

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JASON BARUCH BRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-2172

November 4, 2022

Appeal from the Circuit Court for Lee County; Nicholas R. Thompson, Judge.

Robert P. Harris of Robert Harris Law Firm, Fort Myers, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and C. Todd Chapman, Assistant Attorney General, Tampa; and Natalia Reyna-Pimiento, Assistant Attorney General, Tampa (substituted as counsel of record), for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

Jason Bright appeals from the order revoking his probation. For the reasons set forth below, we reverse the order of revocation and remand for the trial court to reconsider whether it would have

revoked Bright's probation based solely on the violations of conditions 1, 3, and 22.

In 2007, Bright pled no contest to sexual battery (familial authority). After completing his prison sentence, he began serving his term of sex offender probation. In 2018, the trial court found that Bright had repeatedly violated the condition of probation concerning electronic monitoring. Although sentencing Bright to thirty-one days in jail for those violations, the court did not revoke his probation.

In 2021, Bright's probation officer filed another violation affidavit, alleging that Bright had violated the following conditions: condition 1, by failing to report that he had received a traffic citation in April 2019; condition 3, by crossing into Collier County from Lee County in June 2020 without his probation officer's approval; condition 10, "by failing to make court costs and electronic monitoring payments to the probation officer in accordance with the payment instructions of the court," resulting in an arrearage of more than \$6,000; condition 14, by having indirect contact with the victim between 2016 and 2020; condition 22, by failing to turn in a driving log for the month of April 2019; and

condition 25, by failing to submit to electronic monitoring on June 28, 2020. After an evidentiary hearing, the trial court revoked his probation, finding him in violation of conditions 1, 3, 10, and 22 but concluding that the State had failed to prove violations of conditions 14 and 25.

In reviewing the trial court's revocation order, this court first determines whether competent substantial evidence supported the finding of a willful and substantial violation. *Timke v. State*, 313 So. 3d 714, 716 (Fla. 2d DCA 2020). If so, this court then determines whether the trial court abused its discretion in revoking probation. *Id.*

Contrary to Bright's contention, competent substantial evidence—including the testimony of Bright's probation officer, the testimony of Bright's girlfriend, and Bright's own shifting explanations—supported the finding that his violations of conditions 1, 3, and 22 were willful. And although they may seem inconsequential at first blush, they indicate that contrary to what he repeatedly told his probation officer, Bright has been driving; that he has failed to disclose when he has been driving and where he has been going when he drives; and that he has attempted to

venture outside of his approved area of travel. Furthermore, these violations take on added significance and seriousness when one considers not only that Bright is a sex offender but that the family of his victim still lives in the area and that Bright is prohibited from having direct or indirect contact with her. *See State v. Carter*, 835 So. 2d 259, 261 (Fla. 2002) (holding that a probationer's "failure to file a single monthly report may, in certain circumstances, justify probation revocation if such failure is willful and substantial and supported by the greater weight of the evidence" and recognizing that the trial court is obligated "to assess any alleged violations in the context of a defendant's case").

That said, competent substantial evidence does not support the trial court's finding that Bright willfully and substantially violated condition 10. Bright's financial obligations arose out of two different documents. The judgment provided that once on probation, Bright was required to submit to and pay the cost of electronic monitoring (\$6.94/day) and was required to pay \$368 for court costs and \$25 for the cost of prosecution. No due date or schedule was set for the payment of any of these costs. Per the judgment, Bright was also required to make monthly payments of

\$50 toward the cost of his supervision and \$2 to the Department of Corrections Training Trust Fund.

A separate sex offender probation order, however, provided that "[Bright's] cost of probation supervision will be waived during the probationary period [provided] that he is actually paying for counseling." Like the judgment, that order directed that Bright pay, as a condition of probation, court costs and the costs of prosecution, but also like the judgment, that order did not set forth a time frame for payment of those costs.

Although the violation affidavit alleged that Bright had violated condition 10 "by failing to make court costs and electronic monitoring payments to the probation officer in accordance with the payment instructions of the court," the probation officer acknowledged at the hearing that it was the probation office—not the court—that had created a monthly payment schedule for court costs and electronic monitoring costs. As we have stated previously, "a failure to abide by a payment schedule devised by a probation officer is not sufficient to support a violation." *McCoy v. State*, 730 So. 2d 803, 804 (Fla. 2d DCA 1999). Absent a court-ordered schedule or time frame, Bright could not have violated his

probation by failing to make payments so long as sufficient time remained on probation for him to do so. *Cf. Roundtree v. State*, 955 So. 2d 1184, 1186 (Fla. 3d DCA 2007) (holding that the trial court erred in finding that the defendant had violated the conditions of his probation requiring him to undergo a psychological evaluation and to complete a domestic intervention program when the probation order included no schedule or time frame for completing these conditions and the defendant had a year remaining on his probation, "giving him sufficient time to complete these two requirements").

Moreover, the evidence at the revocation hearing established that Bright had been current on all bills for sex offender counseling. Thus, the \$50 monthly cost of supervision was waived, and the *only* monthly payment that Bright was required to make as a condition of his probation was the \$2 to the Training Trust Fund. But the violation affidavit did not allege Bright's failure to make this \$2 monthly payment as the basis for the violation of condition 10. And

even if it had, we would be hard-pressed to consider it a substantial violation even assuming that it was willful.¹

"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." *Henry v. State*, 313 So. 3d 757, 760 (Fla. 2d DCA 2020) (quoting *Malone v. State*, 146 So. 3d 155, 158 (Fla. 1st DCA 2014)).

Although the violations of conditions 1, 3, and 22 would support revocation, we cannot say that it is clear from this record that the court would have revoked Bright's probation based solely on those

¹ "[B]efore a trial court may properly revoke probation and incarcerate a probationer for failure to pay, it must inquire into the probationer's ability to pay and determine whether the probationer had the ability to pay but willfully refused to do so." *Del Valle v. State*, 80 So. 3d 999, 1002 (Fla. 2011); *Cherry v. State*, 718 So. 2d 294, 295 (Fla. 2d DCA 1998). It is difficult to imagine that Bright could not have scraped together an extra \$2 each month. The undisputed evidence at the revocation hearing, however, did establish that his monthly expenses exceed his income, that he has no other savings, and that he and his girlfriend live "paycheck to paycheck" and require help from Bright's family to make ends meet.

violations.² *Cf. Henry*, 313 So. 3d at 760 (explaining that the trial court's "almost exclusive[] concern[]" with the defendant's violation of condition 16 clearly indicated that the court would have revoked his community control even without the violation of condition 1); *Redd v. State*, 204 So. 3d 558, 560 (Fla. 4th DCA 2016) (stating that the trial court's observation "as an aside" that the defendant had also failed to pay restitution indicated that that failure was not a "primary basis for revocation").

Finally, although the trial court orally concluded that the State had failed to establish that Bright had violated conditions 14 and 25, its written order of revocation finds him in violation of those conditions. Accordingly, whatever order the court enters on remand, it should be consistent with the court's oral pronouncement as to those two conditions. *See Ramirez v. State*, 310 So. 3d 145, 146 (Fla. 2d DCA 2021) (holding that a written

² We note that Bright's previous violations concerning electronic monitoring implicated concerns similar to those raised by his most recent violations, but the trial court did not revoke his probation then. On the other hand, the court's decision not to revoke probation based on those previous violations could have weighed in favor of revocation this time. The conflicting possible views of the significance of the court's prior decision only underscore the propriety of remand in this instance.

order of probation revocation must conform to the oral pronouncement at hearing and remanding for the trial court to make that correction).

Order of revocation reversed; remanded with instructions.

KHOUZAM and STARGEL, JJ., Concur.

Opinion subject to revision prior to official publication.