

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ERNIE LEE MAGAHA
CLERK OF CIRCUIT COURT
ESCAMBIA COUNTY, FL

2010 NOV 17 P 3:37

DAVID FEDERICO,

APPEALS DIVISION
FILED & RECORDED

Petitioner

vs.

Case No.: 2010-AP-013
Division: F
L.T. Case No.: 1996-MM-17387
Division: IV

STATE OF FLORIDA,

Respondent.

ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

Petitioner filed a motion in the trial court asserting that the pending violation of probation charges against him should be dismissed on the grounds that the revocation of probation proceedings were not timely initiated. The trial court denied the motion and the Petitioner filed a notice of appeal. This order, however, is not neither a final order nor an appealable non-final order. See Walker v. State, 825 So. 2d 1014 (Fla. 4th DCA 2002); § 924.06, Fla. Stat.

However, a claim that the trial court lacks jurisdiction due to untimely commencing revocation of probation proceedings is cognizable in a petition for writ of prohibition. See Rivera v. State, 939 So. 2d 116 (Fla. 3d DCA 2006); Stambaugh v. State, 891 So. 2d 1136 (Fla. 4th DCA 2005). Accordingly, the Court has construed the Petitioner's "initial brief" filed on September 7, 2010 to be a petition for writ of prohibition. On October 13, 2010, the Court ordered the State to show cause why the Petitioner was not entitled to relief. Having considered the petition and the State's

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November 10, 2010 response to the Court's order to show cause, the Court finds that the writ of prohibition should issue.

At the time the probation revocation proceedings were initiated in 1996, in order to be timely initiated, the State was required to show that "the arrest warrant had been delivered to the sheriff for execution before expiration of [the probationer's] probationary term." State v. Boyd, 717 So. 2d 524, 526 (Fla. 1998). The trial court's factual findings are not contrary to the Petitioner's assertion that no warrant was delivered to the sheriff for execution prior to the expiration of his probation. Therefore, under the law in effect in 1996, the record indicates that the Petitioner's claim that the trial court is without jurisdiction is correct. The State does not disagree.

The Court recognizes that, in 2007

the Florida Legislature amended section 948.06(1), Florida Statutes to allow for tolling of the probationary period "[u]pon the filing of an affidavit alleging a violation of probation or community control and following issuance of a warrant under s. 901.02, *a warrantless arrest under this section, or a notice to appear under this section*" § 948.06(1)(d), Fla. Stat. (2007) (emphasis added). By adding the italicized language, the legislature made it clear that the issuance of a warrant is no longer a requirement to toll the probationary period.

Shenfeld v. State, 14 So. 3d 1021, 1024 (Fla. 4th DCA 2009); see also, Ch. 07-210, § 5, Laws of Fla.

Thus, under the *current* statute, the timely issuance of a notice to appear, as appears to have occurred in this case, would toll the probationary period. However, the Court finds that applying the 2007 amendment to section 948.06 retroactively to the Petitioner would violate the *ex post facto* clause because the Petitioner's term of probation expired *prior* to the date the 2007 statutory amendments became effective. Cf. Shenfeld v. State, 44 So. 3d 96, 101 (Fla. 2010)(Explaining, "If the time for bringing criminal charges may constitutionally be extended before the prosecution has been time-

barred, it follows that a provision for tolling may be applied to a probationary term that has not yet expired," but distinguishing such a case from "a statute reviving a previously time-barred prosecution."). Thus, the trial court lost jurisdiction in this case long ago.

Accordingly, it is **ORDERED and ADJUDGED** that the Petitioner's petition for writ of prohibition is hereby **GRANTED**. The trial court's order denying the Petitioner's motion to dismiss is hereby **QUASHED**. The trial court is **DIRECTED** to enter an order dismissing the pending revocation of probation proceedings as being untimely initiated and the trial court is barred from conducting any revocation of probation proceedings against the Petitioner in Escambia County case number **1996-MM-17387**.


DONE and ORDERED in Chambers, at Pensacola, Escambia County, Florida
on this 16 day of November, 2010.




JAN SHACKELFORD
Circuit Judge

JS/lcw

Copies furnished to:

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