

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOSEPH MICHAEL HENRY,)
Appellant,)
v.)
STATE OF FLORIDA,)
Appellee.)
Case No. 2D18-3462

Opinion filed December 30, 2020.

Appeal from the Circuit Court for
Hillsborough County; Nick Nazaretsian,
Judge.

Howard L. Dimmig, II, Public Defender,
and Carol J.Y. Wilson, Assistant Public
Defender, Bartow, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Katherine Coombs Cline,
Assistant Attorney General, Tampa, for
Appellee.

PER CURIAM.

Joseph Henry challenges the order revoking his community control and sentencing him to 67.2 months in prison. We affirm the revocation of Henry's

community control and his sentence; however, we remand for entry of a corrected revocation order.

Henry pleaded to and was convicted of aggravated battery with a deadly weapon, domestic violence battery, and criminal mischief in June 2016. As part of the plea agreement, Henry was placed on sixty months' probation for the aggravated battery and received time-served sentences on the two misdemeanors. In the first twenty-four months of his probation, Henry had twice been found in violation. The second violation resulted in Henry being placed on community control. In May 2018, another affidavit of violation was filed. The affidavit indicated that Henry had failed to complete and/or remain in his drug treatment program, a violation of condition 1 of his community control, and that Henry had failed to remain confined in his residence, a violation of condition 16 of his community control.

A hearing was held on the violation allegations. Henry and his probation officer testified. With regard to the violation of condition 16, it was undisputed that Henry was not at his residence as required by his community control and that his absence was not authorized. Henry provided no explanation for his absence. As to the violation of condition 1, it was undisputed that Henry had been discharged from the drug treatment program prior to its completion. However, Henry provided uncontradicted testimony that he suffered from epilepsy, that his discharge from the program was due to an absence, and that the absence was the result of being hospitalized after an epileptic seizure. Further, it was uncontradicted that once this explanation was provided to the treatment center, Henry was readmitted but was unable to attend because of his arrest.

When reviewing a revocation order, "this court must 'first assess whether the finding of a willful and substantial violation is supported by competent substantial evidence.'" Cusamano v. State, 298 So. 3d 1266, 1267 (Fla. 2d DCA 2020) (quoting Savage v. State, 120 So. 3d 619, 621 (Fla. 2d DCA 2013)). "[A] violation of supervision is willful only where the defendant fails to make reasonable efforts to comply with the alleged violated condition." Rousey v. State, 226 So. 3d 1015, 1017 (Fla. 2d DCA 2017). And "[a] revocation based on the failure to complete a rehabilitation program must be shown to be the probationer's fault." Rainer v. State, 657 So. 2d 1230, 1230 (Fla. 4th DCA 1995); accord D.G. v. State, 45 Fla. L. Weekly D896, D897 (Fla. 3d DCA Apr. 15, 2020).

The only evidence adduced at the hearing supports the trial court's determination that Henry willfully violated condition 16 of his community control. Cf. Hern v. State, 747 So. 2d 1039, 1039-40 (Fla. 4th DCA 1999) (concluding that the defendant did not willfully or substantially violate her curfew when she was thirty-five minutes late because she missed the bus and had to walk). However, with regard to condition 1, "[the] circumstances fall in line with cases wherein the courts have held that the probationer did not willfully violate probation." See Charles v. State, 209 So. 3d 32, 34 (Fla. 4th DCA 2016) (first citing Thomas v. State, 672 So. 2d 587, 589 (Fla. 4th DCA 1996); and then citing Rainer, 657 So. 2d at 1230). There was no evidence that Henry's discharge from the program was the result of willful actions. See Rainer, 657 So. 2d at 1230 ("Because the record shows that appellant suffers from a medical illness which caused his problems at the drug farm, and there is no evidence to the contrary, appellant's failure to complete treatment was not willful and substantial."); cf. Charles,

209 So. 3d at 34 ("Here, the only evidence establishing *why* Defendant missed her sessions and was therefore discharged from her treatment program came from Defendant herself. She testified that on both occasions she showed up to her sessions, but was turned away after she brought her children and then after she was five minutes late as a result of trying to secure childcare. This evidence established that Defendant made reasonable efforts to attend her treatment sessions but was thwarted by her childcare issues.").

"When some grounds of probation violation are upheld and others are invalidated, the proper course of action is to reverse the order revoking probation and remand for reconsideration, unless the record clearly demonstrates that the trial court would have revoked probation based only on the upheld revocation grounds." Malone v. State, 146 So. 3d 155, 158 (Fla. 1st DCA 2014) (citing Hostetter v. State, 82 So. 3d 1217, 1221 (Fla. 1st DCA 2012)). Here, the record reflects that the trial court was almost exclusively concerned with the violation of condition 16; thus, even without the violation of condition 1, it is evident that the trial court would have found Henry in violation of his community control. See Redd v. State, 204 So. 3d 558, 560 (Fla. 4th DCA 2016) ("Most telling, however, was that, when announcing the violation based on the failure to pay restitution, the trial court stated that '*as an aside* I find that she failed to comply with special condition 2, restitution.' (emphasis added.) By stating that it was '*an aside*,' it is clear that the trial court did not consider that condition as a primary basis for revocation, and therefore, it is clear that the other conditions violated would have led the trial court to revoke Redd's probation and impose an incarceration sentence.").

We affirm the order revoking Henry's community control and the corresponding sentence, but we remand for entry of a corrected revocation order to reflect that Henry violated only condition 16 of his community control.

Affirmed and remanded.

KHOUZAM, C.J., and NORTHCUTT and BLACK, JJ., Concur.