County Criminal Court: CRIMINAL LAW – Probation - Trial court erred in denying motion to discharge. Trial court was without jurisdiction to sentence Appellant for violating his one year term of probation for a first-degree misdemeanor after the court accepted Defendant's admission, then continually postponed sentencing for nearly twenty months; well beyond the maximum probation term. Appellant's probation was not terminated or modified before the one year term expired, at which point the court was divested of all jurisdiction over Appellant. Order denying motion to discharge reversed; case remanded to trial court for immediate discharge. *Witteck v. State*, No. 13-00060APANO (Fla. 6th Cir. App. Ct. March 6, 2014).

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 PINELLAS COUNTY

RICHARD KEITH WITTECK

Appellant,

v.

Appeal No. CRC 13-00060 APANO
UCN 522013AP000060XXXXCR

STATE OF FLORIDA
Appellee.
_____/

Opinion filed March 6, 2014.

Appeal from a judgment and sentence
entered by the Pinellas County Court,
County Judge Thomas B. Freeman

Ngozi C. Acholonu, Esquire
Assistant Regional Counsel
Attorney for Appellant

Morgan Anderson, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant's appeal from an order denying Appellant's Motion for Discharge of Probation. After review of the record and the briefs, we reverse.

Background

On October 24, 2010, Appellant, Richard Keith Witteck, was given a Florida Uniform Traffic Citation for DUI, first offense. On June 14, 2011, Mr. Witteck entered a plea of no contest to the lesser included offense of Reckless Driving with damage to property or person of another, a first degree misdemeanor. He was placed on probation for one year and ordered to pay restitution to four separate victims. An amount of $5,660.80 was established as the restitution due one victim; the amount of restitution due the other three victims remained to be established. The judgment provided that the amount of restitution for the remaining three victims would be "in an amount to be agreed between [Mr. Witteck] and [the] Probation Supervisor or to be determined by the court after hearing." The judgment also provided that the court reserved jurisdiction as to restitution due the remaining three victims. On August 19, 2011 the court entered an order deleting restitution as to two of the remaining three victims and established restitution in an amount of $108.95 for the third remaining victim.

On December 29, 2011, a *Violation of Probation – Notice of Arraignment* signed by Mr. Witteck and an affidavit of violation of probation were filed. That affidavit stated that Mr. Witteck had failed to pay probation supervision fees for three months at the rate

of $55.00 per month. On January 27, 2012 the court held an arraignment on the pending allegations of violation of probation. The court stated to Mr. Witteck:

> So if you want to enter an admission and come back on the 17th of February and show us some progress with respect to payment on the fines by community service or cash and show us that you've completed the urine test, that would certainly hold you in good stead with Judge Freeman who would, I'm sure, look upon it favorably.

Mr. Witteck, pro se, then signed a document entitled *Admission of Violation of Probation, Conditions of Pre-Sentencing Release.* In concluding a plea colloquy the court stated to Mr. Witteck, "[p]lease accept that I find that you're alert and intelligent, you've entered your admission freely and voluntarily." Sentencing was scheduled for February 17, 2012. From February 17, 2012 until October 8, 2013 the sentencing hearing was rescheduled twenty five (25) times. At the sentencing hearing held on October 8, 2013 Mr. Witteck's counsel filed a Motion for Discharge and argued in open court "[t]he Court's actions in effect placed him on probation, unsupervised probation and that one year of probation ran last July." In response to that statement, the court said, "Motion will be denied. Sentence him to 30 days county jail. Terminate supervision. $165 mandatory cost." Mr. Witteck was taken into custody; supersedes bond in the amount of $2500 was set.

Issue

Did the trial court err in denying Appellant's Motion for Discharge? Had Appellant's probation expired?

Standard of Review

Our review of the issue presented in this appeal involves a pure question of law that is subject to the de novo standard of review. *See Demps v. State*, 761 So2d 302, 306

(Fla. 2000); *State v. J.L.M., III*, 926 So.2d 457, 459 (Fla. 1st DCA 2006); *Wardlaw v. State*. 832 So2d 258, 259 (Fla. 2nd DCA 2002).

Involved Points of Law

1. *Maximum Sanctions for a First Degree Misdemeanor.* The criminal offense of Reckless Driving involved in the present case is a misdemeanor of the first degree. § 316.192(3), Fla. Stat. (2006). A person who has been convicted of such an offense may be sentenced to a definite term of imprisonment not exceeding one (1) year. § 775.082(4), Fla. Stat. (2000). The maximum period of probation for such an offense is one (1) year. § 948.15(1), Fla. Stat. (1991).

2. *Probation.* "Probation" means a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03. § 948.001(8), Fla. Stat.

> Any state court having original jurisdiction of criminal actions may at a time to be determined by the court, with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who has been found guilty by the verdict of a jury, has entered a plea of guilty or a plea of nolo contendere, or has been found guilty by the court trying the case without a jury.

§ 948.01(1), Fla. Stat.

3. *Tolling of Probation.* Once a violation of probation affidavit is filed, the probation term is tolled until the court enters a ruling on the violation. *Battles v. State*, 919 So2d 621 (Fla. 1st DCA 2006); *Chadwick v. State*, 118 So3d 827, 829 (Fla. 2nd DCA 2012); *see* § 948.06(1)(f) Fla. Stat. (2011).

4. *Jurisdiction in Violation of Probation Proceedings.* "It has long been the rule that upon expiration of the probationary period the court is divested of all jurisdiction over the person of the probationer unless in the meantime the processes of the court have

been set in motion for revocation or modification of the probation pursuant to Section 948.06, F.S." *State v. Hall*, 641 So.2d 403, 404, (Fla. 1994); *Hernandez v. State*, 889 So2d 913, 915 (Fla. 2nd DCA 2004).

5. *Suspending the Imposition of Sentence.* Since at least 1941, a trial court has lacked authority to suspend or withhold indefinitely the imposition of sentence upon a convicted defendant except as an incident to probation under the provisions of Chapter 948, Florida Statutes. *Helton v. State*, 106 So.2d 79, 80 (Fla.1958); *see* § 948.01(5), Fla. Stat. (2004). A trial court cannot by the artifice of postponing the pronouncement of sentence exercise the power to conditionally parole or pardon a defendant who stands convicted of a crime. *Helton* 106 So2d at 81.

> *[T]he power of trial judges to hold in abeyance the passage of sentences and to impose them any time in the future, regardless of probation, is disapproved.* For procedural reasons such as the determination of 'motions and other matters arising between verdict and judgment, [or for the purpose of] gaining information necessary to the imposition of a just sentence; or during the pendency of other charges, or for other good and valid reasons,' … there may be justificable delay, and when convicts are put on probation the sentences, of course, may be deferred conditioned on obedience to the terms of probation. … [T]hat one convicted of an offense is entitled to know just when in his life, he meanwhile being at liberty, he is no longer subject to the power of the court to translate his liberty to imprisonment. …
>
> [W]hen a person is adjudged guilty of an offense the trial judge should, in the absence of the circumstances outlined, either sentence him or place him on probation.

State v. Bateh, 110 So.2d 7, 9 -10 (Fla. 1959) (emphasis added).

6. *Court-Supervised Probation.* Court-supervised probation is not a sanction recognized under Florida law. *State v. Luxenburg*, 13 So3d 137, 138 (Fla. 2nd DCA 2009); *Phillips v. State*, 455 So2d 656, 657 (Fla. 5th DCA 1984). "Nothing within

chapter 948, which governs probation and community control, allows a judge to personally supervise probationers." *Luxenburg*, 13 So3d at 138.

The Present Case

On June 14, 2011, Mr. Witteck was placed on misdemeanor probation for one year. On December 29, 2011, an affidavit of violation of probation was filed. On January 27, 2012, Mr. Witteck admitted the violation at arraignment. That admission was accepted by the court; all that remained was to sentence Mr. Witteck. For whatever reason the trial court did not immediately impose sentence. Sentencing was scheduled for February 17, 2012 and then rescheduled another twenty-five times until October 8, 2013. There is nothing in the record before this court to suggest the extraordinary number of delays in sentencing were for any of the procedural reasons discussed in *Bateh.* Whatever the trial court's intention, the effect was to suspend sentencing well beyond the maximum probation term. Mr. Witteck's probation term would have been tolled from December 29, 2011 until January 27, 2012 when at arraignment in response to inquiry from the court he admitted the violation of probation. In the absence of an intervening termination or modification of the probation by the trial court the term of probation expired in July 2012. When the probationary period expired the trial court was divested of all jurisdiction over the person of the Appellant.

The State of Florida argues, in part, "the court found Appellant in violation and placed him on the *sentencing path,* allowing Appellant to do community service in lieu of his *outstanding fines* and make progress toward payments." (Emphasis added). This argument misses the fact that Florida trial courts have no such authority. A *sentencing path* is not a sanction recognized in Florida law; as detailed above Florida trial courts

have no authority to suspend or withhold indefinitely the imposition of sentence upon a convicted defendant except as an incident to probation under the provisions of Chapter 948, Florida Statutes. If a *sentencing path* is simply court-supervised probation then that also is a sanction not recognized in Florida law. Likewise if what happened in the present case was a form of probation, that probation term and the jurisdiction of the trial court expired long before the jail sentence was imposed.

The State of Florida also argues that Florida Statute § 775.089(3)(c) allows the trial court to pronounce at the time restitution is ordered, a retention of jurisdiction for up to five years for the purpose of enforcing the restitution order. Appellee's reliance on Florida Statute § 775.089(3)(c) is misplaced. In the present case the violation of probation alleged was failure to pay probation supervision fees for three months, not failure to pay restitution. More importantly the trial court in the present case did not retain jurisdiction on the subject restitution. Assuming arguendo that Florida Statute § 775.089(3)(c) applied to the present case, the language of that statute does not extend a probation term; it allows a trial court to retain jurisdiction to enforce a restitution order.

Conclusion

For the reasons set forth above, this court concludes that the Appellant's probationary period expired in July 2012 at which time the trial court was divested of all jurisdiction over the person of Mr. Witteck. His Motion for Discharge should have been granted.

IT IS THEREFORE ORDERED that the order of the trial court denying the Appellant's Motion for Discharge is reversed. The case is remanded to the trial court with instructions to immediately discharge the Appellant.

ORDERED at Clearwater, Florida this 6th day of March, 2014.

Original order entered on March 6, 2014, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Thomas B. Freeman
Ngozi C. Acholonu, Esquire
Office of the State Attorney