IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA,

v.

JEFFREY BRUCE ANDERSON,

Defendant. / CASE NO.: 2000-00225-CFFA
JUDGE MATTHEW M. FOXMAN

MOTION FOR REINSTATEMENT OF PROBATION AND MEMORANDUM OF LAW

COMES NOW the Defendant, Jeffrey Bruce Anderson, by and through his undersigned Assistant Public Defender and moves this Honorable Court to reinstate his probation in the above styled cause and as grounds in support thereof states:

1. The Defendant is presently before this Honorable Court on an alleged violation of probation.
2. The charges against the Defendant arose from a single car accident in January of 2000 that killed two of the Defendant's good friends and seriously injured the Defendant.
3. Blood was drawn from the Defendant and it revealed he was legally intoxicated at the time of the crash.
4. On July 15, 2002 the Defendant pled no contest to Counts I and II of the amended Information.
5. On July 26th of 2002, the Defendant was sentenced to ten years in prison followed by five years of probation for Count I and to fifteen years of probation on Count II consecutive to Count I. This sentence was a negotiated downward departure. The Defendant scored a minimum sentence of 242.625 state prison months on his Criminal Punishment Code scoresheet.
6. The Defendant was released from the Department of Corrections on January 22, 2011 after serving approximately 8.5 years in prison and started his probationary portion of the sentence.
7. This is the first violation alleged against the Defendant after he had successfully completed more than four and one half years of the initial five year term of probation.
8. Prior to the filing of the violation the Defendant had fully complied with all conditions of his probation. He had completely abstained from the use of alcohol, maintained gainful employment, supported his dependents (two children) to the best of his ability, attended N/A and AA meetings, attended and spoke at MADD impact panel events, reported as required and maintained a law-abiding lifestyle.
9. The violation of probation centers on an allegation of an aggravated assault which occurred as a result of a workplace argument between the Defendant and the alleged victim, his co-worker Timothy Peace.

10. Mr. Peace and the Defendant were friends and worked together at Morgan Brothers Supply in Daytona Beach in the warehouse doing shipping and receiving. Mr. Anderson had been employed there since March of 2012.
11. It is alleged that on September 18, 2015, after a mutual argument between Mr. Peace and Mr. Anderson which escalated that Mr. Anderson produced a box-cutter (normal equipment for a warehouse employee) or a knife (witnesses disagree as to whether it was a knife or a box-cutter) and threatened Mr. Peace. The Defendant then walked off, away from Mr. Peace and continued yelling but then calmed down and the event ended. Mr. Peace and the Defendant went on working and the police were not called.
12. Mr. Peace decided to contact the police five days after the event to make a report. After obtaining witness statements, the Defendant was arrested on September 23rd, 2015 for the alleged aggravated assault and for the violation of probation. He has been incarcerated since that date.
13. Since the arrest, the alleged victim, Timothy Peace, has submitted a notarized letter requesting that all charges against the Defendant be dismissed. That letter has been filed with the Court
14. Other letters of support have been submitted on behalf of the Defendant and these letters likewise have been filed with the Court.
15. Deposition transcripts of the eyewitnesses to the alleged aggravated assault have been filed with the Court and illustrate that this incident was a mutual argument, that it may have been provoked in part by Mr. Peace and that aside from this isolated incident that the Defendant is a peaceful person, an excellent co-worker and presented no problems to the employees of Morgan Brothers.
16. The defense has also filed a confidential psychological evaluation of the Defendant by Dr. Jeffrey Danziger with the Court. Dr. Danziger identified three mitigating factors under Florida Statute 921.0026 for the Court's consideration as well as other sentencing recommendations.

MEMORANDUM OF LAW IN SUPPORT OF A REINSTATEMENT OF PROBATION

The defendant is before this Court on an alleged violation of probation. The Court's authority on an alleged violation of probation is governed by Florida Statute 948.06 (1). That subsection gives the Court authority to "revoke, *modify or continue*" the probation even if there is a finding of a violation. In the case of State v. Harrison, 589 So. 2d 317 (Fla 5th DCA 1991), the defendant Harrison appeared before the court on an alleged violation of probation. The Defendant scored a recommended range of 12 – 17 years on his scoresheet but the trial court, after finding a violation continued Harrison's probation over the State's objection. On appeal the Fifth District Court of Appeal affirmed the trial court's ruling. The opinion of the DCA pointed out that the trial court has "almost unlimited authority" to continue a probationer on probation. (Harrison at page 318). This is so even if the defendant scores to mandatory prison on the scoresheet. Analogizing to the situation of the Defendant in the instant case, this Honorable Court retains the inherent authority to reinstate supervision on this pending violation of probation even though the Defendant's criminal punishment scoresheet has a total of 357 plus points. This is because a defendant on a violation of probation is not technically before the court for a sentencing unless probation is revoked. Simply put, the points on a scoresheet do not control the Court's decision unless that probation is revoked because it is only then is the defendant before

the court for sentencing where the scoresheet may require a certain minimum incarcerative sentence absent a departure.

Another case that followed the Fifth District's reasoning in Harrison is Washington v. State, 82 So.3d 828 (Fla. 4th DCA 2011). There the Defendant, Washington, originally received a downward departure sentence (like the Defendant in this case) and then violated his probation. The trial court in Washington mistakenly believed that in order to reinstate probation that it needed a valid reason for a downward departure. Citing to Harrison and to State v. Grey, 721 So. 2d 370 (Fla 4th DCA 1998), the Fourth reaffirmed the principle that the trial court on a violation of probation retains the authority to reinstate a defendant's probation regardless of the number of sentencing points and such a reinstatement does not amount to a downward departure sentence requiring written reasons. It reversed and remanded the case to the trial court for a new sentencing hearing.

ARGUMENT

The case law clearly supports the argument that a request for reinstatement of the Defendant's probation in this case would not amount to a downward departure. The Defendant is respectfully asking that this court reinstate his probation. The Defendant argues that it is in the best interest of society that he not be further incarcerated as a result of the alleged aggravated assault in September of 2015 at his workplace. The Defendant has support of friends who will offer him a place to live and help to get him back onto his feet and they will assist him in securing employment. The Defendant in this case, through the evaluation by Dr. Danziger, has established three statutorily recognized mitigating circumstances in support of continuing the Defendant on probation albeit with anger management counseling and mental health counseling. This accident in 2000 and the guilt he carries because of it have had devastating results on the Defendant's mental state. Is spite of this, he has performed well after regaining his freedom after spending eight and one half years in prison. The record shows that the Defendant has made substantial efforts to rebuild his life and to pay his debt to society for his crime. In the four and one half years that he has been on probation the defendant maintained employment and led a peaceful and sober life. He paid his child support on time and made his best efforts to remain current on his probation costs despite receiving a very modest income. He spoke every year to MADD panels as to the dangers of drinking and driving and the tragedy his decision to drink and drive created for the families of the deceased in this case and the guilt he carries in his heart every day. If reinstated he will be on probation for another fifteen years. It makes no sense to take this Defendant and reincarcerate him after all he has accomplished. A wrong decision and act directed toward his co-worker that lasted all of maybe 15 – 30 seconds and which resulted in no physical harm to anyone should not lead to the Defendant being placed back in prison. Mr. Anderson cannot change the harm he has caused to the families of the deceased. All he can do is try, day by day, to lead a decent, respectful life and to continue giving back to society and to his family. Society is better off with Jeffrey Anderson amongst us, working, being a father to his children, serving as an example that a person can succeed despite serious setbacks in their life and above all continuing to remind persons that a careless decision can lead to life changing consequences to that person and others.

WHEREFORE, Defendant prays this Honorable Court grant this Motion and reinstate the Defendant's probation and modify it to require that he complete an anger management course and to obtain a mental health evaluation and comply with any treatment that is recommended in accord with the recommendations made by Dr. Danziger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to: Jason Lewis, Assistant State Attorney, 1769 East Moody Blvd., Bldg. #1, Bunnell, FL 32110, and to the defendant, on March 17, 2016.

/s/ William M. Bookhammer
WILLIAM M. BOOKHAMMER
ASSISTANT PUBLIC DEFENDER
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589 So.2d 317
District Court of Appeal of Florida,
Fifth District.

STATE of Florida, Appellant,
v.
David Howard HARRISON, Appellee.

No. 90-1758.
|
Sept. 26, 1991.
|
Rehearing Denied Dec. 16, 1991.

Proceeding was brought to revoke defendant's probation. The Circuit Court, Brevard County, Martin Budnick, J., found that defendant had violated several conditions of probation, but concluded that these violations were technical in nature and elected to continue defendant on probation. State appealed. The District Court of Appeal, Cowart, J., held that decision to reinstate defendant's probation following interlocutory revocation thereof, on ground that defendant's probation violations were merely technical in nature, did not amount to downward departure sentence for which trial court was required to provide contemporaneous written reasons.

Affirmed.

Harris, J., dissented and filed opinion.

West Headnotes (4)

[1] **Sentencing and Punishment**
Discretion of Court

Having once placed defendant on probation, trial court has almost unlimited authority to dismiss violation of probation charge, or to continue or restore defendant to probation (or reinstate probation), whether or not defendant is guilty of violating probation. West's F.S.A. § 948.06(1).

4 Cases that cite this headnote

[2] **Sentencing and Punishment**
Proceedings

Order revoking defendant's probation was interlocutory order, which trial court had inherent authority to modify any time before appeal was taken or final judgment was entered on matter.

1 Cases that cite this headnote

[3] **Sentencing and Punishment**
Sentence Within Statutory or Other Limitation for Offense of Conviction

Probationer before court on charge of probation violation is not necessarily before court for sentencing, within meaning of sentencing guidelines, although if probation is finally revoked, defendant then comes before court for sentencing and guidelines may apply. West's F.S.A. RCrP Rule 3.701.

1 Cases that cite this headnote

[4] **Sentencing and Punishment**
Necessity and Purpose

Decision to reinstate defendant's probation following interlocutory revocation thereof, on ground that defendant's probation violations were merely technical in nature, did not amount to downward departure sentence under guidelines, such as would require trial court to provide contemporaneous written reasons. West's F.S.A. § 948.06(1); West's F.S.A. RCrP Rule 3.701.

2 Cases that cite this headnote

Attorneys and Law Firms

***318** Robert A. Butterworth, Atty. Gen., Tallahassee, and Bonnie Jean Parrish, Asst. Atty. Gen., Daytona Beach, for appellant.

James B. Gibson, Public Defender, and James T. Cook, Asst. Public Defender, Daytona Beach, for appellee.

Opinion

COWART, Judge.

The trial court, following a probation revocation hearing, found that the defendant violated several conditions of his probation but concluded these violations were technical in nature and elected to continue the defendant on probation. The State appeals arguing that this amounts to a downward departure sentence for which the trial court was required to provide contemporaneous written reasons. We disagree and affirm.

[1] Section 948.06(1), Florida Statutes, relating to violation of probation, in effect provides that when a probationer is brought before the court on the accusation that he violated probation, and the probationer admits the charge of violation to be true, the court may revoke, modify or *continue* the probation. If the violation of probation charge is not admitted, the court has the discretion to hold or release the probationer with or without bond to await further hearing, *or it may dismiss the charge of probation violation.* Even after a hearing on the violation of probation charge, the court may revoke, modify or *continue* the probation. In effect, this means that the trial court, having once placed the defendant on probation, has almost unlimited authority to dismiss a violation of probation charge, or to continue or restore the defendant to probation (or reinstate the probation), whether or not the probationer is guilty of violating probation.

[2] [3] [4] In this case, after the violation of probation hearing, the defendant's probation was revoked but thereafter the trial court reinstated the probation on its original terms. The statute gives the trial court the authority to do this and that statutory authority is substance, and does not depend upon procedural technicalities and is not controlled by the sentencing guidelines (§ 921.001, Fla.Stat., and Florida Rule of Criminal Procedure 3.701). Furthermore, the order revoking probation was interlocutory and the trial court retains inherent authority to change such interlocutory determinations at any time before an appeal is taken or a final judgment is entered on the matter. A probationer before the court on a charge of probation violation is not necessarily "before the court for sentencing" within the meaning of that language in the sentencing guidelines rule, although if the probation is finally revoked, the defendant then comes "before the court for sentencing" and the guidelines may apply. The trial court's statutory discretion under section 948.06(1) is such that after stating that probation was revoked, the trial court could reinstate probation without it constituting a departure sentence under the guidelines requiring contemporaneous written reasons.

Affirmed.

W. SHARP, J., concurs.

HARRIS, J., dissents with opinion.

HARRIS, Judge, dissenting.
I respectfully dissent. These are the facts.

Harrison pled to two counts of attempted lewd and lascivious assault on a child. This case concerns his second violation of probation. An affidavit of VOP was filed ***319** alleging four violations by appellant: (1) leaving county without consent; (2) failure to pay court costs; (3) failure to successfully complete MDSO program; and (4) failure to complete community service. Following a VOP hearing, Harrison was found to be in violation and his probation revoked. A presentence investigation was ordered and sentencing was scheduled. A different judge handled the sentencing.

Harrison's recommended guidelines range was 9-12 years, 12-17 years with the one cell bump for VOP. The new sentencing judge found that the violations were all of a technical nature and *reinstated his probation on the original terms.* Oral reasons for departure were given at the hearing but written reason were not prepared until 11 days later.

The majority correctly cite section 948.06(1) as giving the court the authority, after an admission of violation, to "revoke, modify *or* continue" probation, and, after a finding that a violation has occurred, to "revoke, modify *or* continue" the probation. These options, however, are in the alternative. And the court, in this case, *revoked* probation. Once probation is revoked then section 948.06(1) provides (whether there is a plea or finding of guilt):

> If 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 has previously been adjudged guilty, and impose any sentence which it might have

> originally imposed before placing the probationer on probation....

I construe this language to mean that although the court has the discretion to refuse to revoke probation and instead to continue the original probationary term in effect, if it revokes probation-while it may again impose probation if appropriate under the guidelines or based on proper reasons (even on the same terms and conditions), it may not simply reinstate the original probation. The statute requires a new sentence and a new sentence requires guideline consideration.

Rule 3.701, subd. d, par. 14, Rules of Criminal Procedure, provides:

> Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed *after revocation of probation* or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure. [Emphasis added.]

The majority also holds that the departure sentence is justified because the court retains the inherent authority to change its interlocutory order revoking probation. Whether or not the judge had such authority, [1] the record is clear that he did not exercise it. [2] He considered this a new sentence subject to the guideline and gave oral reasons for departure with subsequent written reasons. What we have here is a record sentencing after revocation that does not comply with the statute or rule.

Even though I yearn for the day of sentencing judges' discretion, regretfully, I dissent.

All Citations

589 So.2d 317, 16 Fla. L. Weekly D2526

Footnotes

1 Since whether or not Harrison's probation should be revoked was an exercise of the earlier judge's discretionary authority, the subsequent judge's authority to reverse such ruling is doubtful. *Lawyers Co-operative Pub. Co. v. Williams*, 149 Fla. 390, 5 So.2d 871 (1942). Further, even if the successor judge has the authority to override a previous judge's ruling, there is a code of restraint based on the law of the case as well as consideration of comity and courtesy [*Tingle v. Dade County Board of County Commissioners*, 245 So.2d 76 (Fla.1971)] and the exercise of this authority should not be presumed by an appellate court in the absence of clear record intent.

2 For example, the judge refers to "the sentence I have just imposed to probation;" he adjudicated the defendant guilty as statutorily required after revocation and he attempted compliance with the guideline requirements.

Original Image of 36 So.3d 828 (PDF)

36 So.3d 828
District Court of Appeal of Florida,
Fourth District.

Ethan Jermaine WASHINGTON, Appellant,
v.
STATE of Florida, Appellee.

No. 4D09–2424.
April 6, 2011

Synopsis

Background: Defendant violated probation and requested reinstatement. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Karen M. Miller, J., revoked probation, and sentenced defendant to prison. Defendant appealed.

Holding: The District Court of Appeal, Gerber, J., held that circuit court had discretion to reinstate defendant's probation without a valid reason for a downward departure.

Reversed and remanded for resentencing.

West Headnotes (3)

Change Views

1 **Criminal Law** Revocation of probation or supervised release
Appellate court reviews a trial court's revocation of probation under an abuse of discretion standard.

2 **Criminal Law** Sentence
Sentencing and Punishment Disposition of Offender
In imposing sentence following a revocation of probation, where a trial court erroneously believes it does not have the discretion to impose a certain sentence, resentencing is warranted. West's F.S.A. § 948.06.

1 Case that cites this headnote

3 **Sentencing and Punishment** Reinstatement of probation
Circuit court, after defendant violated probation and requested reinstatement, had discretion to reinstate defendant's probation without a valid reason for a downward departure. West's F.S.A. § 948.06(2)(a).

Attorneys and Law Firms

*828 Carey Haughwout, Public Defender, and Christine C. Geraghty, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Scott Ian Fingerhut, Assistant Attorney General, West Palm Beach, for appellee.

Opinion

GERBER, J.

The defendant violated probation and requested reinstatement. In response, the circuit court requested the defendant to provide a reason for a downward departure. After the defendant was unable to do so, the court revoked the defendant's probation and sentenced him to prison. The defendant argues that the court mistakenly believed it did

not have the discretion to reinstate his probation without grounds for a downward departure. We agree with the defendant. Therefore, we reverse and remand for resentencing.

The defendant pled guilty to certain charges in two cases. Pursuant to a plea agreement, the circuit court granted the defendant a downward departure and sentenced him to a total of two years of incarceration followed by eight years of probation. The defendant later violated his probation by driving with a suspended license. The defendant's girlfriend testified about the circumstances of the violation. She said that she was driving when she became sick and started vomiting. *829 The defendant told her to pull over to avoid getting into an accident. She and the defendant changed seats so that he could drive her to the hospital. As soon as the defendant started driving, a police officer pulled the car over for a tag light being out. The officer cited the defendant for driving with a suspended license, but did not arrest him. Instead, the officer let the defendant's girlfriend drive them home. The state did not seek to refute that testimony.

The defendant entered an open plea to the court admitting the violation. During the plea colloquy, after advising the defendant of the sentencing range, the circuit court told the defendant, "I imagine your lawyer is going to ask for some sort of a downward departure." The state asked the court to revoke the defendant's probation and sentence him to fifteen years in prison. The defendant himself asked "to be reinstated on my probation." Defense counsel and the court then had the following dialogue:

> [DEFENSE]: Judge ... I'm asking the Court to adjudicate him, give him his credit and to reinstate him. Your honor does have the authority to do that. I know he still has about six years left on [p]robation.
>
> I provided Your Honor the case law: Franquiz [v. State]. It's 682 So.2d 539.... In this case, the defendant was on probation.... [H]e violated probation and the Court did a downward departure on sentencing.
>
> THE COURT: Isn't the big thing on this case that if it were a downward departure, that there needs to be a written reason for the downward departure?
>
> [DEFENSE]: Yes.
>
> THE COURT: And if you [are] not given the reasons for the downward departure then the defendant either has the option of not going forward [or] of being resentenced within the guidelines?
>
> [DEFENSE]: Your Honor, yeah, the proposition is that Your Honor can downward depart if your Honor gives written reasons. If there are no written reasons given the case gets remanded. So that's why I brought up that case.
>
> ....
>
> THE COURT: The basis for a downward departure will be what?
>
> [DEFENSE]: The basis is ... that he is complying with probation ... which I believe is a valid reason ...
>
> THE COURT: He is pleading guilty to violation of his probation, so the basis for the downward departure is complying with probation. Does that sort of seem like a circular argument?
>
> [DEFENSE]: We admit that he violated probation with the Driving While Suspended charge ... there's no question about that. ... I'm not excusing that. It's a misdemeanor [t]hat he violated with. It's not ... a felony, but that is the sole basis for the violation.
>
> THE COURT: I want to know what would be the legal basis to say that this gentleman is entitled to a downward departure.
>
> ....
>
> [DEFENSE]: Well the legal basis, again, there are specific departures outlined in [section 921.0026, Florida Statutes].

> THE COURT: Which one would apply?
>
> [DEFENSE]: Well, in the statute, itself, it states these are the exceptions. I would argue if I had to apply one, that this crime was committed in an unsophisticated manner. It was a DUS but ... other than that departure basis, it says in the statute itself that the reasons are not limited to those outlined in the statute. There can be other reasons for departing....

At the end of the hearing, the circuit court revoked the defendant's probation and *830 sentenced him to eight years of incarceration.

The defendant then filed this appeal. He argues that the court mistakenly believed it did not have the discretion to reinstate his probation without grounds for a downward departure. The state argues that the court's statements and inquiries demonstrate it had a keen understanding of the law and the bounds of its discretion regarding whether to reinstate or revoke the defendant's probation.

1 2 An appellate court reviews a trial court's revocation of probation under an abuse of discretion standard. *Russell v. State*, 982 So.2d 642, 646 (Fla.2008). However, where a trial court erroneously believes it does not have the discretion to impose a certain sentence, resentencing is warranted. *See Williams v. State*, 889 So.2d 960, [illegible] (Fla. 4th DCA 2004) (reversing sentence where "the trial court expressed the erroneous belief that it was barred from sentencing [the defendant] as a youthful offender"); *Ellis v. State*, 816 So.2d 759, 760 (Fla. 4th DCA 2002) (reversing habitual violent felony offender sentence where the trial court "may have been under the mistaken impression that [it] lacked any discretion in the matter").

3 Here, the circuit court had the discretion to revoke probation as the state requested, or reinstate probation as the defendant requested. *See* § 948.06(2)(a), Fla. Stat. (2000) (when a defendant admits to violating probation, the court "may forthwith revoke, modify, or continue the probation ... or place the probationer into a community control program."). If the court desired to reinstate probation, it could do so under section 948.06 without such reinstatement constituting a downward departure sentence requiring a valid reason for the departure. *State v. Harris*, [illegible] 580 So.2d [illegible] (Fla. 5th DCA 1991).

The record here, however, does not demonstrate the circuit court's understanding that it had the discretion to reinstate the defendant's probation without a valid reason for a downward departure. It was the court which first notified the defendant of its expectation that "your lawyer is going to ask for some sort of a downward departure." Defense counsel then led the court further astray by citing *Franquiz v. State*, 682 So.2d 536 (Fla.1996). There, our supreme court held that

> a trial court must determine and state in writing, based upon all the circumstances through the date of *the revocation sentencing*, whether valid reasons exist for a downward departure from a guideline sentence *for a revocation*. The written reasons should describe why the court has or has not found the State's prior agreement to a downward departure to be a valid reason for a subsequent downward departure at *the revocation sentencing*.

Id. at 538 (emphasis added). Here, however, the defendant asked the court to *reinstate* his probation. Reinstatement would not have required the court to impose a sentence, much less a sentence requiring a valid reason for a downward departure. *See Harris*, 580 So.2d at 538; *see also State v.* [illegible] ("Only where the court revokes probation must the court impose a sentence. Even when an appellant admits a probation violation, the court is not required to revoke the probation and sentence the offender on the underlying charge.") (internal citations omitted).

The state argues that we should interpret defense counsel's citation to *Franquiz* as the defendant's way of presenting both a request for reinstatement and, in the alternative, a request for revocation with a downward departure sentence. We disagree. The defendant himself asked "to be reinstated on my probation." Nor do *831 we see

anything in the record suggesting that the circuit court understood defense counsel as presenting such requests in the alternative.

Based on the foregoing, we reverse and remand for resentencing so that the court may consider defendant's request to reinstate his probation without such reinstatement constituting a downward departure requiring a valid reason for the departure. The court, of course, also remains free to revoke the defendant's probation and re-impose the existing sentence or any other sentence permissible under the guidelines unless the defendant presents a valid reason for a downward departure. *Williams*, 880 So.2d at 670.

Reversed and remanded for resentencing.

CROSS, C.J., and STEVENSON, J., concur.

All Citations

82 So.3d 828, 36 Fla. L. Weekly D733

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