

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

TODD WILLIAM McGATHEY,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
_____)

Case No. 2D10-2732

Opinion filed October 5, 2011.

Appeal from the Circuit Court for Charlotte
County; Alane Laboda, Judge.

James Marion Moorman, Public Defender,
and Allyn M. Giambalvo, Assistant Public
Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Anne Sheer Weiner,
Assistant Attorney General, Tampa,
for Appellee.

WHATLEY, Judge.

In this appeal of the order revoking his probation, Todd McGathey argues that the trial court abused its discretion in finding that he violated condition seven based on one positive test showing that he had used cocaine. The affidavit of violation of probation alleged that McGathey violated condition seven by using intoxicants to excess

or possessing any drugs or narcotics. At the revocation hearing, McGathey testified that the night before his drug test someone offered him cocaine and he took two puffs and told them they had to leave. There was no testimony regarding the possession element of condition seven.

We reverse based on Alston v. State, 646 So. 2d 184 (Fla. 1994), in which the supreme court held that a single positive drug test is insufficient to show that a probationer used an intoxicant to excess. As did the supreme court in Alston, we note that McGathey's admission to using cocaine violates condition five, which directs that the probationer live without violating the law, and that nothing in this opinion precludes the State from initiating new revocation proceedings against McGathey prior to the expiration of his probation. See id. at 185; Blackshear v. State, 838 So. 2d 1228 (Fla. 1st DCA 2003).

Reversed and remanded for further proceedings consistent with this opinion.

KHOUZAM and BLACK, JJ., Concur.