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Dwaine Woodson v. State of Florida

THE NEXT CASE ON THE COURT'S CALENDAR , IS WOODSON VERSUS STATE OF FLORIDA.

MAY IT PLEASE THE COURT. MY NAME IS AL ENE ROGERS AND I REPRESENT MR . WOODSON IN THIS APPEAL.MR. WOODSON WOULD ASK THIS COURT TO REVERSE THE FIFTH DISTRICT'S HOLDING , FINDING THAT THE TRIAL COURT WAS CORRECT IN VIOLATING HIS PROBATION . CORRECT, IN VIOLATING HIS PROBATION. MR. WOODSON MAINTAINS THAT THE COURT ERRED WHEN IT FOUND THAT THE COURT ERRED, WHEN IT FOUND THAT CHAPTER 48 33 REQUIRED PLEAD COMPLIANCE . REQUIRED IMMEDIATE COMPLIANCE .

WE HAVE GOT A SITUATION WHERE A JUDGE HAS IMPOSED A CONDITION OF PROBATION. IT IS STATUTE. FOR SEXUAL OFFENDERS, THAT IS VERY STRICT , AND ARE YOU CONTENDING THAT , IF , SAY , THERE WAS A TEN - YEAR PERIOD OF PROBATION , THAT SOMEBODY COULD START THEIR SEXUAL OFFENDER TREATMENT , EIGHT YEARS INTO IT, THAT THIS STATUTORY SCHEME DOESN'T ENVISION THAT IMMEDIATELY AFTER THEY ARE PUT ON PROBATION , THAT THEY BEGIN AN ACTIVE TREATMENT FOR SEXUAL OFFENDER PROBLEMS ?

I DON'T BELIEVE THE STATUTE AS IT IS WRITTEN ENVISIONS THAT. I THINK THAT, IF THE COURT YOU THINK THEY COULD WAIT UNTIL YEAR EIGHT TO START SEXUAL OFFENDER TREATMENT?

AT THEIR PERIL , AT THEIR RISK, BECAUSE IF THEY DON'T SUCCESSFULLY COMPLETE THE SEXUAL OFFENDER

SEE, THE RISK, THOUGH, IS NOT THEIR RISK. THE RISK IS TO SOCIETY, THAT THE ONLY REASON THAT SOMEBODY THAT HAS BEEN PUT ON THIS TYPE OF RIGOROUS TREATMENT , IS BECAUSE THERE IS A CONCERN THAT THEY ARE, COULD BE A THREAT BUT THEY, UNDER INTENSIVE SUPERVISION , THEY ARE GOING TO GIVE THEM ANOTHER CHANCE, AND GIVEN THAT LEGISLATIVE CONCEPT IN THE WHOLE SCHEME , I JUST FIND THE ARGUMENT TO SAY, WELL, THERE WASN'T A START DATE GIVEN BY THE JUDGE , TO BE NOT A PROPER STATUTORY INTERPRETATION OF THE SCHEME. HOW DO YOU RESPOND TO THAT?

BECAUSE MR . WOODSON HAS DUE PROCESS RIGHTS , AND THERE ARE OTHER , IN THE FIRST, EXCUSE ME , IN THE SECOND DISTRICT , SPECIFICALLY, THERE ARE CASES WHICH ARE IDENTICAL TO THIS ONE, WHERE A PROBATIONER WHO IS TERMINATED, JUST AS MR. WOODSON WAS , HE WAS GOING TO HIS TREATMENT.

YOU SEE, THERE IS THE FACTUAL DISPUTE , AS TO WHETHER THERE WERE , WHETHER THE PROBATION OFFICER GAVE HIM WARNING AND WHETHER, UNDER THESE FACTS , HE WAS FAIRLY TERMINATED , BUT I THOUGHT YOU WERE ARGUING FOR THIS BRIGHT-LINE RULE WHICH WOULD SAY THAT , UNLESS THERE IS A DATE SET FOR COMPLETION IN THE PROBATION ORDER , THAT THEY COULDN'T BE VIOLATED. IS THAT WHAT YOU ARE ASKING US TO DO?

NOT THAT THERE COULD NEVER BE A VIOLATION. THERE COULD BE OTHER VIOLATIONS OF PROBATION. HOWEVER , IT IS OUR POSITION THAT, IF THE COURT DOES NOT ESTABLISH A DATE BY WHICH THIS TREATMENT IS TO BE COMPLETED , THEN THE PROBATIONER DOES HAVE THE LENGTH, IF THE STATUTE IS SILENT

SO WE WOULD HAVE TO SET UP SOMETHING LIKE A DRUG COURT FOR Z EB YOU THS ULE FOR SEXUAL OFFENDERS, WHERE THE TRIAL COURT IS THE ONE WHO IS MONITORING DO THEY START OR HAVE THEY FA LLEN OFF. THAT, OTHERWISE HOW IS THE JUDGE TO KNOW WHAT IS THE PROPER DATE THAT THIS HAS TO BE COMPLETED BY? I MEA N, IT IS ALL INDIVIDUALIZED. THAT IS THE WHOLE IDEA OF THIS TY PE OF PROBATION.

YES. AND THE JUDGE , WHEN DECIDING AND DETERMIN ING, IF THE JUDGE CHOOSES TO SET A DATE BY WHICH HE OR SHE WA NTS THIS CONDITION COMPLIED WITH , THEN THE JUDGE CAN SET THAT DATE, AND THEN YOU HAVE THE PROBATION OFFI CER DOING WHAT THE PROBATION OFFICER I S SUPPOSED TO DO AND ESTABLISH ING WHETHER OR NOT THE PROBATIONER IS IN COMPLIANCE WITH THE COURT 'S PROBATION ORDER.

DOES THIS RE ALLY CONTEMPLATE THAT THE PROBATION OFFICE R, REALLY, WOULD TAKE THE LEAD IN THESE THINGS AND TELL THE PROBATIONER , L O OK , YOU HAVE BEEN ORDERED TO DO SEX OFFENDER TREATMEN T. YOU NE ED TO START THIS PROGRAM , AND AS THE PROGRAM IS GOING AL ONG , IT IS REALLY THE PROBATION OFFICER WHO IS MONITORING THE THIS , DETERMINE ING WHETHER OR NOT YOU ARE GOING , WHETHER OR N OT YOU ARE PARTICIPATING , WHETHER OR NOT YOU AREPAYING THE COST OF THIS, ANDSO WHAT IS WRONG WITH THAT K IND OF SCHEME?

THERE IS NOTHING WRONGWITH THAT KIND OF SCHEME. IN FACT

ISN'T THAT WHAT HAPPENED HERE? THE PROBATION OFFICER DETERMINED THAT HE WAS NOT PAYING THE COST OF IT , THATHE WAS GOING AND NOT PARTICIPATING , AND THEN THEY BASICALLY SAID , YOU ARE NOT PARTICIPATING. YOU ARE NOT GETTING ANYTHING OUT OF THIS PROGRAM, AND TOLD HIM THAT HE WAS TERMINATED.

I THINK THE DIFFER ENCE HERE , IS THAT, IN LIGHT OF THE FACT THAT HE ST ILL HAD HALF OF HIS , A YEAR AND-A-HALF OF T IM E LE FT IN ORDER FOR HIM TO COMPLY WITH THESE MAND ATORY CONDITIONS, I F HE WAS IN THE SE COND DISTRICT, HE WOULDN'T HAVE BEEN FOUND IN VIOL ATION.

SO HE, SO THE PROBATION OFFICER SAID, OKAY , YOU ARE MESSING UP ON THIS PROGRAM. I AM GOING TO SEND YOU TO ANOTHER PROGRAM. BASICALLY IS WHAT YOU ARE SAYING? YOU SHOULD KEEP GIVING THE DEFENDANT SOME KI ND OF PROGRAM T O GO TO, UN TIL HIS PROBATION IS OFFICER .

- - UNTIL HIS PROBATION IS O VER.

IF THERE IS NOT A DATE CERTAIN EITHER IMPOSED BY THE LEGISLATURE OR IMP OSEDBY THE COURT.

WH Y IS THE DATE SO CRITICAL HERE , AND THAT IS I , UNDER THE FACTS OF THIS PARTICULAR CASE , IF I UNDERSTAND IT CORRECTLY , HE DID ENROLL IN A PROGRAM , SO I AM A LITTLE CONCERNED A BOUT WHET HER WE ARE UN DULY FOCUSING ON THE DATE , BECAUSE THE DATE , REALLY , IN A SENSE, IS MOOTED HERE , BECAUSE CLEARLY , THERE APPEARS TO HAVE BEEN AN AGREEMENT AND A N UNDERSTANDING THAT HE NEEDED TO ENROLL IN A PROGRAM RIGHT A WAY , AND HE DID. IS THAT CORRECT?

HE DID , YOUR HONOR.

SO I A M MORE CONCERNED ABOUT WHETHER OR NOT IT WAS THE FACT THAT HE DID ENROLL IN A PROGRAM AND HE PARTICIPATED AT SOME LEVEL, BUT, THEN , HE FA ILED TO PARTICIPATE TO THE SATISFACTION OF WHOEVER IS RUNNING THE PROGRAM , AND BECAUSE HE WASN'T DOING THESE OTHER THINGS COMPLETING HIS HOMEWORK ASSIGNMENTS OR PARTICIPATING IN CL ASS

AND DOING HIS AUTOBIOGRAPHY AND THE THINGS THAT WERE AN ESSENTIAL PART OF THIS , AND HE WASN 'T PAYING THE FEE , HE WAS TER MINATED FROM A PROGRAM THAT HE DID TIMELY ENROLL IN , AND THE JUDG E HERE HAS, REALLY, FOUND THAT IT WAS HIS TERMINATION FROM THAT AND FAILURE TO SUCCESSFULLY PARTICIPATE , THAT CONSTITUTES HIS VIOLATION. SO I AM A LITTLE CONCERNED ABOUT WHETHER THE TIME IS A RED HER RING HERE, THAT IS AS O PPOSED TO , AND PERHAPS THE HIV TEST IS A BETTER EX AMPLE OF TIME , BUT T O , HE LP M E WITH, S INCE WE ARE NOT T ALKING ABOUT HE DIDN'TENROLL IN A PROGRAM , AND HE THOUGHT HE HAD PLENTY OF TIME TO ENROLL IN ONE , BECAUSE HIS PROBATION WAS STILL LONG ER. HERE WE HAVE EN ROLLMENT AND FAILURE , AND A VIOLATION OF PROBATION BASED ON THAT FAILURE. WHY DOESN'T THAT , R EALLY , REMOVE THE ISSUE OF TIMING AS A GENUINE ISSUE HERE?

THE , BECAUSE IT IS ESTABLISHED PREC EDENT IN FLORIDA, THAT WHEN YOU ARE ON PROBATION , AND YOU FAIL TO COMPLETE A SPECIAL CONDITION , IN THIS CASE A MANDATORY CONDITION, THAT, IF YOU STILL HAVE TIME REMAINING ON YOUR PROBATIONARY ORDER IN WHICHYOU COULD COMPLETE THAT PROBATION , THAT IT IS NOT A WILLFUL AND SUBSTANTIAL VIOLATION. THAT IS THE DISTINCTION.

ARE THOSE OTHER CASE S YOU ARE RE LYING ON , WHERE THE CONDITIONS WERE MAN DATORY BY STATUTE?

IN

THE CONFLICT CASES.

IN LYMAN AND LAWSON , YES , THEY WERE. IN YOUNG , THERE WAS NO 948.03 AT THAT TIME, BUT THE I DEA BE HIND IT WAS THE SA ME. IT IS IMPORT ANT

LET ME, THEN , A SK A SECOND QUESTION.

YES.

WHAT THE JUDGE FOUND HERE, WELL, THE FIRSTQUESTION IS , THE STATUTE THAT APPLIES IN THIS CASE , REQUIRES A CTIVE PARTICIPATION . RIGHT?

YES.

AND THE T R IAL JUDGE FOUNDMR. WOODSON SEND THE BENEFIT OF THE STIPULATED DOWNWARD DEPARTURE AND PART OF THE UNDERTA KING AS PART OF THE STIPULATION , WAS HIS COMPLIANCE WITH AND ACTIVELY PARTICIPATING IN A TREATMENT PROGRAM , AND IT IS THE TESTIMONY OF THE PROBATION OFFICERS AND THE COUNSELOR HERE, THAT HE DID NOT , AND THEY ARE THE ONES IN THE BEST POSITION TO AS SESS WHETHER HIS TREATMENT WAS ACTIVE, WHICH IS ANOTHER WAY OF SAYING WHETHER IT WAS GENUINE PARTICIPATION OR JUST GOING TH ROUGH THE MOTIONS, AND WHAT THE COURTFOUND , BASED ON THE TESTIMONY BEFORE HIM OR HER , WAS THAT THERE WAS NOT ACTIVE PARTICIPATION AS REQUIRED BY THE STATUTE , AND THEREFORE HE HAD VIOLATED THAT MAND ATORY PROVISION OF THE PROBATION, IS THAT CORRECT?

THAT IS CORRECT.

AND SHOULD OUR REVIEW BE WHETHER THAT FI NDING WAS AN ABUSE OF DISC RETION?

I THINK THAT SHOULD BE PART OF THE REV IEW BY THIS COURT. THE POSITION THAT WE HAVE IS THAT FINDING , FIRS T WE DO TAKE ISSUE WITH THE FINDINGTHAT HE WAS NOT ACTIVE LYPARTICIPATING , AND THAT IS A FACTUAL ISSUE. AS THE RE CORRD BEARS OUT THAT THE LEVEL OF PARTICIPATIONTHAT HE WAS ENGAGING WITH , WAS COMMON AND EXPECTED FORMEN IN A G

GROUP TYPE SETTING FOR THIS TYPE OF COUNSELING, THIS SEXUAL BEHAVIOR COUNSELING. BUT GETTING BACK TO, I THINK, YOUR FIRST QUESTION, WE MAINTAIN THAT THE FACT THAT THE COURT BELIEVED THAT HE WAS NOT ACTIVELY PARTICIPATING IS A PREMATURE DECISION, IS A PREMATURE FINDING, BECAUSE HE DID HAVE TIME LEFT ON THE PROBATION.

THAT IS WHERE TIME DOES COME IN, SO WE ARE NOT TALKING ABOUT TIME AND BEGINNING IT, BUT THIS IDEA THAT SOMEHOW, BY SAYING HE HAD TIME TO COMPLETE IT, YOU ARE READING OUT THE PART THAT SAYS THAT HE HAS GOT TO BE ACTIVELY PARTICIPATING, AND THEN COMPLETE IT. SO IF HE IS NOT, THE UNDERLYING ISSUE IN THIS CASE WAS HIS FAILURE TO NOT ACTIVELY PARTICIPATE, WILLFUL, AND DID HE EXPRESS A WILLINGNESS TO GO INTO ANOTHER PROGRAM. NOW, THAT AS YOU HAVE ADMITTED, IS, THE TRIAL COURT FOUND THAT HE WAS NOT, THAT IT WAS INTENTIONAL AND THAT HE DIDN'T EXPRESS A WILLINGNESS TO KEEP IT AND THAT IT WAS NOT GENUINE, AND THAT IS THE, SO, WHAT, WHAT WOULD YOU SAY SHOULD HAVE HAPPENED? THE JUDGE SHOULD HAVE SAID, WELL, EVEN THOUGH YOU ARE NOT DOING IT WELL, EVEN THOUGH YOU ARE NOT DOING IT, I SEE YOU HAVE ANOTHER YEAR AND-A-HALF SO YOU HAVE GOT TO DO IT. IS THAT WHAT THE JUDGE SHOULD HAVE SAID?

INITIALLY I WOULD LIKE TO STATE THAT HE DID EXPRESS A WILLINGNESS TO GO BACK INTO THE TREATMENT AND SAID THAT HE DID THINK THAT HE WOULD BENEFIT.

DID HE SAY THAT AT THE PROBATION HEARING?

YES, HE DID.

ISN'T THAT, I MEAN, I THINK THAT, WHEN HE IS FACING, NOW, 11 YEARS, YOU KNOW, A LOT OF, THERE MIGHT BE, THAT IS WHEN, THAT IS WHEN HE SAID IT NOT TO THE PROBATION OFFICER IN, I THINK, WHAT WAS IT, TWO YEARS FROM THE TIME THAT THIS STARTED, THAT THE PROBATION WAS VIOLATED?

IT WAS VIOLATED A YEAR AND-A-HALF INTO THE PROBATION.

SO IT WAS ON GOING KBHUN KMUN INDICATION BETWEEN THE PROBATION OFFICER AND - - THERE WAS ONGOING COMMUNICATION BETWEEN THE PROBATION OFFICER AND THE PROBATIONER DURING TAKE PERIOD OF TIME.

YES, THERE WAS.

AND THE PROBATION OFFICER WAS THE ONE WHO DETERMINED THAT THERE WEREN'T ANY ATTEMPTS TO GENUINELY ACTIVELY PARTICIPATE.

BUT THAT POSITION FROM THE PROBATION OFFICER WAS ARBITRARY AND CAPRICIOUS, IN THAT MR. WOODSON, AGAIN, IT IS A TIME ISSUE, WAS COMPLYING WITH THE COURT'S ORDER. THE MANDATORY CONDITIONS OF 948 ARE VARIOUS, VERY STRINGENT, VERY STRINGENT, THERE ARE A LOT OF THEM. HE WAS IN COMPLIANCE WITH THE MAJORITY OF THOSE CONDITIONS. THE PROBATION OFFICER'S DETERMINATION, AFTER SIX MONTHS OF HIM HAVING REGULAR ATTENDANCE, BASED UPON THE COUNSELOR'S TESTIMONY THAT HE APPEARED UNINTERESTED AND UNMOTIVATED, ESPECIALLY IN LIGHT OF THE FACT THAT THE COUNSELOR TESTIFIED THAT THAT IS COMMON AND TYPICAL. IT IS AN ARBITRARY AND CAPRICIOUS VIOLATION, BECAUSE IT DOESN'T SPEAK TO WHETHER OR NOT HE WAS ACTIVELY PARTICIPATING.

WHY DID THEY TERMINATE HIM, IF YOU HAVE A SITUATION WHERE THE COUNSELOR IS SAYING OH, NO, THIS IS WHAT WE EXPECT AND THAT IS, AND SO IT WOULD SEEM TO ME THAT, IF THAT IS WHAT IS GOING ON, THAT THE COUNSELOR WOULD SAY, WELL, AND WE ARE NOT GOING TO TERMINATE IT TO TERMINATE HIM. THAT WE ARE GOING TO WORK OUR WAY THROUGH. THAT I AM

JUST CONCERNED THAT WHAT SEEMS TO ME THAT YOU ARE IN VITING BY THIS RULE OF TIME, WHEN WE DO HAVE AN ENROLLMENT IN A PROGRAM RIGHT AWAY, IS THAT THE PROBATIONER, NOW, CAN MORE OR LESS THUMB HIS NOSE AND SAY, LOOK, I HAVE GOT FIVE YEARS ON MY PROBATION. I CAN COMPLETE ONE OF THESE PROGRAMS IN SIX MONTHS. I HAVE STILL GOT FOUR YEARS TO GO, AND I AM OUT OF HERE. I AM NOT GOING TO PARTICIPATE IN THIS PROGRAM, AND I AM GOING TO WAIT UNTIL THERE IS A YEAR LEFT OR WHATEVER ON MY PROBATION, AND THEN MAY BE I WILL TAKE IT SERIOUSLY, AND THAT SEEMS TO ME, TO BE AN ABUSE OF THE PROBATION PRIVILEGE OR PROCESS HERE, AND HELP ME WITH WHY RULING IN YOUR FAVOR WOULDN'T INVITE THAT KIND OF DISRESPECT TO THE PROBATION?

I UNDERSTAND YOUR POSITION, AND I WANT TO EXPRESS, AGAIN, THAT SITUATION DID NOT HAPPEN HERE. HE WAS GOING, AND HE WAS TRYING TO DO THE BEST THAT HE COULD, AND EVEN WITH THAT FEAR, IT DOES NOT WARRANT THE POSITION THAT THE FIFTH DISTRICT TOOK, BY READING INTO THIS LEGISLATION A COMPONENT THAT REQUIRES IMMEDIATE COMPLIANCE, SO SOMEBODY ON THIS PROBATION, SEX OFFENDER PROBATION IN THE FIFTH DISTRICT, MUST IMMEDIATELY REPORT AND BEGIN COMPLIANCE. SOMEBODY IN ANOTHER DISTRICT DOESN'T HAVE TO. I DON'T SEE THE DISTINCTION BETWEEN THIS TYPE OF PROBATION AND EVERY OTHER

THIS COMES BACK TO THE ISSUE ABOUT WHETHER OR NOT THERE IS A DIFFERENCE BETWEEN THIS CONDITION.

YES.

AND, PERHAPS, SOME OTHER, YOU KNOW, ANGER MANAGEMENT OR

ABSOLUTELY.

WHILE CLEARLY THERE WOULD APPEAR TO BE SOME CONSISTENT POLICY RULES THAT THE SOONER THE BETTER, IF SOMEBODY HAS GOT A PROBLEM WITH ANGER, OR DRUGS, OR ALCOHOL, THE SOONER, YOU KNOW, BUT HERE IT APPEARS THAT, BECAUSE THIS IS A VERY STRICT LEGISLATIVE MANDATED CONDITION, THAT THERE WAS AN INTENTION THAT THERE BE AN IMMEDIATE ENROLLMENT, SO THAT THIS IS PART OF THE SAFEGUARD THAT THIS DEFENDANT IS GOING TO ASSURE THE PUBLIC, YOU KNOW, THROUGH THE COURTS, BY PARTICIPATING IN THIS, AND THEREFORE REDUCING THE DANGER THAT HE MIGHT CONSTITUTE, TO THE GENERAL PUBLIC, SO ISN'T IT, ISN'T THERE, PERHAPS, A GOOD REASON FOR THERE TO BE A DIFFERENCE?

I DISAGREE, YOUR HONOR. I DON'T THINK THAT THERE IS A VALID ARGUMENT TO BE MADE THAT IMMEDIATE COMPLIANCE WITH THIS THAT IMMEDIATE COMPLIANCE WITH THIS TYPE OF PROBATION, VERSUS IMMEDIATE COMPLIANCE WITH DRUG OFFENDER OR SOME OTHER TYPE OF ANGER MANAGEMENT, I DON'T SEE THE DISTINCTION THAT THERE IS ANYMORE DANGER TO BE HAD.

YOU DON'T THINK THAT THE LEGISLATURE AND THE PUBLIC GENERALLY, IS MORE CONCERNED WITH, I MEAN, CLEARLY FROM THE PANOPLY OF LAWS AND HERE WE END UP WITH A LAW THAT YOUR CLIENT MAY WELL BE EXPOSED TO, UNDER THE "JIMMY RYCE" ACT.

SHE IS IN HER REBUTTAL AND JUSTICE CANTERO HAD A QUESTION.

IN THIS CASE, DIDN'T THE PROBATION OFFICER SPECIFICALLY TESTIFY, ALSO, THAT SHE IMPOSED CERTAIN REQUIREMENTS ON THE DEFENDANT. SHE SAID, I WANT YOU TO BRING YOUR HIV TEST BY X DATE AND HE DIDN'T DO IT. HE NEVER GAVE HER AN EXCUSE FOR NOT DOING IT SHE REPEATED THE ADMONITION BRING YOUR HIV TEST. HE DIDN'T BRING IT IN. HE DIDN'T OFFER AN EXCUSE FOR NOT BRINGING IT IN, AND IF WE HOLD IN YOUR FAVOR, AREN'T WE JUST SAYING IT DOESN'T MATTER WHAT THE PROBATION OFFICER REQUIRES THAT MATTERS WHAT THE STATUTE SAYS. THE STATUTE DOESN'T PRESENT ANY TIME DEADLINES. THE JUDGE DIDN'T GIVE

ANY TIME DEAD LINES , SO THE PROBATION OFFICER CAN'T GIVE ANY TIME DEAD LINES.

YOUR HONOR, IF YOU HOLD IN MY FAVOR , WHAT YOU ARE SAYING IS THE PROBATION OFFICERS, AS THEY HAVE ALWAYS BEEN REQUIRED TO DO, MUST UP HOLD THE INITIAL ORDER OF PROBATION FROM THE TRIAL COURT , AND

SINCE THE INITIAL PROBATION ORDER DID NOT CONTAIN A TIME, THE PROBATION OFFICER HAD NO DISCRETION WHATSOEVER, TO SAY YOU NEEDED TO BRING YOUR HIV TEST WITHIN SIX MONTHS , WITHIN A YEAR. YOU CAN'T SAY THAT , BECAUSE THE JUDGE DIDN'T SAY WITHIN A YEAR, SO SHE CAN'T GIVE ANY KIND OF DEADLINE?

SHE DOESN'T HAVE THE AUTHORITY TO ORDER SOMETHING THAT IS NOT IN THE ORIGINAL COURT ORDER. THAT WAS FOR THE JUDGE TO DETERMINE.

AND THAT IS WHERE WE GET BACK TO THE STATUTE , IS SPECIFIC AS TO THE ACT OF PARTICIPATION, AND IF YOU WANT TO SAVE TIME FOR REBUTTAL.

YES, I DO. THANK YOU .

MAY IT PLEASE THE COURT. MY NAME IS PAM KOLLER AND I REPRESENT THE ATTORNEY GENERAL IN THIS APPEAL.

WOULD YOU GIVE US AN IDEA, FROM THE TIME THAT THIS PROBATION WAS IMPOSED , EXACTLY WHAT THE PROBATION OFFICER TESTIFIED AND WHAT THE RECORD SHOWS, AS TO THE INTERACTION BETWEEN THE PROBATIONER AND THE PROBATION OFFICER , AND THE REASON I ASK THAT , IS BECAUSE IF YOU LOOK AT THIS VERY SPECIFIC STATUTORY SCHEME, YOU KNOW , YOU HAVE SEXUAL OFFENDER PROBATION OFFICERS WHO HAVE REDUCED CASELOADS. THEY EMPHASIZE TREATMENT AND SUPERVISION. AND INDIVIDUALIZED TREATMENT , AND THEY HAVE TO HAVE SPECIALIZED TRAINING, SO WE DON'T, WHAT I AM AFRAID OF THAT I WAS SEEING IN THIS RECORD WAS SOMEHOW A PROBATION OFFICER THAT WAS SAYING, WELL, YOU DIDN'T GO TO THAT PROGRAM , SO, YOU KNOW, AND YOU HAD NO EXCUSE SO NOW I AM TERMINATING YOU , AS OPPOSED , OR I AM GOING TO TELL THE JUDGE THAT YOU ARE NOW IN WILLFUL VIOLATION , AS OPPOSED TO REALLY UNDERSTANDING THAT YOU ARE DEALING WITH A UNIQUE KIND OF OFFENDER AND THAT, MAYBE , HE NEEDED AN INDIVIDUALIZED PROGRAM OR WHATEVER, SO IF YOU CAN SORT OF TELL US HOW , WHAT KIND OF INTENSIVE SUPERVISION THERE WAS AND WHY THIS VIOLATION WAS WILLFUL .

CERTAINLY. WHEN HE ORIGINALLY WAS SENTENCED ON JULY 31 , HE WAS INFORMED OF HIS CONDITIONS. ONE OF WHICH WAS THAT HE WOULD SUBMIT TO SEX OFFENDER COUNSELING. WHEN HE WENT BACK TO SPEAK WITH HIS PROBATION OFFICER, AGAIN HE HAD TO SIGN A FORM SAYING THAT HE UNDERSTOOD THAT THAT WAS ONE OF THE CONDITIONS OF HIS PROBATION. HE ENTERED A PLEA AGREEMENT TO SEX OFFENDER PROBATION FOR THREE YEARS. HE WAS REFERRED TO A SEX OFFENDER TREATMENT COUNSELING PROGRAM BECAUSE HE WAS REQUIRED TO DO IT . APPARENTLY HE WAS APPEARING , I GUESS , IN A FIVE-MONTH PERIOD, THEY SAID HE SHOWED UP, MAYBE , 17 , 18 TIMES. HE DID NOT SHOW UP FOR THREE TIMES. HE WOULD SHOW UP AND BASICALLY NOT PARTICIPATE AT ALL. INTACT, HE EVEN SLEPT - - IN FACT, HE EVEN SLEPT DURING SOME OF THE CLASSES.

DURING THAT TIME PERIOD WHEN HE WASN'T, REALLY , SEEMED TO BE MOTIVATED , DID THE COUNSELOR GET BACK WITH THE PROBATION OFFICER , TO TELL HIM OR HER THAT HE WASN'T ACTIVELY PARTICIPATE SOMETHING .

THE RECORD INDICATES , OBVIOUSLY, THAT THE COUNSELOR DID SPEAK TO THE DEFENDANT AND SAY YOU ARE NOT PARTICIPATING. YOU ARE NOT DOING YOUR HOMEWORK. YOU NEED TO DO BETTER OR YOU ARE NOT GOING TO PROGRESS IN THIS PROGRAM. THE PROBATION OFFICER,

APPARENTLY IN HER VIOLATION REPORT, INDICATES SHE TOLD THE DEFENDANT HERSELF, YOU ARE NOT PARTICIPATING. YOU ARE NOT DOING WHAT YOU ARE SUPPOSED TO. YOU COULD GET VIOLATED IF YOU DON'T DO THIS. HE DIDN'T CHANGE HIS BEHAVIOR AT ALL. HE CONTINUED TO NOT PARTICIPATE AND NOT APPEAR INTERESTED AND HE WAS EVENTUALLY VIOLATED FOR THAT.

WAS THERE A TIME WHERE THE PROBATION OFFICER SAID, BECAUSE, AGAIN, WHAT WAS, LET ME ASK YOU WHAT WAS HIS INDIVIDUALIZED TREATMENT PLAN? IS THERE ONE IN THE RECORD AS TO, WHAT HOW HE WAS, YOU KNOW, INDIVIDUALLY TO BE TREATED?

HE WAS SUPPOSED TO PARTICIPATE IN GROUP THERAPY. THE COUNSELOR TESTIFIED THERE WAS NOTHING PSYCHOLOGICALLY PROHIBITING THE DEFENDANT FROM BENEFITING FROM A GROUP THERAPY SITUATION. WHEN THE DEFENDANT TOLD HIM I DON'T LIKE IT, HE SAID, WELL, NOBODY DOES, BUT YOU HAVE GOT TO DO IT ANYWAY, IN ORDER TO PROGRESS IN THIS PROGRAM. AND HE SAID, IN FACT, IF YOU DO WHAT YOU ARE SUPPOSED TO DO, IF YOU FINISH YOUR MODULES, AS THEY CALL THEM, YOUR HOMEWORK ASSIGNMENTS, HE SAID, YOU GET A FINAL EXAM, AND THEN IF YOU PASS THAT FINAL EXAM, YOU ONLY HAVE TO SHOW UP ONCE A MONTH FOR A CHECKUP. YOU DON'T HAVE TO BE HERE EVERY WEEK FOR COUNSELING.

SO FOR THE 17 TIMES HE WAS GOING, WAS THAT ONCE A WEEK?

YES.

SO THAT WAS OVER, FROM THE TIME THE PROBATION STARTED, UNTIL THE LAST THREE TIMES, HOW MANY MONTHS HAD ELAPSED?

WELL, THIS COUNSELOR ONLY KNEW ABOUT FIVE MONTHS OF IT, BECAUSE HE WAS REFERRED, I THINK HE STARTED IN AUGUST.

SO HE DID START. HE STARTED IMMEDIATELY.

RIGHT. HE STARTED IMMEDIATELY. THIS COUNSELOR ONLY SUPERVISED HIM, I THINK, FOR FIVE MONTHS OF THAT PERIOD, THE LAST FIVE MONTHS OF IT.

SO, BUT, SO HOW MANY, UNTIL HE STARTED UNTIL HE WAS TOLD THAT HE COULDN'T CONTINUE IN THAT PROGRAM, HOW MANY MONTHS HAD GONE BY?

HE WAS TERMINATED FROM THE PROGRAM MAY 30. SO HE STARTED IN AUGUST OR SEPTEMBER.

AND THEN WAS HE, DID HE INDICATE AT THAT TIME, DID THE PROBATION OFFICER GO RIGHT AWAY, TO COURT TO VIOLATE HIM, OR WAS THERE ANY ATTEMPT TO SEE ABOUT HIM GOING BACK INTO THAT PROGRAM OR TO ANOTHER PROGRAM?

HE WAS TERMINATED 3450 I. THE DEFENDANT WAS TERMINATED MAY 30 6789 THE DEFENDANT WAS SUPPOSED TO SHOW UP WITH AN HIV TEST PROOF IN JUNE. APPARENTLY SHE WOULD SEE HIM AT THE PROGRAM. SHE WOULD SEE HIM AT THE TREATMENT THERAPY PLACE AND TALK TO HIM AND TELL HIM.

IS THAT IN YOUR RECORDS?

YES. SHE SAID SHE SAW HIM NUMEROUS TIMES AND TOLD HIM I NEED PROOF OF HIV TESTING, I NEED PROOF OF HIV TESTING, AND FINALLY SHE SENT HIM A LETTER SAYING I HAVE TO HAVE THIS BY JUNE 5 OR YOU ARE GOING TO BE IN TROUBLE, AND HE STILL DIDN'T SHOW UP ON JUNE 5 WITH PROOF OF IT, EVEN THOUGH HE CLAIMED HAD HE TAKEN THE TEST TWICE.

ACTUALLY HE WAS SENTENCED IN JULY 2000.

CORRECT.

AND THEN HE GOT A NEW OFFICER IN '01.

I THINK IT WAS JULY 2 001.

20 01. SO I AM SAYING FOR THE FIRST YEAR OF PROBATION, THERE IS NO EVIDENCE THAT I SEE THAT HE DID ANY SEX OFFENDER TREATMENT PROGRAM.

IT SAID THAT HE WAS REFERRED. I KNOW HE WAS EVALUATED ON A AUGUST 6.

BOTTOM LINE , HE DIDN'T GET VIOLATED, THE VIOLATION WAS NOT FILED UNTIL THE SUMMER OF '02 AND HE WAS PLACED ON , TWO YEARS EARLIER.

CORRECT. NO. ONE YEAR EARLIER .

HE WAS SENTENCED IN JULY OF

2001.

WAS IT IT 2001?

YES.

SO HE STARTED THIS PROGRAM AL MOST IMMEDIATELY A FTER SENTENCING, IS THAT CORRECT?

THAT IS WHAT IT APPEARS. I CAN' T BE S U RE.

HELP ME W ITH THE PROPOSITION, YOU KNOW , THERE ARE CONFLICTING THINGS GOING ON HERE. EVEN THE TRIAL COURT , OFCOURSE, SAID THE BETTER PRACTICE IS TO HAVE TIME STANDARDS HERE, BUT HE WAS CONCERNED AB OUT THE STATUTORY SCHEME.

SURE.

AND CL EARLY TIME STANDARDS DO , OBVIOUSLY , HELP, AS THE SE COND DIST RICT HAS INDICATED IN A NUMBER O F TIMES. I AM TRYING TO GET, THOUGH, TO SORT OF THE MEAT OF COCONUT , AND THAT IS DO WE HAVE A SITUATION HERE , WHERE THE COUNSELOR , WHO I ASSUME WOULD BE THE MOST IMPORTANT WITNESS IN T HIS CASE , REALL Y , IS TESTIFYING TO THE TRIAL COURT JUDGE THAT , JUDGE , YOU KNOW , WE HAVE T RIED TO WORK WITH THIS FELLOW, AND IT ISN'T WO RKing , AND HE SHOULD BE TERMINATED , BECAUSE HE IS NOT COOPERATING , AND REALLY IT IS NOT A MA TTER OF TIME. IT IS A MATTER O F FA ILURE , AND SO THAT WOULD SEEM TO ME , TO BE , IF A TRIAL JUDGE, THEN, BASED ON THAT KIND OF EVIDENCE AND TESTIMONY , THAT THIS PERSON IS JUST REJECTING THIS REQUIREMENT , THAT THAT SEEMS TO BE THE K IND OF SITU ATION THAT THEY PROBABLY SHOULD BE VIOLATED , YOU KNOW , AND NOW I AM CONCERNED ABOUT THAT , TH OUGH, AS O PPOSED TO , WELL , HE IS ATTENDING THE SESSIONS, BU T IS HE NOT DOING SOME OF THE THINGS THAT HE SHOULD DO, AND THIS IS WHAT WE TYPICALLY SEE , IS THAT INITIALLY , THEY RESIST , AND THEY DON'T WANT TO SAY OUT L OUD, YOU KNOW, THAT THEYHAVE GOT A PROB LEM OR W RITE IT DOWN , AND , IN A N AUTOBIOGRAPHY OR WHAT EVER , AND IF HE WILL COME , THAT WE CAN WORK OUR WAY THROUGH THIS , AND THAT THAT IS , REALLY, YOU KNOW , WHAT WE WANT TO DO. HELP ME, IF WE CAN CHARACTERIZE THIS CASE IN ONE PLACE OR THE OTHER HERE.

THIS ACTUALLY KIND OF GETS BACK TO WHAT MY MAIN POSITION IS, WH ICH IS AL L WE HAVE HERE IS AN ABUSE OF DISCRETION CASE. I MEAN , THIS, THESE ARE F ACTUAL DISP UTES. THIS IS BAS ICALLY A TRIAL JUDGE HOLD ING A HEARING AND LISTENING TO ALL OF THESE DIFFERENT

TYPES OF FACTS, WHETHER OR NOT HE HAD JUST STARTED HIS PROBATION FOUR MONTHS AND HADN'T BEEN TERMINATED, IS THAT A VIOLATION, BUT HE WASN'T PARTICIPATING, IS THAT A VIOLATION. IF HE HAS BEEN ON PROBATION FOR TWO YEARS AND HE HASN'T SIGNED UP FOR THE CLASS, ALL OF THESE THINGS ARE DIFFERENT FACTS, BUT THAT IS WHY WE HAVE A HEARING AND THAT IS WHY WE HAVE AN ABUSE OF DISCRETION STANDARD.

BUT WE WANT THIS STUFF TO WORK. OKAY. WE CAN HAVE AN ABUSE OF DISCRETION STANDARD, WHERE WE MAY HAVE ONE TRIAL JUDGE THAT, BY GOSH, YOU DON'T FILE ONE REPORT, AND I DON'T CARE WHETHER YOU GOT IN AN AUTOMOBILE WRECK THE DAY THAT YOU WERE HEADING DOWN THERE TO FILE IT, BOY, I AM GOING TO NAIL YOU, THAT IT WAS A PRIVILEGE THAT YOU GOT ON PROBATION, KIND OF THING TO BEGIN, WITH AS OPPOSED TO ANOTHER JUDGE THAT BENDS OVER BACKWARDS OR SOMETHING. WE WANT THIS TO WORK, REALLY, IS WHAT SURE.

SO TELL ME WHAT THE STRONGEST EVIDENCE WAS HERE, FROM THE COUNSELOR OR OTHERWISE, THAT THIS PERSON, REALLY, WAS WILLFULLY IGNORING THESE REQUIREMENTS OF HIS PROBATION. WHAT WAS THE STRONGEST EVIDENCE THAT, DID IT THE COUNSELOR SAY SOMETHING THAT, JUDGE, IT IS NOT GOING TO WORK WITH THIS GUY?

THE COUNSELOR SAID, YES, HE WAS MAKING NO PROGRESS, THAT HE WAS UNMOTIVATED, UNINTERESTED. HE HAD SPOKEN TO THE DEFENDANT ABOUT IT AND THE DEFENDANT DID NOTHING TO CHANGE IT.

SO THAT WAS THE TESTIMONY.

YEAH, AND THERE WAS NO TESTIMONY HE HAD EVER BEEN ASKED OR THERE WAS ANY INQUIRY WHETHER OR NOT THE DEFENDANT COULD GET BACK INTO THE PROGRAM. THE ONLY TIME WE EVER HEARD ANYTHING ABOUT THAT IS HIS LAWYER SAID DO YOU NEED COUNSELING AT THE HEARING. YEAH. I NEED COUNSELING. WOULD YOU GO BACK? YES, I WOULD.

LET ME TALK ABOUT THE CONFLICT IS SUE. WHEN YOU CITED THE SUPPLEMENTAL AUTHORITY OF THE MILLS CASE OUT OF THE FOURTH DISTRICT, AND THEY SEEM TO CHARACTERIZE THAT ALL OF THESE CASES ARE ACTUALLY, REALLY, NOT IN CONFLICT.

CORRECT.

THEY SAY THAT GENERALLY UNEXCUSED AND SEANCES FROM REQUIRED THERAPEUTIC PROGRAMS CONSTITUTE WILLFUL VIOLATIONS, AND THEN THERE ARE CITATIONS TO SOME CASES INCLUDING SOME FROM THE SECOND DISTRICT, AND THEY SAY WHILE THE CITED CASES DID INVOLVE THE LACK OF SPECIFICITY AS TO A TIME PERIOD, THEY ARE DISTINGUISHABLE, BECAUSE IN EACH CASE THE CONDUCT WAS NOT DEEMED WILLFUL, AT PERSON HAD EXPRESSED WILLINGNESS TO COMPLETE THE PROGRAM.

CORRECT.

DO YOU THINK THE SECOND DISTRICT ENUNCIATED A BRIGHT-LINE RULE ABOUT, BECAUSE THERE IS NO DATE FOR COMPLETION, YOU CAN'T VIOLATE SOME BODY BEFORE THE END OF THE PROBATIONARY PERIOD?

I DON'T THINK SO. BECAUSE IF YOU LOOK AT YOUNG, THE CASE THAT THE FIFTH CITED CONFLICT WITH, IT WAS DIFFERENT FACTS. ALL THE DEFENDANT WAS ORDERED TO DO IN THAT CASE WAS COMPLETE MDO COUNSELING. HE WAS NEVER TOLD TO ACTIVELY PARTICIPATE IN COUNSELING. IN THAT ONE HE HAD A PERSONALITY CONFLICT WITH HIS COUNSELOR. THE COUNSELOR TESTIFIED I WILL TAKE HIM BACK. THE DEFENDANT ASKED FOR A CONTINUANCE TO

GET INTO ANOTHER PROGRAM. WE HAVE NONE OF THESE FACTS IN THIS CASE, AND THIS IS SUCH A FACT-INTENSIVE SITUATION AS YOU STATED IN STATE V CARTER, IT IS A CASE-BY-CASE ANALYSIS, AND SO THE FACTS ARE SO IMPORTANT IN THESE CASES AND THE FACTS ARE VERY DIFFERENT BETWEEN THIS CASE AND YOUNG AND LAWSON. THEY ARE VERY DIFFERENT FACTS, AS FAR AS WHAT WE HAVE.

IT SEEMS THAT MOST OF THE FOCUS WAS ON WHETHER HE WAS ACTUALLY PAYING AS HE WENT, AND YOU KNOW, THIS PERSON CLEARLY HAD SOME ET CETERA, BUT YOU KNOW, AGAIN, IN TERMS, IT IS A SIGNIFICANT DECISION, WHEN SOMEBODY WHO IS GLITCHES ESSENTIALLY A YEAR IN IS GIVEN ESSENTIALLY A YEAR IN JAIL IS NOW GOING TO BE SENTENCED OR I ASSUME NOW IS SERVING TIME, ELEVEN YEARS, AND YET AGAIN, IF HE, SO WAS THE FOCUS ON THE NOT PAYING AS HE WENT, IS THAT REALLY WHY HE WAS DISCHARGED?

NO. THAT IS WHAT THE COUNSELOR EXPLAINED. HE SAID, WE CAN TERMINATE PEOPLE THE PROGRAM WHEN THEY ARE \$75 IN ARREARS, WHICH WOULD BE THREE WEEKS OF COUNSELING NOT PAID FOR. HE SAID WE WAITED UNTIL HE WAS ALMOST \$600 IN ARREARS. I TRIED TO WORK WITH THIS MAN. I KNEW HE HAD FINANCIAL PROBLEMS. HE WAS NOT PROGRESSING SO WE TERMINATED. IF HE HAD BEEN PROGRESSING AND DOING HIS HOMEWORK, HE WOULD HAVE STILL KEPT HIM.

DID IT GO IMMEDIATELY TO THE VIOLATION IMMEDIATELY TO THE VIOLATION OF PROBATION, OR WAS THERE ANY DISCUSSION BETWEEN PROBATION OFFICER AND THE DEFENDANT ABOUT THE CONSEQUENCES OF THIS TERMINATION? TIME NOT SURE. THERE IS NO TESTIMONY. HE WAS TERMINATED MAY 30. I KNOW HE WAS IN, TALKING TO HIS PROBATION OFFICER ON JUNE 5, BECAUSE THAT WAS WHEN HE WAS SUPPOSED TO BRING HIS HIV TESTING PROOF, AND THEN HE WAS TERMINATED OR VIOLATED IN AUGUST.

DID HE EVER GET THE RESULTS OF THE, I KNOW THAT HE ALLEGEDLY HAD

NO, SIR, AND HE EVEN ADMITTED AT THE HEARING, REALLY, THE ONLY EVIDENCE THIS COURT HAS, THAT I DID TAKE THE TEST, IS MY TESTIMONY. THAT IS THE ONLY THING YOU HAVE GOT IN FRONT OF YOU. HE NEVER PROVIDED.

I THOUGHT HE HAD A RECEIPT.

HE CLAIMED IT WAS A RECEIPT BUT HE ADMITTED IT SAID NOTHING ABOUT HIV TESTING. SO I MEAN THAT, IS IDEA STATE OBJECTED AND SAID IT DOESN'T EVEN SAY ANYTHING ABOUT HIV TESTING SO ALL WE HAVE IS YOUR TESTIMONY, AND HE SAID, YEAH, THAT IS ALL YOU HAVE GOT.

ARE TRIAL JUDGES AROUND THE STATE, WITH THIS TYPE OF SEXUAL OFFENDER PROBATION, ARE THEY, ARE ANY JUDGES PUTTING MORE SPECIFIC LANGUAGE IN THE ORDER? AND HAVING ANY TYPE OF MONITORING, YOU KNOW, WHERE THEY COME BACK IN SIX MONTHS?

I THINK A COUPLE OF THE CASES THAT THE FIFTH DCA CITED IN THEIR OPINION, DO TALK ABOUT TIME LIMITATIONS THAT WERE GIVEN TO DEFENDANTS. I DON'T KNOW ABOUT SEX OFFENDER PROBATION.

I AM TALKING SPECIFICALLY ABOUT SEX OFFENDER PROBATION.

NOT THAT I KNOW OF PERSONALLY. NOT THAT I KNOW OF.

ISN'T IT REALLY, UNTIL YOU GET THE EVALUATION AND KNOW THE TYPE OF COUNSELING NEEDED, THAT IT IS REALLY SO INDIVIDUALIZED.

CORRECT.

THAT IT IS HARD , UN LIKE ANGER MANAGEMENT , WHICH IS A NINE-WEEK PROGRAM OR DOMESTIC VIOLENCE , 24 OR 26 WEEK PROGRAM OR WHAT EVER.

RIGHT.

MY UNDERSTANDING IS IT IS SO INDIVIDUALIZED, IT WOULD BE HARD TO DO IT UNLESS YOU GOT THEM EVALUATED AND BROUGHT THEM BACK AND WENT THROUGH A MODIFICATION PROCESS.

R I GHT.THAT IS WHY YOU DO AN EVALUATION TO BEGIN WITH.

IN THIS CASE T HERE WAS AN EVALUATION AND THEN ATREATMENT PLAN WAS PUT INTO PLACE.

YES.

IN THE TREATMENT PLAN , IT SAID YOU ARE GOING TO GO TO THIS PARTIC ULAR PROGRAM.

PRESUMABLY.

IT IS NOT IN THE RECORD.

THERE IS NOTHING SPECIFIC. HIS COUNSELOR SAID HE WAS EXPECTED TO SHOW UP FOR HIS GROUP THERAPY. HE WAS EXPECTED TO PARTICIPATE.

IT FEELS A LI TTLE BIT L IKE THE PROBATION OFFICER WAS GOING THROUGH THE MOTIONS. AGAIN , WHEN YOU READ THE STATUTORY SCHE ME, YOU KIND OF HAVE THIS MORE OF AN IMPRESSION THAT IT IS GOING TO WORK LIKE DRUG COURT , WHERE THERE IS GOING TO BE A LOT OF INTENSIVE INTERACTION.

THERE WAS TESTIMONY THAT SHE WAS SAY ING SEEING HIM AT HIS TREATMENT FACILITY QUITE OF TEN . SHE SAID EVERY TIME I RAN INTO HIM AT HIS SEX OFFENDER COUNSELOR PROGRAM, I TALKED TO HIM.

RUNNING INTO SOMEBODY IS NOT THE SA ME

HE WAS SHOWING UP AT HER OFFICE, TOO. HE WAS REQUIRED TO SHOW UP AT HER OFFICE AND TAL K TO AND SU BMIT MONT HLY REPORTS AND THAT IS W HEN SHE WAS TELLING AM I NEED TO SEE YOUR HIV TESTS AND, L OOK , I HEAR YOU ARE NOT PARTICIPATING IN YOUR COUNSELING. YOU NEED DO SOMETHING OR YOU ARE GOING TO GET RIGHTED. SHE WAS COUNSELING AND TO GET VIOLATED.SHE WAS COUNSELING AND TRYING TO WORK WITH HIM.

IN THE PROGRAM , IT LO OKS LIKE IN THE PROGRAM, IT L OOKS LIKE THERE SHOULD BE SPECIALIZED TRAINING AND IT IS UP TO THE OFFICER TO IMPLEMENT AND DEVELOP THE SUPERVISED TREATMENT PLAN, SO, AGAIN, I AM ENVISIONING WHE N I LOOK AT THIS , THAT THIS IS MORE LIKE THE OFFICER IS A DRUG COURT JUDGE , KEEPS ON MONITORING AND HELPING TO MAKE SURE YOU KNOW, THAT THIS IS BEING ACTIVELY DONE, BECAUSE, AGAIN , WE ARE NOT REALLY, I AM NOT AS CONCERNED ABOUT WHETHER THIS PROBATIONER GETS VIOLATED OR NOT.I AM CONCERNED THAT IN THE INTERIM , THIS COULD BE A THREAT TO THE PUBLIC , I F HE IS NOT ACTIVELY DOING WHAT HE NEEDS TO DO TO GET BETTER.

WELL , OBVIOUSLY THAT WAS NOT A CONCERN TO THE PARTIES BELOW. NOBODY WAS ASKING ABOUT IT. NOBODY WAS WANTING TO KNOW DID YOU DO WHAT YOU WERE SUPPOSED TO DO , TO THE PROBATION OFFICER. PRESUMABLY THEY WERE ALL HAPPY WITH HOW THINGS WERE BEING HANDLED, SO THAT WAS NEVER RA ISED OR NEVER DISCUSSED OR QUESTIONED BELOW.

OBVIOUSLY OUR MAIN POINT IS THAT THERE IS NO JURISDICTION WITH THIS COURT BECAUSE THERE IS NO CONFLICT WITH EITHER YOUNG OR LINE A.M. OR LAWSON OR LYNUM OR LAWSON. EACH CASE IS GOING TO BE DIFFERENT AS RESULT, BASED ON EACH DEFENDANT'S DIFFERENT DEFENDANT'S ABILITY AND INABILITIES AND SO FORTH AND BASICALLY ALL WE HAVE TO PROVE IS THAT THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT HIS FINDINGS THAT THE DEFENDANT WAS WILLFULLY IN VIOLATION OF HIS PROBATION SUBSTANTIALLY AND I THINK THERE IS EVIDENCE OF THAT IN THIS CASE.

WHY DIDN'T THE DCA FIND THAT?

BASICALLY ALL THEY FOUND WAS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND TALKING ABOUT POLICY REASONS AS FAR AS SEX OFFENDER BEING A LITTLE BIT DIFFERENT BECAUSE IT IS STATUTORY-REQUIRED CONDITIONS, BUT THIS IS SLAFER FINDING THAT THERE WAS NO AND SIMPLY A FINDING THAT THERE WAS NO ABUSE OF DISCRETION BY THE TRIAL COURT, BY THE FIFTH DCA.

THAT IS WHY THEY INTERPRET, THERE IS LANGUAGE IN THE SECOND DISTRICT OPINION THAT WOULD APPEAR TO STATE, BECAUSE THERE WASN'T A TIME SET FOR COMPLETION, THAT YOU COULD NOT BE IN VIOLATION OF YOUR PROBATION, UNLESS THERE WAS A TIME SET, SO WHETHER IT IS THE FACTS ARE DIFFERENT, THERE SEEMS TO BE THAT BROAD UNDERSTANDING IN THE SECOND DISTRICT, THAT, AS MS. ROGERS SEEMS TO SAY, THAT YOU HAVE REALLY UNTIL THE END OF YOUR PROBATION TO COMPLETE IT, SO IF YOU HAVE BEEN TERMINATED, YOU SHOULD BE GIVEN AN OTHER CHANCES ESSENTIALLY.

WHICH DOES NOT COMPORT WITH FLORIDA LAW, BECAUSE AS MRS. CARTER SAID, THERE ARE NO PER SE RULES. IT IS A CASE-BY-CASE ANALYSIS AND IT IS THE PARTICULAR DEFENDANT AND THAT SITUATION OF THE DEFENDANT, IF HE HAS GOT TRANSPORTATION PROBLEMS OR PSYCHOLOGICAL PROBLEMS OR WHATEVER IT MAY BE THAT INTERFERES WITH HIS ABILITY TO COMPLY WITH HIS CONDITIONS. THAT IS UP FOR THE TRIAL JUDGE TO HEAR ABOUT AND MAKE A DETERMINATION.

BUT THE POINT IS, DON'T WE HAVE TO RESOLVE THAT QUESTION AS TO WHETHER, WHERE THE STATUTE DOESN'T GIVE A CERTAIN DATE AND THE JUDGE DOESN'T GIVE A CERTAIN DATE, WHETHER THE DEFENDANT CAN BE VIOLATED WHERE HE DOESN'T COMPLETE IT WITHIN A FEW MONTHS?

I DON'T THINK SO. I THINK IT JUST DEPENDS ON EACH, IT IS A CASE-BY-CASE ANALYSIS, AND I MEAN, IN THIS CASE THE DEFENDANT CLEARLY WASN'T GOING TO FINISH HIS COUNSELING OR SUCCESSFULLY COMPLETE HIS COUNSELING, BECAUSE HE WASN'T PARTICIPATING. HE WASN'T DOING HIS HOMEWORK. THEY GAVE HIM PLENTY OF OPPORTUNITY AND HE DIDN'T DO IT, WHETHER OR NOT HE HAD TIME. OBVIOUSLY A TIME LIMITATION HELPS SHOW A WILLFUL VIOLATION. THE TRIAL COURT COULD IMPOSE IT. THE LEGISLATURE COULD IMPOSE SOME SORT OF TIME LIMITATION.

DOESN'T THE TIME LIMITATION, REALLY, DEPEND ON WHAT KIND OF PROGRAM YOU GET IN.

EXACTLY.

BECAUSE DIFFERENT PROGRAMS, I WOULD IMAGINE, TAKE DIFFERENT TIMES TO COMPLETE, SO DEPENDING ON WHAT INDIVIDUAL PROGRAM THE DEFENDANT, THE PARTICULAR DEFENDANT IS REQUIRED TO PARTICIPATE IN, WOULD DEPEND ON THE TIME THAT HE NEEDS TO COMPLETE IT. WOULDN'T IT?

ABSOLUTELY, AND SEX OFFENDER COUNSELING IS DIFFERENT, I MEAN, AS JUSTICE BELL WAS EXPLAINING. IT IS DIFFERENT FROM A SHOPAHOLIC CLASS, WHICH IS A CERTAIN NUMBER OF

DATES THAT YOU HAVE TO SHOW UP FOR. THAT SORT OF THING. THIS IS DIFFERENT, BECAUSE EACH PERSON HAS THEIR OWN FANTASIES AND THINGS THAT TRIGGER THIS BEHAVIOR THAT THEY ARE TRYING TO PREVENT, AND SO IT IS VERY DIFFERENT FOR EACH DEFENDANT.

CHIEF JUSTICE: THANK YOU.

IF THERE ARE NO FURTHER QUESTIONS, THANK YOU.

CHIEF JUSTICE: REBUTTAL.

THANK YOU. THE ISSUE HERE, IS THAT SOMEBODY PLACED ON SEX OFFENDER PROBATION IN THE FIFTH DISTRICT, MUST IMMEDIATELY BE GIVEN THE MANDATORY CONDITIONS, IF THE TRIAL COURT DOES NOT SET A SPECIFIC DATE.

OKAY.

DOESN'T IT SEEM AS THOUGH WE, REALLY, ARE TALKING ABOUT WHY THIS DIDN'T HAPPEN WITHIN A TIME PERIOD, BECAUSE IT APPEARS, CERTAINLY, THAT IF YOU HAD HAD OTHER FACTORS THAT PREVENTED THE PERFORMANCE, SUCH AS ILLNESS OR OTHER KINDS OF THINGS, WE WOULDN'T EVEN BE HERE TO DAY, WOULD WE? BECAUSE THEN YOU WOULD HAVE, STILL, JUST A PURE TIME ISSUE. THIS IS NOT REALLY A PURE TIMING KIND OF PROBLEM, IS IT?

IT IS. IT BECOMES A PURE TIMING ISSUE, BECAUSE OF THE NATURE OF THIS TYPE OF PROBATION. IT IS NOT SOMETHING, AS PROVIDED BY THE TESTIMONY FROM THE STATE'S WITNESS, IT IS NOT THE TYPE OF PROBATION WHERE THE PROBATIONER JUMPS IN AND SAYS, HERE I GO. I AM READY TO PARTICIPATE. THERE IS AN ADJUSTMENT. THERE IS A PERIOD OF TIME. I DISAGREE WITH THE STATE'S CHARACTERIZATION OF MR. FALTER, THE THERAPIST'S TESTIMONY. HE DID NOT INDICATE THAT IT WAS A HOPELESS CASE. HE SAID THAT THE PROBATIONER, MR. WOODSON, WAS NOT VIOLATED BECAUSE OF FAILURE TO APPEAR. IT WASN'T HIS BEHAVIOR. HE WASN'T DISRUPTIVE. HE WAS HAVING, AS IS VERY TYPICAL AND COMMON AND AS IS EXPECTED, A DIFFICULT TIME WITH THIS TYPE OF PROBATION. I, ALSO, DISAGREE THAT THERE IS A DIFFERENCE

NOW WAIT A MINUTE. IF HE SAID THAT, HE IS THE EXPERIENCED COUNSELOR AND HE KNOWS THAT PEOPLE HAVE, SO WHAT WAS HIS REASON FOR TERMINATING THIS PARTICULAR PERSON, IF HE UNDERSTANDS THAT THERE IS DIFFICULTIES THAT ARE IN THIS TYPE OF SITUATION?

HE WAS VERY CLEAR THAT, ALSO THE FACT THAT MR. WOODSON WAS IN AR REARS FINANCIALLY, WAS A CONTRIBUTOR TO WHY HE VIOLATED HIM, WHY HE TERMINATED HIM, EXCUSE ME, FROM THE GROUP.

THIS TIMING THING, REALLY, THAT YOU KEEP ARGUING, REALLY BOTHERS ME, BECAUSE WHAT YOU ARE REALLY SAYING IS THAT A DEFENDANT IS PUT ON THIS SEXUAL OFFENDER PROBATION. HE IS EVALUATED. HE IS TOLD WHAT KIND OF THERAPY HE NEEDS TO HAVE, AND HE SAYS, YEAH, OKAY, BUT HE GETS TO CHOOSE WHEN TO START IT? I MEAN, IF HE DECIDES I DON'T WANT TO START IT TODAY, I WANT TO START IT A YEAR FROM TODAY, THAT WOULD BE OKAY, BECAUSE HE STILL HAS TIME LEFT ON HIS PROBATION?

THIS MAY BE A PROBLEM THAT NEEDS TO BE FIXED, BUT IT IS NOT FOR THE FIFTH TO FIX IT. OUR POSITION IS THAT EITHER

IF THE PROBATION OFFICER SAYS THERE IS A PROGRAM THAT STARTS THREE MONTHS FROM NOW THAT YOU CAN GET INTO, THE KIND OF PROGRAM THAT YOU NEED, THE DEFENDANT SAYS I WANT TO WAIT UNTIL THE PROGRAM THAT STARTS 18 MONTHS FROM NOW, THAT WOULD BE OKAY?

UNDER THE LAW AS IT IS TODAY , UNDER THE LAW AS WE HAVE IT , WITHOUT A DATE CERTAIN FROM THE COURT OR FROM THE LEGISLATURE , YES .

CHIEF JUSTICE: JUSTICE LEWIS . YOUR TIME HAS HE CAN P IRD. THANK YOU VERY MU CH. TO BOTH PARTIES, FOR A HELPFUL ORAL AR GUMENT , AND THE COURT WILL BE IN ITS MORNING RE CESS O F 15 MINUTES.

MARSHA L: PLEASE RISE.