IN THE SUPREME COURT OF FLORIDA

WARREN STAPLES,

Petitioner,

CASE NO. SC14-2485

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENT

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT PETITIONER DID NOT KNOWINGLY, WILLFULLY, OR SUBSTANTIALLY VIOLATE HIS PROBATION WHERE, OTHER THAN REFUSING TO ADMIT TO DEVIANT SEXUAL BEHAVIOR AS PART OF A TREATMENT PROGRAM, PETITIONER WAS COMPLIANT IN ALL OTHER ASPECTS OF HIS SUPERVISION.

Initially, the State maintains that there is no conflict between the opinion at issue and Bennett v. State, 684 So. 2d 242 (Fla. 2d DCA 1996). The State asserts that Bennet is clearly distinguishable. Specifically, the State points out that Bennett was terminated from his counseling program for refusing to admit he engaged in the very criminal act for which he was placed on probation. The State appears to contend that Petitioner needed to admit that he engaged in deviant behavior "in general."

Petitioner contends that this is a distinction without a difference. The specific deviant behavior that Petitioner refused to admit was, in fact, the crime to which he pled, i.e., traveling to meet a minor for sex. In fact, Petitioner consistently maintained that he did nothing wrong. His contention appears to have some support in the factual basis set forth by the prosecutor at the plea colloquy.[1]

[1] The prosecutor refers to only one age of the alleged victim, i.e. nineteen. (I 108).

Besides, why would any probationer admit to some other unrelated illegal act? If, as part of treatment, a probationer admitted to any other past sexual activity involving children, he would, in all likelihood be prosecuted for that crime. See Fla. Stat. § 39.201(1)(a), (d)(2015). Hence, the State's distinction, (admitting to the crime for which you were placed on probation cannot be required, only admissions to other crimes are required), has no logic.

In their answer brief, the State refers to Petitioner's contention that Mills v. State, 840 So. 2d 464 (Fla. 4th DCA 2003) and Archer v. State, 604 So. 2d 561 (Fla. 1st DCA 1992) are clearly distinguishable, "but fails to explain how." (Answer brief, p. 8). Mills is distinguishable because that trial judge concluded that Mills's unexcused absences **alone** constituted a willful, material, and substantial violation of Mills's probation. Mills v. State, 840 So. 2d 464, 466 (Fla. 4th DCA 2003).

At first glance, Archer appears to be indistinguishable. Closer examination reveals that, although very similar to Petitioner's facts, Archer is also distinguishable. Specifically, Archer began treatment at one program, but was terminated for "failing to cooperate with his counselor." He was then referred to a psychologist who did a psychosexual evaluation. After that, Archer was

placed in a second program where he was terminated again, this time for refusing to admit that he had a sexual problem. Archer v. State, 604 So. 2d 561, 562 (Fla. 1st DCA 1992). In other words, Archer had two chances, not one like Petitioner, and failed at both. However, the reason that Archer was terminated the second time, was the same reason that Petitioner's therapist terminated him.

Regardless of the distinctions among these court opinions, the Fifth District Court of Appeal's opinion in Petitioner's case, as they implicitly recognized in their written opinion, is in conflict with Bennett. This Court must resolve that conflict. See also, Lawson v. State, 845 So. 2d 349, 350 (Fla. 2d DCA 2003) (reversing because evidence failed to show willful and substantial violation of probation when defendant had near perfect attendance record at sex offender counseling).

With that in mind, it appears that the main problem with this type of case is the fact that the probationer has no idea what this special condition of probation entails. This clearly seemed to concern the trial court. He was particularly bothered by the fact that there was no notice that Petitioner would have to admit his guilt. (II 157-8). Unfortunately, the State provided the case law that the trial court relied on in making his ruling, i.e., Archer and Mills. There is a significant possibility that the trial court would have made a different ruling if either party

below had provided him with a copy of Bennett.

The lack of notice to the probationer remains the biggest problem with this legislatively-mandated special condition of probation. The language of the special condition is simply too vague. Ultimately, the probationer learns what is expected of him, but then it is too late. The language of the orally-pronounced condition also varies from case to case. See, e.g., ["You will be evaluated for sex offender problems and enter into and successfully complete an out-patient sex offender treatment program if indicated." Bennett v. State, 684 So. 2d 242, 243 (Fla. 2d DCA 1996); "complete successfully on the first try any recommended treatment." Oertel v. State, 82 So. 3d 152, 153-54 (Fla. 4th DCA 2012); "..attend sex offender counseling." Slovak v. State, 862 So. 2d 875, 876 (Fla. 2d DCA 2003); ...receive a psychological evaluation and "any treatment or counseling deemed necessary." Diaz v. State, 629 So. 2d 261, 261-62 (Fla. 4th DCA 1993); and "actively participate in and successfully complete a sex offender treatment program." Bishop v. State, 62 So. 3d 1226, 1227 (Fla. 5th DCA 2011).]

CONCLUSION

Based on the arguments and authorities contained herein and in the initial brief on the merits, Petitioner requests that this Honorable Court quash the Fifth District decision below and remand for proceedings consistent with Bennett v. State, 684 So.2d 242 (Fla. 2d DCA 1996); Bell v. State, 643 So. 2d 674, 675 (Fla. 1st DCA 1994), and Diaz v. State, 629 So.2d 261 (Fla. 4th DCA 1993).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, capappdab@myfloridalegal.com, and mailed to Appellant, on this 29th day of June, 2015.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

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