IN THE SUPREME COURT OF THE STATE OF FLORIDA

WARREN STAPLES,

Petitioner,

v. CASE NO. SC14-2485
5TH DCA NO. 5D13-3573

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 FACTS

The State generally accepts Warren Staples' ("Staples") statement of the case and facts, but notes the following additions and/or corrections in support of its merits brief.

Staples pled guilty to one count of travelling to meet a minor (parent).[1] (R. 8, Vol. I; R. 106, Vol. II).[2]

A probation officer instructed Staples on the conditions of his probation, "which [Staples] signed to acknowledge that he understood what was expected of him."[3] (R. 16, Vol. I; R. 120-21, 128, 137, Vol. II). Condition 17 required that Staples "actively participate in and successfully complete a sex offender treatment program." (R. 119, Vol. II).

The treatment program focused on "not so much the legal aspect of [Staples' behavior], but . . . what can we do clinically for him." (R. 142, Vol. II). The program addressed "the offending behaviors of why they were referred to treatment and not just that, but also any other type of deviant or unhealthy behaviors." (R. 141, 147, Vol. II). "We look to also address things in regards to understanding the effect of their behavior on others. And then look to change and – into more healthy, appropriate behaviors in the community." Id. In order to effect change, the program

[1] See § 847.0135(4)(b), Fla. Stat. (2011).
[2] "R" references the record on appeal, followed by the pertinent page and volume number(s).
[3] The conditions of Staples' sex offender probation are not included in the record on appeal.

required a participant admit "responsibility for some type of deviant or inappropriate behavior to address as part of the treatment program. A client's not going to be amenable to treatment if they're not – if there's nothing – if they're saying there's nothing to treat." Id.

When Staples began treatment, he became aware the program required he admit responsibility for inappropriate behavior. (R. 122-23, 153-54, Vol. II). Staples went through "a trial period" to determine if he was amenable to treatment; a period which extended beyond the time frame typically allowed a participant. (R. 142, 143, Vol. II). Before his discharge from treatment, Staples knew that denying he had a sexual problem which required treatment could lead to his termination from the program and result in a probation violation. (R. 123, 149-50, Vol. II). Staples was discharged from the program because he continually "denied deviant intent for his actions." (R. 132, 142-43, Vol. II). "[T]here was denial that he was responsible for any behaviors that would need to be addressed as a part of the program. That the belief was his actions were – were not inappropriate." (R. 142, Vol. II).

The affidavit of violation of sex offender probation alleged Staples violated condition 17,

> by failing to actively participate in and successfully complete a sex offender treatment program with qualified practitioners specifically trained to treat sex offenders a[t] the offender's own expense, and as

> grounds for belief that the offender violated his probation, Officer Lisa Barker states that the offender was unsuccessfully discharged from The ITM Group on 3-22-13, as told to Officer Lisa Barker by Benji Stultz, the subject's therapist for denial of sex offending behavior, after reasonable attempts to encourage disclosure of deviant sexual behavior.

(R. 14, Vol. I).

During the revocation hearing, Staples said he entered the plea in his best interest, stating, "I didn't do anything." (R. 123, 125, Vol. II). Staples never discussed alternative treatment programs with his probation officer. (R. 126, Vol. II).

The Fifth District Court of Appeal affirmed the revocation of Staples' probation:

> On appeal, Staples argues that his dismissal from the sex offender treatment program based on his repeated refusal to admit to engaging in deviant sexual behavior cannot constitute a willful and substantial violation of probation where he was never advised, prior to the entry of his plea, that his admission to such behavior would be required. Although Staples may not have been aware of this requirement at the time of the entry of his plea, the record reflects that he was made aware of the necessity to acknowledge his offending behavior months before he was dismissed from the program. Upon learning of the full consequences of his plea, Staples' remedy was to either file a written motion to withdraw his plea, or a motion to vacate his judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. Because Staples did neither, we conclude that the trial court could properly revoke his probation.

Staples v. State, 39 Fla. L. Weekly D2279 (Fla. 5th DCA Oct. 24,

2014), reh'g denied, (Nov. 25, 2014), review granted, No. SC14-2485 (Fla. April 14, 2015)). The Fifth District also noted:

> In the instant case, the ITM Group program requires each client to acknowledge his or her offending behavior so as to facilitate treatment. It was Staples' decision to refuse to take the steps necessary to complete the treatment program. To accept Staples' argument would, in essence, excuse Staples from performance of a legislatively-mandated probation condition.

Id.

SUMMARY OF THE ARGUMENT

This Court should dismiss this case because the Fifth District's opinion does not expressly and directly conflict with Bennett v. State, 684 So. 2d 242 (Fla. 2d DCA 1996), or any other district court opinion. Should this Court retain discretionary jurisdiction, to the extent that Staples contends he entered his guilty plea without full appreciation of the consequences of his plea, his remedy was to file a motion to withdraw his plea or a motion to vacate his judgment and sentence. Staples did neither.

Furthermore, Staples willfully and substantially violated a standard condition of his probation. The legislatively-mandated condition required Staples actively participate in and successfully complete a sex offender treatment program. A stated purpose of sex offender probation is the rehabilitation of the offender through an individualized treatment plan. Reversal in this case would thwart that goal and allow similarly-situated defendants to escape untreated and unpunished. This Court should uphold the Fifth District's affirmance of the revocation of Staples' probation.

ARGUMENT

THE FIFTH DISTRICT PROPERLY AFFIRMED THE REVOCATION OF STAPLES' SEX OFFENDER PROBATION.

The State maintains that there is no express and direct conflict between Staples v. State, 39 Fla. L. Weekly D2279 (Fla. 5th DCA Oct. 24, 2014), and Bennett v. State, 684 So. 2d 242 (Fla. 2d DCA 1996), or any other decision of a Florida district court of appeal.

Pursuant to article V, Section 3(b)(3) of the Florida Constitution, this Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." See also Fla. R. App. P. 9.030(a)(2)(A)(iv). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986). In addition, an "inherent or so called 'implied' conflict" may not serve as a basis for this Court's jurisdiction. DHRS v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888, 889 (Fla. 1986).

Bennett is factually distinct from this case. The treatment program at issue in Bennett required the appellant to admit he committed the sexual act charged in the information. Id. at 243. The other cases cited by Staples required the same. See Bell v.

State, 643 So. 2d 674, 675 (Fla. 1st DCA 1994) (appellant required "to admit to the charges against him");[4] Diaz v. State, 629 So. 2d 261, 262 (Fla. 4th DCA 1993) (appellant required "to admit to a counselor the specific acts charged"). Furthermore, Diaz was simply placed on probation and required to "receive a psychological evaluation and 'any treatment or counseling deemed necessary.'" 629 So. 2d at 261. In this case, the sex offender treatment program required Staples admit "responsibility for *some type of deviant or inappropriate behavior*." 39 Fla. L. Weekly D2279 (emphasis in original). Staples was not required to admit that he committed the crime charged in the information. And, the condition of Staples' probation required active participation and successful completion. See Oertel v. State, 82 So. 3d 152, 156 (Fla. 4th DCA 2012) (discussing the distinction between discharging a probationer for failing to admit guilt to the underlying charge and discharging for failing to admit to a sexual problem).

The Bell case is also factually distinguishable in additional respects. Bell specifically indicated at his plea hearing that he was entering a best interest guilty plea by crossing out the words "I am guilty" on the plea form and writing in "it is in my best interest." Bell, 643 So. 2d at 674. In addition, a condition of

[4] The First District specifically recognized that Bell did not conflict with an earlier decision because, in that earlier opinion, the appellant was required to acknowledge he had a sexual problem. Bell, 643 So. 2d at 675 n.1. Bell was required to admit to the underlying crimes. Id.

probation required that Bell submit to psychosexual counseling as directed by his probation officer. Id. Here, the plea transcript and the minutes from the plea hearing indicate that Staples entered a guilty plea, essentially confessing to the crime alleged in the information. See Braddy v. State, 111 So. 3d 810, 859 (Fla. 2012), cert. denied, 134 S. Ct. 275 (2013)(Mem.)("A guilty plea includes a confession to the acts which constitute the crime."). And, the standard condition of Staples' probation required that he actively participate in and successfully complete a sex offender treatment program.

The Fifth District relied on Mills v. State, 840 So. 2d 464 (Fla. 4th DCA 2003), and Archer v. State, 604 So. 2d 561 (Fla. 1st DCA 1992) in affirming the revocation of Staples' probation. Staples contends that Mills and Archer are clearly distinguishable from this case, but fails to explain how. The Fifth District cited both cases for the proposition that where a defendant claims that he entered a plea without understanding the consequences of that plea, the proper remedy is to file a motion to withdraw plea or to seek to vacate the judgment and sentence. Mills and Archer are consistent with the Fifth District's ruling in Staples:

> Although Staples may not have been aware of this requirement at the time of the entry of his plea, the record reflects that he was made aware of the necessity to acknowledge his offending behavior months before he was dismissed from the program. Upon learning of the full consequences of his plea, Staples'

> remedy was to either file a written motion to withdraw his plea, or a motion to vacate his judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. Because Staples did neither, we conclude that the trial court could properly revoke his probation.

Staples, 39 Fla. L. Weekly D2279. As this Court ultimately determined in Woodson v. State, 889 So. 2d 823 (Fla. 2004)(Mem), there was no genuine conflict and, therefore, dismissal was required.

Should this Court retain jurisdiction, it should affirm the Fifth District's opinion and the analysis contained therein. Staples consistently asserts throughout his initial brief that when he entered his guilty plea, he was unaware that successful completion of his sex offender treatment program required he acknowledge any offending behavior. To the extent that Staples argues that he "entered his plea without a full understanding of its consequences, he should have moved to vacate either his plea or his judgment and sentence in the trial court." Mills, 840 So. 2d at 467. See also Archer, 604 So. 2d at 562-63 ("Where a defendant's claim is that his plea was entered without a full understanding of its consequences, his remedy is through either a motion to vacate his plea, or a motion to vacate his judgment and sentence under Rule of Criminal Procedure 3.850.").

Moreover, the record supports the conclusion that Staples willfully and substantially violated a condition of his sex

offender probation. Probation may be revoked if there is a willful violation of a substantial condition of probation. Lawson v. State, 969 So. 2d 222 (Fla. 2007). The State must prove the violation "by the greater weight of the evidence." Del Valle v. State, 80 So. 3d 999, 1002 (Fla. 2011). Whether a violation is willful and substantial is a question of fact for the trial court. Stanley v. State, 922 So. 2d 411, 414 (Fla. 5th DCA 2006). A lower court's determination that a probationer willfully and substantially violated a term or condition of his probation must be "supported by competent substantial evidence." Filmore v. State, 133 So. 3d 1188, 1193 (Fla. 2d DCA 2014).

This Court generally reviews a trial court's decision to revoke probation for an abuse of discretion. State v. Carter, 835 So. 2d 259, 262 (Fla. 2002). In other words, an appellate court must affirm the revocation unless "the trial court acted in an arbitrary, fanciful or unreasonable manner." Id. However, where the issue presented is a question of law, the standard of review is de novo. Adams v. State, 979 So. 2d 921, 925 (Fla. 2008).

The Fifth District properly affirmed the revocation of Staples' probation, because his failure to successfully complete his sex offender treatment program was willful and substantial. Staples' probation officer instructed him on the terms and conditions of his probation, which included actively participating in and successfully completing a sex offender treatment program.

Staples' therapist testified that the program focused not on the legal aspect of Staples' criminal behavior but rather, on addressing and treating the cause of the offending behavior. The program allowed Staples a longer than normal trial period in order to determine if Staples was amenable to treatment. The therapist testified that in order for treatment to be successful, a participant had to admit that he had a sexual problem. Throughout the trial period, Staples continually denied he had a problem, and that the conduct which led to his guilty plea was not inappropriate.

Staples was aware that his consistent denial could lead to his discharge from the treatment program. Staples' therapist eventually concluded that Staples was not amenable to treatment based on his continued denial and discharged him. Staples' failure to successfully complete the program was a willful and substantial violation of condition 17. See Bishop v. State, 62 So. 3d 1226 (Fla. 5th DCA 2011) (concluding revocation was appropriate where the appellant was discharged from a sex offender treatment program because he was not amenable to treatment). See also Adams, 979 So. at 927 (holding that the violation was willful because the appellant was informed his conduct would result in termination; "it was substantial because of the importance of sex offender treatment to the offender and to society"). Given that Staples willfully and substantially violated condition 17, the revocation of his sex

offender probation was a proper exercise of the trial court's discretion.

A contrary holding would frustrate the legislative intent in requiring treatment as a condition of sex offender probation. "Sex offender probation" is "a form of intensive supervision . . . which emphasizes treatment and supervision of a sex offender in accordance with an individualized treatment plan." § 948.001(13), Fla. Stat. (2011). "[T]he Legislature has clearly indicated that the emphasis of sex offender probation is treatment of the offender" along with "the concomitant goals of rehabilitation and protection of society once the sex offender is released on supervision." Woodson v. State, 864 So. 2d 512, 516 (Fla. 5th DCA 2004). As Staples' therapist recognized, if a probationer denies he has a problem which requires treatment, the program will not successfully rehabilitate him. A probationer's denial would defeat the intended goal of sex offender treatment, and result in the release of an untreated individual into society. "Releasing a sex offender, untreated, does not alleviate the concern that he or she will reoffend and affords no protection to society." Woodson, 864 So. 2d at 516. If a purpose of probation is "rehabilitation rather than punishment," Lawson, 969 So. 2d at 229, excusing a defendant such as Staples from completing treatment would allow him to escape punishment for his crime. Surely, this is not what the legislature intended.

The plain meaning of the pertinent statutes further supports this conclusion. Section 948.30(1)(c), Florida Statutes (2011), does not define "active participation in or successful completion." The statute mandates that an offender receive treatment from a qualified practitioner. § 948.30(1)(c), Fla. Stat. (2011). Section 948.001(13), Florida Statutes (2011), defines "sex offender probation" as including an "individualized treatment plan." Read *in pari materia*, the statutes indicate that the legislature intended the required treatment be based on the individual needs of the sex offender, as determined by a qualified practitioner. See § 948.001(9), Fla. Stat. (2011) (defining "qualified practitioner" as an individual who can "evaluate and treat sex offenders"). Had the legislature intended to limit a practitioner's professional determination of the treatment needed to successfully rehabilitate a sex offender, it would have done so. The legislature must have meant for a trained professional to determine the appropriate course of treatment for an offender, including the requirement that a participant admit to some type of inappropriate behavior.

Although not explicitly argued by Staples, there is no Fifth Amendment concern in this case. "A defendant generally retains the privilege against self-incrimination at sentencing because sentencing is a part of the criminal case." Mitchell v. United States, 526 U.S. 314, 321 (1999). However, "where there can be no further incrimination, there is no basis for the assertion of the

privilege." Id. at 326. The Mitchell court further reasoned, "If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared." Id. The court expressly did not address "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment. Id. at 330.

In Henderson v. State, 543 So. 2d 344 (Fla. 1st DCA 1989), the appellant challenged a rule[5] which required a sex offender "to eventually accept responsibility for his behavior and for changing it." Id. at 346. The First District rejected his claim that the rule violated the appellant's privilege against self-incrimination:

> The requirement under the rule that sex offenders admit responsibility for their behavior does not violate the Fifth Amendment right against self incrimination in that any admission of the commission of the offense occurs after the defendant's conviction, and Fifth Amendment protections apply prior to conviction. Even if the requirement of admission of guilt under the rule impinged on Fifth Amendment rights, the inmate is not compelled to incriminate himself because the inmate may choose not to participate in the program.

Id. (internal citations omitted). Other states have held similarly. See, e.g., Gyles v. State, 901 P.2d 1143, 1149 (Alaska Ct. App. 1995) (rejecting the appellant's claim that requiring he

[5] Rule 33-19.001(3), Fla. Admin. Code (repealed effective Aug. 16, 1992).

answer questions about the offense for which he was convicted violated his privilege against self-incrimination); People v. Ickler, 877 P.2d 863, 866-67 (Colo. 1994) (finding an appellant who pled guilty violated a condition of probation which required sex offender treatment by refusing to accept responsibility for his crime; "A contrary result would encourage sex offenders to avoid cooperation in any evaluation procedure in the hope of achieving a denial of admission and thus never having to 'participate' in such a program."); Dzul v. State, 56 P.3d 875, 885 (2002) ("[P]resenting Dzul with the choice between admitting responsibility for the offense to which he pleaded guilty and increasing the likelihood of receiving a favorable psychosexual evaluation, or denying responsibility for the offense to which he pleaded guilty and reducing the likelihood of a favorable psychosexual evaluation does not violate his Fifth Amendment right against self-incrimination."); State v. Carrizales, 528 N.W.2d 29, 32 (Wis. Ct. App. 1995) (holding that requiring a convicted defendant to admit to committing the charged crime did "not pose a threat of incrimination in a separate criminal proceeding" where the statements were solely being used for rehabilitation); See also Minnesota v. Murphy, 465 U.S. 420, 435 (1984) ("A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be

different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution.").

In this case, Staples already pled guilty to traveling to meet a minor and had been adjudicated guilty by the trial court when he was required to admit to inappropriate behavior. As previously noted, his plea was essentially a confession to the underlying acts alleged in the information. Any admission during treatment to the acts underlying the offense or to the crime charged would not subject him to additional adverse consequences. Cf. James v. State, 75 P.3d 1065, 1072 (Alaska Ct. App. 2003) (finding the appellant, who testified at trial that he did not commit the crimes, had a valid Fifth Amendment privilege because any admissions to committing the crimes, made during therapy, could subject him to prosecution for perjury). Moreover, communications made during treatment are generally privileged, subject to certain exceptions. See § 90.503(2), Fla. Stat. (2001).

Staples additionally argues, in the summary of the argument section of his initial brief, that the requirement that he admit he had a problem was an additional requirement imposed by his therapist and his probation officer. He contends the requirement amounted to an impermissible upward modification of a probation condition, for which the trial court could not revoke his probation. It is well-established that a trial court cannot revoke

probation for violation of a condition which a probation officer imposed. Kiess v. State, 642 So. 2d 1141, 1142 (Fla. 4th DCA 1994). Here, neither Staples' probation officer nor his therapist imposed an additional probation condition or modified Staples' probation. The need for Staples to admit he had a sexual problem was implicit in the standard condition which required he actively participate in and successfully complete sex offender treatment. Logic dictates that a sex offender cannot be rehabilitated if he does not recognize that he has a problem which needs to be addressed. Imagine the fallacy of a drug offender who is required to undergo treatment as part of probation, but refuses to admit he or she is addicted. In addition, Staples was not required to admit to the criminal offense charged in this case. And, nowhere in the record did Staples alert the trial court to the existence of sex offender treatment programs which did not require a participant to admit that he or she had a problem.

Probation "is a matter of grace rather than right extended to the offender." Bernhardt v. State, 288 So. 2d 490, 494 (Fla. 1974). It is a privilege conferred upon a defendant. When Staples pled guilty, he accepted a downward departure sentence on the condition that he actively participate in and successfully complete a sex offender treatment program. This was part of the State's bargain: that Staples would receive treatment. Staples chose to accept rehabilitation rather than prison. Given Staples' actions,

the State is being deprived of the benefit of its bargain. To reverse in this case would nullify the legislature's purpose in mandating treatment for certain offenders and, as the Fifth District noted, "would, in essence, excuse Staples from performance of a legislatively-mandated probation condition." Staples, 39 Fla. L. Weekly D2279.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this Honorable Court affirm the revocation of Staples' probation, and uphold the Fifth District's affirmance of the trial court's ruling.

DESIGNATION OF E-MAIL ADDRESSES

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, in this proceeding: crimappdab@myfloridalegal.com (primary) and Marjorie.Vincent-Tripp@myfloridalegal.com (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Jurisdictional Brief of Respondent has been furnished by e-mail to counsel for Petitioner, Assistant Public Defender Christopher S. Quarles (444 Seabreeze Blvd, Suite 210, Daytona Beach, FL 32118) at appellate.efile@pd7.org and quarles@pd7.org this 8th day of June, 2015.

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 Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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