

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY  
APPELLATE DIVISION

RIKKI LEE COTTO,  
Appellant,

UCN: 512018AP000028APAXWS  
Appeal No.: 18-AP-28  
L.T. No.: 17-CT-773

v.

STATE OF FLORIDA,  
Appellee.

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On appeal from Pasco County Court,  
Honorable Debra Roberts,

Jessica Rae Stephans, Esq.,  
for Appellant,

Oliver Moll, Assistant State Attorney,  
for Appellee.

**ORDER AND OPINION**

For the reasons detailed below, the trial court erred in ruling that the Appellant willfully and substantially violated the conditions of her probation.

**STATEMENT OF THE CASE AND FACTS**

On July 28, 2017, the Appellant pled no contest to Driving Under the Influence (DUI) and was sentenced to 11 months and 28 days of probation. The Order of Probation did not provide a specific date in which to complete the conditions of probation. The Order of Probation stated only that probation would be supervised by the Pasco Sheriff's Office. The Order of Probation did not provide report dates.

The "Conditions of Probation" were not made part of the court record until April 17, 2018 and was not signed by the Appellant until that date. The "Conditions of Probation" were not made part of the written Judgment and Order of Probation.

On February 14, 2018, an Affidavit of Violation of Probation (VOP Affidavit) was filed charging the Appellant with violating the following conditions of probation: (2) report to probation each month, (8) pay costs of supervision; (10) complete 50 hours of

community service, (12) pay courts costs and fines, (14) and (15) complete the DUI program and any recommended treatment, (17) pay PD fee, (27) impound vehicle for 10 days, (33) pay costs of investigation, (35) complete a victim impact session, (36) pay fine surcharge, (39) pay FDLE fee, and (40) pay Clerk Payment Plan Fee. On May 15, 2018, a final hearing was held.

During the hearing, Probation Officer Michael Autieri testified that the conditions of probation would have been explained to her the first day she came to probation by her probation officer. Officer Autieri testified that the Appellant never reported to probation and did not complete any conditions of probation.

The Appellant testified that when she was sentenced to probation, no one, the trial court included, told her that she would be required to report to probation that day or that she would be required to report to probation the first time on her own initiative. She testified that because of this, she believed that probation would send a notice or contact her to let her know when she was required to report. She testified that when she did not hear from probation, she called the probation office and left a message for her probation officer but that call was not returned. She testified that she made no further attempts to contact her probation officer or go to the probation office.

She testified that the conditions of her probation were on her judgment and sentence. It should be noted that, contrary to Appellant's testimony, all of the conditions of her probation were NOT on the judgment and order of probation, only some. There is no evidence in the record that she was informed of all of the conditions of probation until April of 2018 (see below).

She testified that the trial court told her where the probation office was located. She testified that she was aware that she had to pay court costs and fines and that she had not made any payments towards them. She testified that she was infrequently employed during probation.

The State argued that the Appellant willfully violated the conditions of her probation because she recalls being told what those conditions were via the written judgment and sentence but failed to complete those conditions. The State further argued that the Appellant made minimal attempts to contact probation and that those minimal attempts

combined with her assumption that it was somehow probation's responsibility to reach out to her shows a willful and substantial violation.

The Appellant argued that the State only established that the Appellant was confused about reporting to probation, not that she had willfully violated the condition. The Appellant further argued that the State asked no questions about the DUI program and that the State made insufficient inquiries about her income and ability to pay the financial conditions of probation. The State failed to ask questions about the vehicle impound or the victim impact session and asked minimal questions about community service.

The trial court found that the Appellant was not a credible witness and that she had failed to report to probation despite being told she needed to meet with probation across the street. The trial court found that the Appellant had violated conditions 2 (failure to report), 8 (failure to pay costs of supervision), 10 (failure to complete 50 hours of community service), 12 (failure to pay court costs and fines), 17 (failure to pay PD fee), 27 (failure to impound vehicle for 10 days), 33 (failure to pay costs of investigation), 35 (failure to complete victim impact session), 36 (failure to pay fine surcharge), and 39 (failure to pay FDLE fee).

The trial court did not address the alleged violations of conditions 14 and 15 (failure to complete the DUI program and recommended treatment), and 40 (failure to pay Clerk Payment Plan fee). Thus, it does not appear that the Appellant was found to have violated those conditions.

Regarding sentencing, the State argued that because the Appellant was found to have violated 10 conditions of probation, she should be sentenced to 180 days in county jail.

The trial court sentenced the Appellant to 180 days in county jail. On May 16, 2018, the Appellant timely-filed her Notice of Appeal.

### **STANDARD OF REVIEW**

The trial court must find a willful and substantial violation of the conditions of probation, supported by competent evidence, prior to revoking probation. *Savage v. State*, 120 So. 3d 619, 623 (Fla. 2d DCA 2013); *Sanders v. State*, 675 So. 2d 665, 665-66 (Fla. 2d DCA 1996). Where the violation is based upon a probationer's failure to pay

a financial obligation, the State must present sufficient evidence of the probationer's ability to pay to support the trial court's finding of willfulness. *Del Valle v. State*, 80 So. 3d 999, 1015-16 (Fla. 2011). After evidence of willfulness is introduced, the burden shifts to the probationer to assert and prove his inability to pay by a preponderance of the evidence. *Id.* The trial court must then "make an explicit finding of willfulness based on the greater weight of the evidence." *Id.*

When reviewing an order revoking probation, this Court first reviews the record for competent evidence to support a finding of a substantial and willful violation, and then determines "whether the trial court abused its discretion in revoking probation." See *Savage*, 120 So. 3d at 622, 624. *Russell v. State*, 982 So. 2d 642 (Fla. 2008). An abuse of discretion occurs when the trial court acts in an arbitrary or unreasonable manner when determining whether revocation is warranted. See *Savage*, 120 So. 2d at 623; *Friddle v. State*, 989 So. 2d 1254 (Fla. 1st DCA 2008). Questions of law in a case involving probation revocation are reviewed *de novo*. See *Koile v. State*, 934 So. 2d 1226, 1229 (Fla. 2006).

## **ANALYSIS**

### **Appellant's Contention of Error – Condition 2 – Failure to Report**

This Court defers to the trial court's finding that the Appellant was not a credible witness. That said, even discounting the Appellant's testimony, the Appellee still bore the burden of providing competent substantial evidence that a defendant willfully violated probation. See *Savage*, 120 So. 3d at 619 (providing that there must be competent substantial evidence of a willful and substantial violation of probation before probation may be revoked). And there is no evidence in the record that the Appellant was informed that she was required to make her initial report to probation after sentencing and that she was required to take the initiative in setting the time to report.<sup>1</sup>

Nowhere on the Judgment and Order of Probation does it provide a reporting date or deadline or that the Appellant must report to probation every month. There is no

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<sup>1</sup> The Appellant testified during the final hearing that the conditions of her probation were on her Judgment and Order of Probation. However, this is incorrect. Her Judgment and Order of Probation fails to provide that she was required to make the initial report to probation shortly after sentencing and it fails to provide that she was required to report to probation every month. There is, in fact, no evidence that she was informed of either requirement until after the VOP Affidavit was filed.

transcript of the 2017 sentencing hearing nor anything else in the record before the trial court indicating that the trial court informed the Appellant that she needed to make an initial report to probation within a specific amount of time. While Conditions of Probation form provides that "each month, during the period of probation, you will make a full and truthful report in person to your Probation Supervisor, unless otherwise directed by your Probation Supervisor," the record reflects that the Appellant was not provided with this document until April 17, 2018, two months after the VOP Affidavit had been filed. Furthermore, the Conditions of Probation form does not state that the Appellant must make the initial report to probation within a set period of time after sentencing. Finally, the Appellee put forth no evidence refuting (1) the Appellant's contention that she believed that probation would contact her and let her know when she was required to report, and (2) that the Appellant attempted to address the reporting issue by calling and leaving a message with probation but receiving no return call.

Thus, there is no evidence in the record before this Court establishing that the Appellant willfully violated condition 2. With regard to reporting during the rest of her probationary term, Officer Autieri testified that the Appellant would have been told she had to report every month had she made the initial report. But, as previously noted, there is no evidence that the Appellant was ever told to make that initial report. Additionally, there was no evidence refuting her contention that she left a message with probation to inquire about the reporting requirement but received no response to that message.

For the aforementioned reasons, the Court finds that the trial court erred in finding that the Appellant violated condition 2 of probation (failure to report).

#### **Unpreserved and Unraised Fundamental Errors**

The Appellant's Initial Brief addresses only the trial court's finding of a violation of condition 2 (failure to report). However, there are additional errors on the face of the record that were not addressed by the Appellant either before the trial court or in her Initial Brief. Normally, this Court would be unable to address those errors. See *State v. Szempruch*, 935 So. 2d 66, 68 (Fla. 2d DCA 2006) (an appellate court cannot review an error that is not preserved before the trial court); *Bryant v. State*, 901 So. 2d 810, 827 (Fla. 2005) (errors not raised in an initial brief are deemed waived).

However, these unpreserved and unraised errors, when taken together, reflect that the trial court should not have found that the Appellant had violated any of the remaining conditions of probation of which the trial court found her in violation: 8 (failure to pay costs of supervision), 10 (failure to complete 50 hours of community service), 12 (failure to pay court costs and fines), 17 (failure to pay PD fee), 27 (failure to impound vehicle for 10 days), 33 (failure to pay costs of investigation), 35 (failure to complete victim impact session), 36 (failure to pay fine surcharge), and 39 (failure to pay FDLE fee). Because these errors should have resulted in the Appellant being found to have not violated any conditions of her probation, probation should not have been revoked and the Appellant should not have been sentenced to any jail time. Therefore, these errors are fundamental and this Court may address them *sua sponte*. See *Phelps v. State*, 236 So. 3d 1162, 1164 (Fla. 2d DCA 2018) (holding that an appellate court may *sua sponte* address fundamental errors that are apparent on the face of the record).

#### There Was Sufficient Time Available to Complete Several Conditions of Probation

Where the order of probation or conditions of probation documents do not set a deadline to complete a condition of probation, the deadline to complete the condition is the end of the probationary period. *Marzendorfer v. State*, 976 So. 2d 596, 599-600 (Fla. 1st DCA 2007); *Pollard v. State*, 930 So. 2d 855 (Fla. 2d DCA 2006). When there is sufficient time to complete a condition of probation at the time the VOP Affidavit is filed, a trial court errs in finding that a defendant violated that condition unless there is evidence that the defendant had no intention of completing that condition. *Id.*

In the instant case, the Appellant was sentenced to 11 months and 28 days of probation on July 28, 2017. Thus, the end of the probationary period was approximately July 26, 2018. Conditions 10, 12, 17, 27, 33, 35, 36, and 39 did not provide a completion deadline. Thus, when the VOP Affidavit was filed on February 14, 2018, the Appellant still had more than five months to complete the aforementioned conditions of probation. On May 15, 2018, the date of the final hearing, the Appellant still had more than two months to complete those conditions. The Appellee presented no evidence that the Appellant had no intention of completing those conditions. Therefore, the trial court erred in finding that the Appellant had violated conditions 10, 12, 17, 27, 33, 35, 36, and 39 of her probation.

No Evidence or Finding that Appellant Had Ability to Pay Financial Conditions of Probation

Before finding that a defendant has violated a financial condition of probation, a trial court must explicitly find that the defendant had the ability to pay the financial obligation. See *Crowley v. State*, 124 So. 3d 434, 436 (Fla. 1st DCA 2013). In the instant case, the trial court made no such finding. Additionally, the Appellant offered testimony unrefuted by the Appellee that she was employed infrequently during probation. Therefore, the trial court erred in finding that the Appellant violated conditions 8, 12, 17, 33, 36, and 39 of her probation.<sup>2</sup>

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<sup>2</sup> The Appellant's Initial Brief argues that she was never informed that she had to start paying her financial obligations immediately. However, the trial court found the Appellant in violation for not paying the financial obligations at all. Additionally, the failure to pay financial obligations immediately would not have prevented a finding of a violation of condition 8 (failure to pay *monthly* costs of supervision).

### **CONCLUSION**

The trial court erred in finding that the Appellant had violated condition 2 of her probation (failure to report) because the Appellee presented no evidence that she was ever informed that she had to make the initial report and presented no evidence refuting her testimony that she attempted to contact probation regarding this condition but received no response. The trial court erred in finding that the Appellant violated conditions 8, 10, 12, 17, 27, 33, 35, 36, and 39 because (1) the Appellee did not present any evidence, and the trial court did not explicitly find, that the Appellant had the ability to pay the financial obligations, and (2) there was sufficient time to complete conditions of probation when the VOP Affidavit was filed and the Appellee presented no evidence that the Appellant had no intention of completing those conditions. Therefore, the Appellant's judgment and sentence must be reversed.

It is therefore, ORDERED and ADJUDGED that the Appellant's judgment and sentence is hereby REVERSED. The cause is REMANDED for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida  
this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

Original Order entered on January 24, 2019, by Circuit Judges Daniel D. Diskey,  
Susan G. Barthle, and Kimberly Campbell.

*Copies to:*

**Honorable Debra Roberts**  
**Jessica Rae Stephans, Esq.**  
**Office of the State Attorney**  
**Staff Attorney**