

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: 2012-AP-11-A-O
Lower Case No.: 2010-MM-12561-A-O

SHANECA LASHANDA CLARKE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____ /

DATE: August 8, 2013

Appeal from the County Court
for Orange County, Florida
Kenneth A. Barlow, Jr., County Court Judge

Robert Wesley, Public Defender
and Kristen Blum, Assistant Public Defender
for Appellant

Lawson Lamar, State Attorney,
and Dugald McMillan, Assistant State Attorney
for Appellee

Before DAVIS, J. KEST, MUNYON, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Shaneca Clarke (herein "Appellant") appeals the order revoking her probation. On January 10, 2012 Appellant's probation was revoked, she was adjudicated guilty of Resisting an Officer Without Violence, and sentenced to 64 days in the Orange County Jail with credit for four days time served through home confinement, to be followed by nine months supervised probation.

Appellant was charged with Resisting an Officer Without Violence and Driving While License Suspended on November 3, 2010. On February 3, 2011, she pled nolo contendere to Count (1) as charged and to Operating a Motor Vehicle Without a Valid Driver's License for Count (2). Adjudication was withheld for Count (1) and she was sentenced to one day time served in the Orange County Jail for both Counts, in addition to 360 days supervised probation for Count (1).

On March 16, 2011, an affidavit of violation of probation was filed alleging Appellant violated the terms of her probation by committing a new criminal offense. At the hearing on January 10, 2012, the probation officer testified that he submitted an affidavit of violation of probation to the court because he was notified that Appellant was arrested for a new offense of Neglect of a Child. He testified that Appellant did not contact him within 72 hours of arrest on the new charge. Appellant testified that she notified her probation officer of her new arrest by telephone the day after she was arrested. The trial court found that there was not sufficient evidence to establish that Appellant violated any law while on probation but found that Appellant willfully violated probation by failing to report her arrest on the new offense within 72 hours. Appellant's probation was revoked and she was adjudicated guilty of Resisting an Officer Without Violence. She was sentenced to 64 days in the Orange County Jail with credit for four days time served through home confinement, to be followed by nine months supervised probation.

Appellant filed a motion to reconsider the verdict arguing that the court incorrectly violated her probation based on failure to report within 72 hours of arrest because the Court lacked authority to violate her for an act that was not alleged in the affidavit of violation of probation. At the February 7, 2012 hearing on the motion, the court denied Appellant's motion

stating that the reporting requirement was inherent in an arrest for a new law violation, and therefore the order finding Appellant in violation was correct.

Appellant argues that the trial court committed fundamental error by revoking her probation based on conduct not alleged in the affidavit of violation of probation. Appellant claims that failing to report the new offense within 72 hours of arrest was not alleged in the affidavit of violation of probation.

In its Answer Brief, the State concedes that the trial court committed fundamental error by finding that Appellant violated probation for a condition that was not alleged in the charging document. The State expresses that it has no objection to the Court reversing the trial court's revocation of probation.

A violation of probation determination is subject to an abuse of discretion standard of review. *Gauthier v. State*, 949 So. 2d 326 (Fla. 5th DCA 2007). A trial court may only revoke probation for violations that are charged in the affidavit of probation violation. *Moser v. State*, 523 So. 2d 783, 785 (Fla. 5th DCA 1988); *McRae v. State*, 88 So. 3d 384 (Fla. 2d DCA 2012); *Wells v. State*, 60 So. 3d 551, 553 (Fla. 1st DCA 2011); *Ray v. State*, 855 So. 2d 1260, 1261 (Fla. 4th DCA 2003); *Harris v. State*, 495 So. 2d 243 (Fla. 2d DCA 1986). Revoking probation for conduct not alleged in the charging document is fundamental error. *McRae*, 88 So. 3d at 385; *Wells*, 60 So. 3d at 553; *Ray*, 855 So. 2d at 1261.

The affidavit of violation of probation charges Appellant with violating probation by committing a new offense. At the violation hearing, the trial court ruled that there was insufficient evidence to find that Appellant violated probation by committing a new offense. The affidavit of violation of probation did not charge Appellant with failing to report the commission of a new offense within 72 hours of arrest. Therefore, the trial court erred in finding that

Appellant violated a condition of her probation that was not alleged in the affidavit of violation of probation.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's adjudication of guilt and order revoking probation is reversed and the sentence is set aside.

REVERSED and REMANDED.