

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

CARLOS ROMERO,

Appellant,

v.

Case No. 5D19-2570

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed July 24, 2020

Appeal from the Circuit Court
for Brevard County,
Nancy Maloney, Judge.

James S. Purdy, Public Defender,
and Andrew Mich, Assistant Public
Defender, Daytona Beach, for
Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Allison L. Morris,
Assistant Attorney General, Daytona
Beach, for Appellee.

SASSO, J.

Carlos Romero appeals his judgment and sentence imposed upon a violation of probation. The trial court found that Romero willfully and substantially violated a condition of his probation by committing trespass. Romero argues the State did not prove by the preponderance of the evidence that he knew he was trespassing. We disagree and hold

that the trial court's finding of a willful and substantial violation is supported by competent, substantial evidence. We therefore affirm in all respects.

After pleading no contest to aggravated assault with a deadly weapon, Romero was adjudicated guilty and sentenced to time served in the county jail followed by two years of probation. Several months later, an affidavit of violation of probation was filed, alleging that Romero had been arrested for trespassing.

At the violation of probation hearing, the deputy who violated Romero testified that she responded to a location ("the Property") in Merritt Island because of a complaint that individuals, including Romero, were living in a wooded area there. Upon arriving, the deputy informed the individuals that they were not allowed to be there and would be arrested if they returned to the Property or the surrounding properties. The deputy confirmed that Romero was "absolutely clear" on her instructions.

The deputy returned the next day and saw Romero in the same wooded area on the Property. At the hearing, there was conflicting evidence as to where exactly in the wooded area Romero was located. The deputy testified that Romero had moved "off to the side" of where she originally located him by fifteen to twenty feet, but Romero was still very close to the exact spot where she had trespassed him. Using a demonstrative aid, the deputy marked the spot for the trial court's benefit. The deputy testified that when she approached Romero, he only told her that he did not have anywhere else to go, supporting an inference that he knew he was trespassing.

Next, Romero testified. According to Romero, after the deputy trespassed him, he moved twenty to twenty-five feet further back into the woods. Romero demonstrated his location by marking a different spot on the demonstrative aid. Romero maintained that he

did not know he was still on the Property from which he was trespassed and had moved in an effort to comply with the deputy's instructions.

After Romero presented his testimony, the State suggested to the trial court that it would recall the deputy in rebuttal. However, the court indicated it could make credibility findings on its own and moved on to its oral ruling. The court then announced that it had concluded Romero willfully and substantially committed trespass and revoked Romero's probation. The court found the deputy's testimony more credible than Romero's and stated:

[L]aw enforcement went above and beyond the call of duty to make sure that it was entirely clear, that not only was [Romero] trespassed from that place, that he was trespassed from the surrounding areas, that he was not invited, and that law enforcement would be back and they would be enforcing it. So to assert that he did not know that he was trespassing again . . . would be preposterous for the Court to believe.

An order revoking probation is reviewed for abuse of discretion. *Woodson v. State*, 864 So. 2d 512, 514 (Fla. 5th DCA 2004); see also *State v. Carter*, 835 So. 2d 259, 262 (Fla. 2002) (recognizing trial court has broad discretion in determining whether there was willful and substantial violation of condition of probation and whether violation is supported by greater weight of evidence). "Whether a violation of probation is willful and substantial is a factual issue that cannot be overturned on appeal unless there is no evidence to support it." *Walker v. State*, 966 So. 2d 1004, 1006 (Fla. 5th DCA 2007) (citing *Wilson v. State*, 781 So. 2d 1185 (Fla. 5th DCA 2001)). And in evaluating whether a trial court's determination is supported by sufficient evidence, appellate courts recognize that the trial court is in the best position to "weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses." *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla.1976); see also *First Am. Farms, Inc. v. Marden Mfg. Co.*,

255 So. 2d 536, 540 (Fla. 1st DCA 1971) (Wigginton, J., dissenting) (“It is not the province of an appellate court to reevaluate conflicting evidence introduced at the trial or to say what it would have done had it been sitting as a trier of the facts.” (quoting *Carolina Lumber Co. v. Daniel*, 97 So. 2d 156, 158 (Fla. 1st DCA 1957))).

On appeal, Romero concedes that the State presented sufficient evidence to demonstrate that he was, in fact, on the same Property he was trespassed from the previous day. However, Romero contends that the State’s evidence was insufficient to refute his testimony that he genuinely believed he had moved far enough away to be off the Property. Specifically, Romero argues that his violation was not willful because he was unaware of the property boundaries, citing *Archie v. State*, 264 So. 3d 276 (Fla. 5th DCA 2019).

In *Archie*, this Court held that the evidence presented below was insufficient to support its finding that a probationer willfully and substantially violated his probation by leaving his residential county. *Id.* at 278. There, the only evidence presented to prove the probationer’s knowledge that he left his residential county was his probation officer’s testimony that the day after the incident, she spoke with him about a GPS tracking point indicating that he left Marion County, and he did not deny it.¹ *Id.*

But *Archie* does not establish, as a matter of law, that there must be some evidence of a probationer’s knowledge of actual property boundaries. Rather, whether a violation was “willful” remains a fact-specific inquiry that must be determined on a case-by-case

¹ The *Archie* opinion also observed that the probationer’s GPS device tracking his location did not have the alert function enabled that would notify him when he left the county, he was not questioned about his knowledge of county borders, and no evidence was presented indicating there was county signage that would have alerted him that he was leaving his residential county. 264 So. 3d at 278.

basis. *Russell v. State*, 982 So. 2d 642, 646 (Fla. 2008). And factually, this case is quite different from *Archie*.

Here, there was disputed testimony as to where Romero was located when the deputy returned. It was within the province of the trial court to weigh the conflicting testimony and determine credibility. In doing so, the trial court accepted the deputy's testimony that Romero was essentially in the same place from which he was trespassed, characterizing Romero's contention that the trespass was unintentional as "preposterous." Thus, whether the State presented evidence that Romero knew of the actual property lines is not dispositive. Rather, the evidence was sufficient to demonstrate Romero willfully and intentionally was where he knew he should not be. Consequently, the trial court did not abuse its discretion in concluding Romero violated his probation.

AFFIRMED.

LAMBERT, J., concurs.

ORFINGER, J., dissents with opinion.

ORFINGER, J., dissenting.

The trial court's finding that Romero's probation violation was willful is not supported by competent, substantial evidence. Therefore, I respectfully dissent.

At the violation of probation hearing, the evidence established that Romero, who was homeless, was living in a heavily wooded area that for years had been frequented by homeless people. The street address nearest the wooded area where Romero lived was 355 South Courtenay Parkway, Merritt Island, Florida, and housed a small commercial strip of businesses with a heavily wooded area behind and to one side of it. Romero's probation officer knew where he was living and instructed him that he could not move from the area without first obtaining the probation officer's consent, which was a condition of Romero's probation.

On the day before Romero's arrest, Brevard County Deputy Sheriff Bridgette Johnson received a complaint that homeless people were living in the area of 355 South Courtenay Parkway. She entered the wooded property and encountered Romero and two other people. She told all three people that they were not allowed on the property and gave them a trespass warning. That warning included the property running from 355 to 245 South Courtenay Parkway, the latter property located almost a block away, together with the surrounding area. While businesses occupied those two specific addresses, a wooded area was located between them and extended a considerable way back from the road. When Deputy Johnson gave Romero the trespass warning, she did not delineate the boundaries of the property from which he was prohibited either by pointing out a landmark such as a fence or creek, advising him how far back the excluded property ran,

or showing him a map. Indeed, Deputy Johnson testified that she did not know where the property lines were located. The next day, when Deputy Johnson returned to the area of 355 South Courtenay Parkway and found Romero sleeping approximately fifteen to twenty feet further back into the woods, she arrested him for trespassing.

Romero acknowledged that at the time of his arrest, he had moved deeper into the woods from where the deputy found him the previous day. He did so because he believed that would comply with the warning that he had received, even though he had not been shown a map of the property and there were no fences or landmarks showing where the property lines were in the woods. And, because he did not have a phone, and it was the weekend, he had to wait until Monday to obtain permission from his probation officer to leave his current place of residence. Despite his explanation, the trial court found that Romero willfully and substantially violated his probation and sentenced him to prison.

Romero contends that the State failed to prove that he willfully violated his probation. A trial court's decision to revoke probation is reviewed for an abuse of discretion. See Savage v. State, 120 So. 3d 619, 623 (Fla. 2d DCA 2013). Competent, substantial evidence must support a finding of a willful and substantial violation. Id.

In my view, this case is similar to the facts of Archie v. State, 264 So. 3d 276 (Fla. 5th DCA 2019). There, the defendant was prohibited from leaving Marion County. On the date of his alleged violation, the defendant admitted that he left Marion County, but argued that he did not willfully do so as there was no signage on the road to indicate that he was traveling into Sumter County. Archie, 264 So. 3d at 278. We held that the state had not proven that the defendant willfully violated his probation, explaining:

Appellant was not questioned about his knowledge of the Marion County or Sumter County borders, or for that matter,

whether he knowingly left Marion County. Further, no evidence was presented indicating that there was signage on the road that would have alerted Appellant that he was traveling into Sumter County. The State could not establish that Appellant willfully violated his probation without introducing evidence that he knowingly left Marion County.

Id.

As in Archie, Romero argued that his violation was not willful because he was unaware of the property boundaries. I agree. Romero was not told what property constituted 355-245 South Courtenay Parkway or the “surrounding area,” nor was it obvious. Likewise, the deputy admitted that she did not know where the property lines were located and the State never questioned Romero about his knowledge of the property boundaries in the woods behind 355-245 South Courtenay Parkway.

Based on this record, I would conclude the trial court erred when it found that Romero violated his probation.