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

STATE OF FLORIDA,

Petitioner,

v. Case No. 5D20-1082

KENNETH PATTERSON,

Respondent.

_____/

Opinion filed August 21, 2020

Petition for Certiorari Review of Order from the Circuit Court for Orange County, Bob LeBlanc, Judge.

Ashley Moody, Attorney General, Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Petitioner.

Robert Wesley, Public Defender, and Chantay Perry, Assistant Public Defender, Orlando, for Respondent.

LAMBERT, J.

The State of Florida petitions for certiorari relief challenging the trial court's ruling allowing the respondent, Kenneth Patterson, to be released on bail without first making the requisite finding under section 948.06(4), Florida Statutes (2019), that his release

would not pose a danger to the public. We have jurisdiction,[1] and, for the following reasons, we grant the petition.

Patterson is on probation for failure of a sexual offender to report at a driver's license office for renewal of license and after any change in residence. An affidavit was filed by Patterson's probation officer asserting that Patterson twice violated a condition of his probation regarding the electronic monitoring of his whereabouts. Based on this affidavit, the court issued a warrant for Patterson's arrest, setting bond on the warrant at $2500. The day after Patterson was arrested, he posted the $2500 bail and was released from custody.

The State promptly moved for reconsideration of Patterson's release on bail. It argued that because Patterson is a registered sexual offender, section 948.06(4) mandated that the court hold a hearing and make a finding that Patterson is not a danger to the public prior to releasing him on bail or on his own recognizance. *See also* Fla. R. Crim. P. 3.790(b)(2) (providing that "[w]hen a probationer or community controllee is arrested for violating his or her probation or community control in a material respect" and is "a registered sexual offender . . . the court must make a finding that the probationer or community controllee is not a danger to the public prior to release with or without bail" at a hearing). As that was not done here, the State, in a motion for reconsideration, requested that the court schedule the required hearing so that it could consider the

[1] *See Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011) ("[C]ertiorari relief is available when a lower court has departed from the essential requirements of the law . . . and no appeal or direct method of reviewing the proceeding exists."); *State v. Pettis*, 520 So. 2d 250, 253 (Fla. 1988) ("The ability of the district courts of appeal to entertain state petitions for certiorari to review pretrial orders in criminal cases is important to the fair administration of criminal justice in this state.").

various factors described in section 948.06(4)[2] when determining whether releasing Patterson on bail would pose a danger to the public. The court denied the State's motion for reconsideration without a hearing, and the instant petition followed.

The State's position here is straightforward—certiorari relief is necessary because the trial court departed from the essential requirements of the law when it failed to abide by the plain language of both section 948.06(4) and rule 3.790(b)(2) that requires it to have made a specific finding that Patterson is not a danger to the public before allowing his release on bail pending trial.

In response, Patterson does not dispute that he is a registered sexual offender. Patterson also apparently concedes that the court failed to comply with section 948.06(4) and rule 3.790(b)(2) by permitting his release on bail without first finding that his release would not pose a danger to the public. Patterson nevertheless argues that the State is not entitled to certiorari relief because the error committed by the lower court did not constitute a miscarriage of justice, *see Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983), and secondly, the State failed to aver in its charging affidavit that his alleged violations of probation were "willful and substantial." We disagree.

[2] "In determining the danger posed by the offender's or probationer's release, the court may consider the nature and circumstances of the violation and any new offenses charged; the offender's or probationer's past and present conduct, including convictions of crimes; any record of arrests without conviction for crimes involving violence or sexual crimes; any other evidence of allegations of unlawful sexual conduct or the use of violence by the offender or probationer; the offender's or probationer's family ties, length of residence in the community, employment history, and mental condition; his or her history and conduct during the probation or community control supervision from which the violation arises and any other previous supervisions, including disciplinary records of previous incarcerations; the likelihood that the offender or probationer will engage again in a criminal course of conduct; the weight of the evidence against the offender or probationer; and any other facts the court considers relevant." § 948.06(4), Fla. Stat. (2019).

Certiorari relief is appropriate when a trial court grants a defendant post-arrest release from custody in violation of the plain language contained in a statute. *See State v. Davis*, 699 So. 2d 848, 848–49 (Fla. 3d DCA 1997). Significantly, the plain language of section 948.06(4) makes clear that the Florida Legislature intended and directed that designated sexual offenders, such as Patterson, not be released from custody following arrest unless the court, following a hearing, finds that releasing the offender will not pose a danger to the public. *See Leftwich v. Fla. Dep't of Corr.*, 148 So. 3d 79, 87 (Fla. 2014) ("The plain language of a statute is the primary method through which legislative intent may be discovered." (citing *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 210 (Fla. 2012))).

Second, a probationer's alleged failure to comply with a probationary condition requiring electronic monitoring can constitute a willful and substantial violation justifying revocation. *See Soliz v. State*, 18 So. 3d 1094, 1097 (Fla. 2d DCA 2009) (affirming the trial court's revocation of the defendant's probation for not carrying his electronic tracking device at all times and not charging the device properly). Whether the State ultimately presents competent substantial evidence at trial establishing, by the greater weight of the evidence, that Patterson's violations were willful and substantial is a matter to be decided on a later day. *See Knight v. State*, 187 So. 3d 307, 309 (Fla. 5th DCA 2016) (recognizing that the State must present competent substantial evidence at the violation of probation trial establishing, by the greater weight of the evidence, that the defendant willfully and materially violated a condition of probation).

We therefore conclude that the lower court's failure here to comply with section 948.06(4), Florida Statutes, constituted a clear departure from the essential requirements

of the law for which there is no later remedy available to the State. Accordingly, we grant the State's petition for writ of certiorari and quash the trial court's order that allowed Patterson's present release on bail. We remand this case for the court to conduct an evidentiary hearing to determine, with appropriate findings, whether Patterson's release from custody on bail would constitute a danger to the public.[3]

PETITION GRANTED; ORDER QUASHED; REMANDED with directions.

EVANDER, C.J., concurs.
GROSSHANS, J., concurs with opinion.

[3] We also note that, while not directly raised by the State in its petition, our limited record suggests that Patterson may also qualify for designation as a violent felony offender of special concern. If so, section 948.06(4)(a) provides that a probationer who is a violent felony offender of special concern and who allegedly violates felony probation, other than by a failure to pay costs or fines or make restitution payments, "shall not be released and shall not be admitted to bail."

GROSSHANS, J., concurring.

I agree with the majority's opinion; however, I find it unnecessary to reach the issue discussed in footnote 3 as it was not raised by the State. "This requirement of specific argument and briefing is one of the most important concepts of the appellate process." D.H. v. Adept Cmty. Servs., Inc., 271 So. 3d 870, 888 (Fla. 2018) (Canady, C.J., dissenting). Therefore, I do not join that portion of the opinion.