

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

September 18, 2013

JOSEPH BUSH,)	
)	
Appellant,)	
)	
v.)	Case No. 2D11-2531
)	
STATE OF FLORIDA,)	
)	
Appellee.)	
_____)	

BY ORDER OF THE COURT:

The State's motion for rehearing is granted in part. The only revisions to the original opinion are those discussed in the section titled "On Motion for Rehearing." The motion is otherwise denied. Accordingly, the prior opinion dated March 20, 2013, is withdrawn, and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES BIRK HOLD, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOSEPH BUSH,)	
)	
Appellant,)	
)	
v.)	Case No. 2D11-2531
)	
STATE OF FLORIDA,)	
)	
Appellee.)	
)	
_____)	

Opinion filed September 18, 2013.

Appeal from the Circuit Court for Pasco
County; Michael F. Andrews, Judge.

Howard L. Dimmig, II, Public Defender,
and Richard J. Sanders, Assistant Public
Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Diana K. Bock, Assistant
Attorney General, Tampa,
for Appellee.

ALTENBERND, Judge.

Joseph Bush appeals "judgments" and sentences that were entered on
revocations of his probation in two cases. We dismiss this appeal as moot because Mr.
Bush has fully served his sentences. We write to discuss the difficulty of providing
meaningful relief in appeals from short sentences and to identify a significant problem

with the standard forms that were used to revoke probation in these two cases from Pasco County.

In 2009, Mr. Bush was on probation in case numbers 04-00131-CFAWS and 05-00577-CFAWS when an affidavit of violation was filed in each case. Following an evidentiary hearing in April 2011, the trial court found that Mr. Bush had violated the conditions of his probation and sentenced him to concurrent terms of five years' imprisonment. Mr. Bush then filed this appeal.

The State properly and candidly conceded error on one issue raised by Mr. Bush with respect to case number 05-00577-CFAWS, which could have resulted in a reversal and remand for reinstatement of Mr. Bush's probation in that case. However, in January 2013, while this appeal was pending, Mr. Bush was released from custody by the Department of Corrections. This primarily occurred because Mr. Bush had more than one thousand days of jail credit when the sentences were imposed. Thus, with jail credit and gain time, he had fully served his sentences in both cases before the end of January 2013. As a result, this court suspected that it could afford no meaningful relief to Mr. Bush.

This court ordered Mr. Bush's counsel, Richard J. Sanders, to respond as to whether the issues raised in this appeal had become moot. Mr. Sanders is an experienced and respected assistant public defender who admitted that the case was moot. In his response, he commented that, from his twenty-nine years of experience, this problem was not uncommon. As he explained, an appellant with a short "net" sentence can rarely perfect an appeal of a sentencing issue before the sentence has

been fully served. Mr. Sanders recognized that a solution to this problem would require some type of expedited proceeding that may be difficult to implement.

Although it is true that such a solution might be difficult to implement, it may be that the State and the defendant could occasionally stipulate to an immediate relinquishment to the trial court to correct such errors. Given that defendants should be entitled to more than mere procedural due process in appeals of sentencing issues, this court would be open to any method that the State and the public defenders might devise to address such sentencing errors, so long as it does not significantly delay the disposition of other cases.

We now turn to the significant problem in the standard forms that were used by the trial court. In both of these cases, the trial court used a form judgment that may be unique to Pasco County. The form deviates from the supreme court's approved forms in Florida Rules of Criminal Procedure 3.986(b), 3.986(d), and 3.995. The form judgment has a location where it can be checked for use at a hearing on a violation of probation or community control, a retrial, or a resentencing. Below the standard section in which the defendant is either adjudicated guilty or has guilt withheld, the form has an additional line that states: " ____ The Court finds that the defendant violated all the conditions alleged in the affidavit, a copy of which is attached."¹ This is the box that was checked on both of the judgments on appeal. The trial court never entered an order of revocation similar to the form appearing in rule 3.995.²

¹Although the affidavits of violation are in the record on appeal, they were not actually attached to the judgments as represented.

²This court often relinquishes jurisdiction to the trial court by nonpublished order to enter an order of revocation when the issues raised in an appeal involve the

This form, especially as used in this case, creates several problems. First, it causes multiple judgments of guilt to be entered in a single case. This court has previously explained that a violation of probation concerning a defendant who has already been adjudicated guilty should not be resolved by the entry of another judgment of guilt. See Johnson v. State, 17 So. 3d 1290 (Fla. 2d DCA 2009).

Second, the language of the order merely finds that the "defendant violated all of the conditions alleged in the affidavit." Putting aside the problem a trial court would have using this form in a case like this one where at least one violation was not proven, this language does not actually revoke probation. Obviously, it is common for defendants to be found in violation of probation and not have their probation revoked.³ If the trial court had revoked probation on the record in open court, we would be less concerned in this case. But the record reflects that the trial court only found violations of probation; the court never actually revoked Mr. Bush's probation. In the absence of written revocation orders, the trial court had no authority to enter new

revocation of a defendant's probation or community control and a written revocation order has not been rendered by the trial court. See Dawkins v. State, 936 So. 2d 710, 712 (Fla. 2d DCA 2006). In rare instances, we treat a second judgment as a final appealable order effectively revoking probation. Id. at 712. Occasionally, we require that the order be entered on remand from this court. See, e.g., Dolinger v. State, 779 So. 2d 419 (Fla. 2d DCA 2000). Because the issues raised in this appeal were rendered moot by Mr. Bush's completion of his sentences and his release from the custody of the Department of Corrections, we declined to issue an order relinquishing jurisdiction and in this opinion we have not remanded this matter for the entry of proper revocation orders.

³Indeed, in 2005, Mr. Bush violated the conditions of his probation in both cases. He negotiated a plea concerning the violations that contemplated a modification of his probation in each case rather than a revocation. At that time, the trial court simply entered another standard order of probation in each case that adjudged Mr. Bush guilty of the "offense." Thus, in this record he has six judgments of guilt when he is supposed to have only two.

sentences of imprisonment. See Dawkins v. State, 936 So. 2d 710, 712 (Fla. 2d DCA 2006).

On return of this record to the trial court, we would encourage the trial court to examine carefully the forms that are currently in use to address both violations of probation that do not result in revocation and those that do.

Appeal dismissed as moot.

On Motion for Rehearing

The appellant's attorney has filed a motion for rehearing explaining that his concession that the appeal was moot overlooked some possible collateral consequences. If Mr. Bush was unlawfully incarcerated as a result of an improper revocation of probation, then it is at least arguable that he can avoid liability for certain incarceration costs and other correctional costs.⁴ The State concedes that the rehearing has merit. Accordingly, we reinstate this appeal.

Although the State properly concedes reversible error in the revocation of Mr. Bush's probation in case number 05-00577-CFAWS, it does not concede error in the revocation of Mr. Bush's probation in case number 04-00131-CFAWS. Competent, substantial evidence established a willful and substantial violation of probation in case number 04-00131-CFAWS, and the trial court did not abuse its discretion in revoking Mr. Bush's probation and in sentencing him to five years' imprisonment in that case. Furthermore, despite the procedural incongruities mentioned in our original opinion, we have not found reversible error as to the revocation of probation in that case. We thus

⁴To the extent that our original opinion suggests that a case might become moot merely because a defendant has fully served his or her sentence, we acknowledge that this would not be correct in all cases.

affirm the revocation of Mr. Bush's probation and the resulting sentence of five years' imprisonment in case number 04-00131-CFAWS. However, in light of the possibility that the costs of incarceration or other collateral consequences might be slightly different for these two cases, we reverse the order of revocation and the resulting sentence in case number 05-00577-CFAWS. On remand, the trial court shall reinstate the order of probation in case number 05-00577-CFAWS, which has now been fully served.

Affirmed in part, reversed in part, and remanded.

BLACK, J., and DAKAN, STEPHEN L., ASSOCIATE SENIOR JUDGE, Concur.