at 17721 Oxenham Avenue for two years and received all of her mail there, although she indicated that it was sometimes late. (T 22, 23). Petitioner's mother had lived on Oxenham Avenue for eleven years. (T 27). Petitioner's mother received all of her mail at that address. (T 27).

After argument of counsel, the trial court found both the statute and the Fifth District Court of Appeal's decision in Fields v. State, 731 So. 2d 753 (Fla. 5th DCA 1999), superseded by statute, Anderson v. State, 48 So. 3d 1015 (Fla. 5th DCA

2010), to be controlling and denied the renewed motion for a directed verdict. The trial court found there had been a material violation and Petitioner did receive the notice "according to the best efforts of the Department." (T32-33).

In its opinion affirming the trial court's revocation of Petitioner's community control based on a new law violation, driving while license suspended, the Fifth District Court of Appeal held:

> Here, [Petitioner] was aware that she was required to pay restitution under a court order and payment plan. She knew that she had failed to pay and knew, or should have known, that there would be consequences for her failure to abide by the court's order. The clerk apparently mailed to her a copy of the request to the DHSMV to suspend her license. The statutory notice from the DHSMV was mailed to [Petitioner], properly addressed, as evidenced by the entry in the DHSMV's records. The State's evidence, if believed, directly contradicted [Petitioner]'s theory of innocence. It was up to the trial judge, sitting as trier of fact, to decide whether the State proved this element by a preponderance of the evidence, when weighed against [Petitioner]'s protestations that she had been unaware of the suspension. It is not our function to reweigh this conflicting evidence.

Anderson v. State, 48 So. 3d 1015, 1019 (Fla. 5th DCA 2010).

SUMMARY OF THE ARGUMENT

It remains the State's position that there is no express and direct conflict between Brown v. State, 764 So. 2d 741 (Fla. 4th DCA 2000), Haygood v. State, 17 So. 3d 894 (Fla. 1st DCA 2009), and Anderson v. State, 48 So. 3d 1015 (Fla. 5th DCA 2010). However, if this Court does retain jurisdiction, the State would assert that this Court should approve the interpretation of "financial responsibility" violation suggested by the Anderson court rather than the erroneous interpretation relied upon by the Haygood court. As a matter of statutory interpretation, since the term "financial responsibility" relates solely to insurance requirements and suspensions for violations thereof in Chapter 324, the suspension in this case for non-payment of court ordered restitution, or for non-payment of child support in Haygood, are not "financial responsibility" violations which are exempted from the rebuttable presumption provided in section 322.34(2). As such, the rebuttable presumption should have applied in Haygood and was applicable in Anderson. The trial court's revocation of community control was properly affirmed by the Fifth District Court of Appeal.

ARGUMENT

POINT OF LAW

NOT ONLY ARE THE OPINIONS IN BROWN AND HAYGOOD NOT IN EXPRESS AND DIRECT CONFLICT WITH ANDERSON, BUT THE INTERPRETATION OF "FINANCIAL RESPONSIBILITY" VIOLATION IN HAYGOOD IS ERRONEOUS AND THE REVOCATION OF PETITIONER'S COMMUNITY CONTROL SHOULD BE AFFIRMED.

While acknowledging this Court's decision to accept jurisdiction in this case, it remains the position of the State that there is no express and direct conflict on the face of the decision under review. Unlike Anderson v. State, 48 So. 3d 1015 (Fla. 5th DCA 2010), which involves a violation of community control, Brown v. State, 764 So. 2d 741 (Fla. 4th DCA 2000), and Haygood v. State, 17 So. 3d 894 (Fla. 1st DCA 2009), address the proof necessary to establish the element of knowledge for the crime of driving while license suspended, but in the context of a trial where proof of all elements of a crime must be established beyond and to the exclusion of every reasonable doubt. Haygood, 17 So. 3d at 896 ("we must reverse Appellant's conviction for knowingly driving with a suspended license."); Brown, 764 So. 2d at 744 ("we must reverse Brown's conviction for felony driving with a suspended license.").

In Anderson, the Fifth District Court of Appeal sustained the lower court's finding that the evidence was sufficient to prove the knowledge element by a preponderance of evidence, the considerably lesser standard of proof that is applied in violation cases. State v. Carter, 835 So. 2d 259, 263 (Fla. 2002)("The trial court has broad discretion to determine whether there has been a willful and substantial violation of a term of probation and whether such a violation has been demonstrated by the greater weight of the evidence."). This considerable difference in the burden of proof is underscored by cases where the State does not or cannot prove a crime was committed beyond a reasonable doubt but the same evidence can and does sustain a probation violation. See Gonzales v. State, 780 So. 2d 266, 267 (Fla. 4th DCA 2001)("The fact that appellant was acquitted of aggravated battery by a jury does not mean that his probation could not be revoked based on the same facts."); State v. Jenkins, 762 So. 2d 535, 536 (Fla. 4th DCA 2000)("To meet its burden in a violation of probation proceeding, the state need only demonstrate by a preponderance of the evidence that the defendant committed the subject offense. As that is a lesser standard than is required to prove the criminal charge, the state may still have sufficient evidence to meet its lesser burden."); Morris v. State, 727 So. 2d 975, 977 (Fla. 5th DCA

1999)(acquittal in a criminal case does not preclude the judge from determining that probation violation has occurred based on the same conduct because a criminal case must be proven beyond a reasonable doubt and a probation violation need only be proven by a preponderance of the evidence).

Similarly, the opinion in Anderson does not expressly and directly conflict with Brown and Haygood because the Anderson court concluded that, pursuant to section 322.34(3), Florida Statutes, the State provided other evidence which proved by a preponderance of evidence that Petitioner knew or should have known her license was suspended for failing to pay court ordered restitution under a payment plan. Anderson, 48 So. 3d at 1018-1019. In fact, it is only in a footnote that the Anderson court makes the suggestion that the exception to the rebuttable presumption regarding knowledge may not be applicable since Petitioner's suspension was imposed pursuant to section 322.245(5)(a), rather than under Chapter 324. Anderson, 48 So. 3d at 1018 n.6. As such, the portion of Anderson which might be in conflict with Haygood is simply dicta. See State v. Yule, 905 So. 2d 251, 259 n.10 (Fla. 2d DCA 2005)(then-Judge Canady referred to a law review article in which dicta is defined as a statement not related to the majority's "chosen decisional path or paths of reasoning"). Because of the critical differences

between a trial and a violation hearing, and since any potential conflict is only dicta in Anderson, the rulings in Brown and Haygood cannot and do not expressly and directly conflict with Anderson.

Notwithstanding the foregoing, this Court should affirm the Anderson court's holding sustaining the revocation of community control and follow the interpretation of "financial responsibility" violation suggested in Anderson rather than the definition relied upon in Haygood. Section 322.34, Florida Statutes (2009), states in pertinent part:

> (1) Except as provided in subsection (2), any person whose driver's license or driving privilege has been canceled, suspended, or revoked, except a "habitual traffic offender" as defined in s. 322.264, who drives a vehicle upon the highways of this state while such license or privilege is canceled, suspended, or revoked is guilty of a moving violation, punishable as provided in chapter 318.
>
> (2) Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, except persons defined in s. 322.264, who, knowing of such cancellation, suspension, or revocation, drives any motor vehicle upon the highways of this state while such license or privilege is canceled, suspended, or revoked, upon:
>
> [...]
>
> The element of knowledge is satisfied if the person has been previously cited as provided

> in subsection (1); or the person admits to knowledge of the cancellation, suspension, or revocation; or the person received notice as provided in subsection (4). **There shall be a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order as provided in subsection (4) appears in the department's records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation.**
>
> (3) In any proceeding for a violation of this section, a court may consider evidence, other than that specified in subsection (2), that the person knowingly violated this section.

§ 322.34, Fla. Stat. (2009)(Emphasis added). As Petitioner was not suspended for failure to pay a traffic fine[1], clearly, the issue herein is the meaning of the phrase "financial responsibility" violation as used in section 322.34. Chapter 322 does not contain a definition of "financial responsibility".

In Anderson, the Fifth District Court of Appeal alluded to this issue, suggesting that court ordered restitution was not a "financial responsibility" violation as that type of violation involves suspensions under Chapter 324, Florida Statutes, which

[1] As far as the ruling in Brown, the State would agree that the Brown court properly concluded that, based on the plain language of the statute, the rebuttable presumption regarding the knowledge element did not apply in that case since the failure to pay a traffic fine is specifically exempted in section 322.34. As Brown does not involve the interpretation of the phrase "financial responsibility", it is not relevant to the ruling in Anderson or the issue herein.

is the chapter pertaining to financial responsibility. Anderson, 48 So. 3d at 1018 n.6. In fact, Chapter 324 is entitled "Financial Responsibility" and concerns the requirements pertaining to insurance. For example, in section 324.021(7), Proof of Financial Responsibility is defined as:

> That proof of ability to respond in damages for liability on account of crashes arising out of the use of a motor vehicle:
>
> (a) In the amount of $10,000 because of bodily injury to, or death of, one person in any one crash;
> (b) Subject to such limits for one person, in the amount of $20,000 because of bodily injury to, or death of, two or more persons in any one crash;
> (c) In the amount of $10,000 because of injury to, or destruction of, property of others in any one crash; and
> (d) With respect to commercial motor vehicles and nonpublic sector buses, in the amounts specific in ss. 627.7415 and 629.742, respectively.

Since the exact same phrase "financial responsibility" is used in two different statutes, under statutory interpretation principles it can be assumed the Legislature intended the same meaning to apply. See generally State v. Hearns, 961 So. 2d 211, 217 (Fla. 2007)("[W]here the Legislature uses the exact same words or phrases in two different statutes, we may assume it

intended the same meaning to apply."); Goldstein v. Acme Concrete Corp., 103 So. 2d 202, 203 (Fla. 1958)(" We may assume that in both chapters they intended certain exact words or exact phrases to mean the same thing. In a broad sense the chapters are *in pari material* and should, to the extent that an understanding of one may aid in the interpretation of the other, be read and considered together."). The phrase "financial responsibility" used in section 322.34(2) is the exact same phrase as "financial responsibility" set forth in Chapter 324, a chapter dedicated to insurance requirements and suspensions related to violations of insurance requirements. Thus, a "financial responsibility" violation is one related solely to insurance requirement violations; not non-payment of child support or non-payment of court ordered obligations including the non-payment of restitution at issue in this case.

Not surprisingly, the suspension of a license for failure to pay child support or any financial obligation in any other criminal case. is *not* addressed in Chapter 324, which is entitled "Financial Responsibility". Instead, such suspensions for non-payment of court ordered financial obligations are addressed in section 322.245. The interpretation by the Haygood court of "financial responsibility" violation, meaning any financial obligation suspension including for nonpayment of

child support or, in the instant case, for nonpayment of restitution, is erroneous. Since the rebuttable presumption should have applied in Anderson, the trial court's revocation of community control was properly affirmed by the Fifth District Court of Appeal.

Based on the foregoing facts and authorities, it remains the State's position that there is no express and direct conflict between Brown, Haygood, and Anderson. However, if this Court does retain jurisdiction, the State would assert that this Court should adopt the interpretation of "financial responsibility" violation suggested by the Anderson court rather than the erroneous interpretation relied upon by the Haygood court. As a matter of statutory interpretation, since the term "financial responsibility" relates solely to insurance requirements and violations thereof in Chapter 324, the suspension in this case for non-payment of court ordered restitution or in Haygood for non-payment of child support are not "financial responsibility" violations which are exempted from the rebuttable presumption provided in section 322.34(2). As such, the rebuttable presumption should have applied in Haygood and was applicable in Anderson. The trial court's revocation of community control was properly affirmed by the Fifth District Court of Appeal.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests this Honorable Court find that jurisdiction was improvidently granted or approve the interpretation of a "financial responsibility" violation set forth in section 322.34(2) in conjunction with Chapter 324, and affirm the Fifth District Court of Appeal's opinion upholding the revocation of Petitioner's community control.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Respondent has been served by interoffice delivery to counsel for Petitioner, Michael S. Becker, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, this _____ day of May, 2011.

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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