FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-540

DAKOTA STERLING OWENS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Jackson County.
Wade Mercer, Judge.

August 25, 2020

BILBREY, J.

Appellant challenges the revocation of his probation and the resulting twenty-four-month prison sentence. He argues that upon his admission to violating the conditions of his probation, the trial court was limited by section 948.06(2)(f)1., Florida Statutes (2019), to modification or continuation of his probation rather than imposing a prison sentence. Appellant asserts that the trial court's ruling that he had to meet all the conditions in subsection 948.06(2)(f)1. for the subsection to apply was erroneous and requires reversal and remand for reinstatement of his probation or modification in accordance with the 2019 amendments to section 948.06. We hold that even if the 2019 amendments to section 948.06 apply to Appellant, the trial court was correct to determine that Appellant had to comply with **all** four conditions in section

948.06(2)(f)1. to receive the benefit of the statute. We therefore affirm.

In December 8, 2015, Appellant entered a no contest plea to the second-degree felony charge of fleeing or attempting to elude law enforcement while driving at high speed or with wanton disregard for others.[1] *See* § 316.1935(3)(a), Fla. Stat. (2015). The offense was committed on October 14, 2015. Appellant was adjudicated guilty and was placed on probation for five years. *See* § 948.03, Fla. Stat. (2015).

At the time of the offense, section 948.06(2)(a), Florida Statutes (2015), provided that if a person on probation admitted to a charged violation of probation, the court could "forthwith revoke, modify, or continue" the probation. If the court revoked the probation, then it could issue "any sentence which it might have originally imposed before placing the probationer on probation." § 948.06(2)(b), Fla. Stat. (2015).[2] Here, since the offense was a second-degree felony, at the time of sentencing Appellant faced up to a statutory maximum sentence of fifteen years in prison. *See* § 775.082(3)(d), Fla. Stat. (2015).

One week after Appellant's term of probation commenced, an affidavit of violation of probation alleged that Appellant had absconded supervision by not reporting to the probation office following his sentencing. The trial court issued a warrant based on the affidavit. On January 10, 2020, an amended violation of probation affidavit realleged the absconding allegations and also alleged that Appellant had committed multiple new law offenses in Georgia and Alabama on various occasions over the intervening four years. Appellant was arrested for the violation of probation at the end of January 2020 and on February 11, 2020, admitted to the allegations in the amended violation of probation affidavit.

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[1] Appellant also pleaded no contest to misdemeanor offenses which are not at issue here.

[2] The same options were available if, after a hearing, a probationer was found to have violated a condition of probation. *See* § 948.06(2)(e), Fla. Stat. (2015).

Substantial amendments to section 948.06 took effect on October 1, 2019. *See* Ch. 2019-167, § 63, Laws of Florida. The new law added subparagraph (f)1. to section 948.06(2), and it states:

> Except as provided in subparagraph 3. or upon waiver by the probationer, the court shall modify or continue a probationary term upon finding a probationer in violation when **any** of the following applies:
>
> a. The term of supervision is probation.
>
> b. The probationer does not qualify as a violent felony offender of special concern, as defined in paragraph (8)(b).
>
> c. The violation is a low-risk technical violation, as defined in paragraph (9)(b).
>
> d. The court has not previously found the probationer in violation of his or her probation pursuant to a filed violation of probation affidavit during the current term of supervision. A probationer who has successfully completed sanctions through the alternative sanctioning program is eligible for mandatory modification or continuation of his or her probation.

(Emphasis added).

Pursuant to the new provisions in subsection 948.06(2)(f)1., after finding a probationer has violated the conditions of probation, whether through an admission or following a hearing, a court's sentencing authority is limited in certain situations to modification or continuation of the probation. *See* § 948.06(2)(f)2., Fla. Stat. (2019). When the listed conditions under the new subsection 948.06(2)(f)1. apply, a court is no longer authorized to revoke probation and impose a prison sentence. Instead, the court must "modify or continue a probationary term" and may impose no

more than "90 days in county jail." §§ 948.06(2)(f)1.–2., Fla. Stat. (2019).[3]

Here, at sentencing for the violations of probation, Appellant claimed that he qualified for the benefit of the new statute under 948.06(2)(f)1.a. since he was on probation and also under 948.06(2)(f)1.b. since he was not a violent felony offender of special concern (VFOSC). Furthermore, Appellant claimed that the trial court was required by section 948.06(2)(f)1. to "modify or continue" his probation with no more than 90 days in the county jail as part of the sentence. The trial court disagreed with Appellant's contention, found that Appellant did not meet all four requirements under section 948.06(2)(f)1., revoked Appellant's probation, and imposed a twenty-four-month prison sentence.

The trial court's reason for not applying the new statute was based on its reading of the conditions required for application. The court rejected Appellant's position that the statute applied "when any" of the listed conditions were present, finding that such a literal reading was unreasonable and rendered portions of the new statute meaningless. The court rejected the contention that it was prohibited from revoking probation if "any" of the listed conditions in 948.06(2)(f)1. applied and found that the Legislature meant to require "all" of the four listed conditions.

The State argues on appeal that the 2019 amendments to subsection 948.06(2)(f)1. do not apply to Appellant. The State relies on well-established cases that hold a defendant is sentenced under the law in effect when the offense was committed. *See State v. Reininger*, 254 So. 3d 996, 1000 (Fla. 4th DCA 2018); *Wright v. State*, 225 So. 3d 914, 915 (Fla. 1st DCA 2017) (Wolf, J., concurring); *Lamore v. State*, 86 So. 3d 546, 548 (Fla. 2d DCA 2012). Sentencing following a finding that a probationer has violated probation "is a 'deferred sentencing proceeding.'" *Tasker v. State*, 48 So. 3d 798, 805 (Fla. 2010) (quoting *Green v. State*, 463 So. 2d 1139, 1140 (Fla. 1985)); *see also Shields v. State*, 296 So. 3d

[3] If the "probationer has less than 90 days of supervision remaining on his or her term of probation," then probation can be revoked and a jail sentence of up to 90 days can be imposed. § 948.06(2)(f)3., Fla. Stat. (2019).

967, 972 (Fla. 2d DCA 2020) (noting that "a sentencing after a revocation of probation is, for all intents and purposes, just a resentencing on the original offense"); *Marion v. State*, 582 So. 2d 115, 116 (Fla. 3d DCA 1991) ("The date of the original offense determines the applicable statute for sentencing.").

If, as the State argues, the 2019 amendments to section 948.06 do not apply to Appellant, then after finding Appellant in violation, the trial court was permitted to revoke probation and impose a prison sentence. *See* § 948.06(2)(e), Fla. Stat. (2015). We do not have to reach the issue to decide the case. Assuming that Appellant is entitled to the benefit of new law, we hold that the trial court was correct to require that upon violating probation Appellant had to meet all four conditions of subsection 948.06(2)(f)1. before he could receive the benefit of that subsection. Appellant did not meet all four conditions upon violation, so the trial court could revoke his probation and impose a prison sentence.

Disposition of this case requires us to consider the rule of lenity and the absurdity doctrine. Appellant argues that the rule of lenity applies. The rule of lenity is a common law doctrine. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 88 (4TH ED. 1770).[4] The rule of lenity requires "that penal statutes must be strictly construed according to their letter." *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991). "Therefore, any ambiguity or situation in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense." *State v. Byars*, 823 So. 2d 740, 742 (Fla. 2002).

The rule of lenity applies "when criminal statutes are subject to competing, albeit reasonable, interpretations." *Polite v. State*, 973 So. 2d 1107, 1111 (Fla. 2007). "[A]lthough penal laws are to be construed strictly, the intention of the legislature must govern in their construction." *Wiltberger*, 18 U.S. at 95. We hold that that the rule of lenity does not apply here because applying it would not be a reasonable reading of the 2019 version of the statute. "[T]here

[4] The rule has been codified in section 775.021(1), Florida Statutes (2019).

is no need to apply the rule of lenity unless there is an unresolvable ambiguity in the statute in question." *Key v. State*, 296 So. 3d 469, 471 (Fla. 4th DCA 2020).

Here, although the use of "any" rather than "all" before the list of four conditions in subsection 948.06(2)(f)1. creates an ambiguity, it is not unresolvable. We must read all parts of the amended section 948.06 together so as "to ascertain their meaning." *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000). "It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992).

"In certain circumstances, the absurdity doctrine may be used to justify departures from the general rule that courts will apply a statute's plain language." *State v. Hackley*, 95 So. 3d 92, 95 (Fla. 2012). If we were to read "any" strictly and not in context with the four conditions that follow, we would give an absurd reading to the revised statute. "[A] sterile literal interpretation should not be adhered to when it would lead to absurd results." *Maddox v. State*, 923 So. 2d 442, 448 (Fla. 2006). If "any" in context here did not mean "all," everyone on probation would meet the requirement of subsection 948.06(2)(f)1.a. The conditions in b. through d. would be superfluous since anyone found to have violated probation must, of course, be on probation.

Probationers who were VFOSC, on probation for the most serious felony offenses, would qualify for the benefit of subsection 948.06(2)(f)1., so the reference to the VFOSC definition in subsection 948.06(8)(b) would be unnecessary. *See* § 948.06(2)(f)1.b. All probationers would qualify no matter how serious the Legislature has classified their violation of probation, so the distinction between low-risk and medium-risk violations in subsection 948.06(9) would be unnecessary. *See* § 948.06(2)(f)1.c. Lastly, regardless of how many previous violations of probation have been committed, if "any" was read literally, then subsection 948.06(2)(f)1.d. would be meaningless and probation could never

be revoked. Such readings would not give meaning to the whole of the statutory amendment and would be absurd.[5]

Courts must be careful in applying the absurdity doctrine so as to not "substitute their judgment of how legislation *should* read, rather than how it *does* read, in violation of the separation of powers." *Nassau County v. Willis*, 41 So. 3d 270, 279 (Fla. 1st DCA 2010). Courts should not resort to the absurdity doctrine merely because of disagreements with the result of legislation. *Lewars v. State*, 277 So. 3d 143, 149 (Fla. 2d DCA 2017). But, "a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). We believe it would be unreasonable to conclude that the Legislature intended the new subsection 948.06(2)(f)1. apply to every probationer irrespective of whether the probationer complied with all the listed conditions. Rather than benefitting all probationers, it seems clear that the Legislature intended section 948.06(2)(f)1. apply only to persons who meet all four conditions.

Regardless of whether the amended statute did not apply to Appellant, or it applied to him but he did not qualify under all four conditions, a correct result was reached. Affirmance is thus appropriate.

AFFIRMED.

RAY, C.J., and JAY, J., concur.

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[5] Our holding that the Legislature meant "all" rather than the literal "any" is buttressed by the new subsection 948.06(2)(f)3., which now allows no more than a 90 day jail sentence "if a probationer has less than 90 days of supervision remaining on his or her term of probation and meets the criteria for mandatory modification or continuation in subparagraph 1." The word criteria used by the Legislature is the plural of criterion. Criterion, *Merriam-Webster Online Dictionary,* https://www.merriam-webster.com/dictionary/criteria (last visited Aug. 24, 2020). Using the plural shows that the Legislature intended all four conditions to be met before a probationer receives the benefit of subsection 948.06(2)(f)1.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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