

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JEFFREY JOSEPH
MARZENDORFER,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D08-3272

STATE OF FLORIDA,

Appellee.

Opinion filed August 21, 2009.

An appeal from the Circuit Court for Santa Rosa County.
R.V. Swanson, Judge.

Nancy A. Daniels, Public Defender, and Joel Arnold, Assistant Public Defender,
Tallahassee, for Appellant.

Bill McCollum, Attorney General, Bryan Jordan, Assistant Attorney General, and
Ian M. Cotner, Assistant Attorney General, Office of the Attorney General,
Tallahassee, for Appellee.

PER CURIAM.

Appellant challenges the trial court's denial of his motion to dismiss the allegation that he violated probation by failing to abide by the special condition prohibiting him from possessing or consuming alcohol, and the subsequent revocation of his probation based on his violating this condition, on grounds that the condition was illegally imposed. Because Appellant is not entitled now to challenge the legality of the special condition, these claims do not merit discussion. Matthews v. State, 736 So. 2d 72, 75 (Fla. 4th DCA 1999) (quoting State v. Powell, 703 So. 2d 444 (Fla. 1997)).

However, Appellant's claim that the trial court erred in revoking his probation for his failure to pay restitution without making a determination that he had the ability to pay is meritorious. It is undisputed that Appellant failed to pay restitution. However, "before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has willfully refused to do so." Stephens v. State, 630 So. 2d 1090, 1091 (Fla. 1994). Here, the trial court reversibly erred in failing to make a determination that Appellant had the ability to pay restitution, and therefore, the finding that Appellant willfully violated the condition requiring him to pay restitution must be stricken from the probation order. See Odom v. State, 34 Fla. L. Weekly D1278 (Fla. 1st DCA June 24, 2009). Because it is unclear from the

record whether the trial court would have revoked probation and imposed the same sentence based solely on Appellant's violation of the condition prohibiting him from possessing or consuming alcohol, we reverse the revocation order and remand for further proceedings. Richardson v. State, 694 So. 2d 147 (Fla. 1st DCA 1997); Mordica v. State, 618 So. 2d 301, 305 (Fla. 1st DCA 1993).

REVERSED AND REMANDED.

WOLF, WEBSTER, AND CLARK, JJ., CONCUR.