IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502016AP900244AXXXMB
L.T. NO.: 502014CT018314AXXXMB

JOHN EDWARD GARDNER, IV,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: SEP 2 5 2017

Appeal from the County Court in and for Palm Beach County,
Judge Leonard Hanser

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PER CURIAM.

Upon consideration of Appellant's Amended Motion for Clarification and the Appellee's Response thereto, we grant Appellant's Motion, withdraw the Opinion issued August 8, 2017, and substitute the following in its stead.

Appellant John Gardner, IV, appeals an order of the trial court revoking his probation. On appeal, Appellant asserts that the trial court abused its discretion in finding his failure to timely complete all fifty hours of his required community service to be a willful and substantial violation of his probation. We agree and reverse.

On February 27, 2015, Appellant was adjudicated guilty of DUI and sentenced to one year of probation with various conditions including DUI school; a ten-day vehicle immobilization; no consumption of alcohol or drugs without prescription; attend victim panel within sixty days; and complete fifty hours of community service within the one-year probationary term. On February 4, 2016, the State filed an Affidavit of Violation of Probation alleging that Appellant had violated the terms of his probation by, *inter alia*, failing to complete the fifty hours of community service.

At the Violation of Probation hearing, the State presented only the testimony of Appellant's probation officer, who testified that Appellant had not completed all fifty hours of his community service on time. Appellant then testified as to the fifty hours of community service, stating, "I've completed it all, but I know some of it was a little bit -- a couple of hours were late." Appellant also testified about a number of serious medical problems he experienced during the probationary period, one of which required surgery and had yet to be resolved, that at times prevented him from working. Appellant further asserted that he tried to complete all of the community service hours within the required time to the best of his abilities, and that he did not purposely or willfully fail to complete them on time. In response, the State simply argued that Appellant's violation was willful and substantial based on the estimated twelve months Appellant had during his probationary period to complete the fifty hours of community service and his failure to do so.

At the conclusion of the hearing, the trial court revoked Appellant's probation. Although the trial court acknowledged its duty to determine whether Appellant's violation was willful and substantial, in revoking Appellant's probation, the trial court simply stated:

> And the community service hours; you know the allegation is . . . that he failed to do the 50 hours of community service in total. I mean -- and the Defendant admitted that he did not do all of the community service during the term that he was required to do it in. He said he did all but a couple of hours; a couple of hours were late.
>
> So he did not do all of them. Some of the hours were late. So he didn't do the community service, he violated probation because of that. But quite frankly at this point I'm just revoking probation.

The trial court then adjudicated Appellant guilty of Violation of Probation and entered judgments for various fines, costs, and fees.

We review a revocation of probation by a trial court for "an abuse of discretion and to determine whether competent substantial evidence supports the decision." *Dimaio v. State*, 194 So. 3d 1086, 1088 (Fla. 4th DCA 2016) (citing *Bauer v. State*, 96 So. 3d 1063, 1066 (Fla. 4th DCA 2012)). "For a violation of a condition of probation to trigger a revocation, the violation must be willful and substantial . . . ." *Webb v. State*, 154 So. 3d 1186, 1188 (Fla. 4th DCA 2015) (citing *Tobias v. State*, 828 So. 2d 1066, 1068 (Fla. 4th DCA 2002)). On review, a "trial court's determination that a violation of probation is willful and substantial 'will not be overturned on appeal unless the record shows that there is no evidence to support it.'" *Dimaio*, 194 So. 3d at 1088 (quoting *Riggins v. State*, 830 So. 2d 920, 921 (Fla. 4th DCA 2002)).

Here, we find nothing in the record clearly supporting a finding that Appellant's violation was willful and substantial. As noted above, the State's evidence consisted only of a probation officer's testimony that Appellant had not completed the community service hours within the period required, thereby simply establishing the fact of the violation itself. Appellant, however,

then provided unrebutted testimony establishing that he completed only "a couple" of the community service hours late, that he ultimately did complete all fifty of the required hours, and that during the probationary term, he experienced a number of medical conditions that, at times, inhibited his ability to work.

When determining willfulness, a violation of probation will not be considered willful "if a probationer makes reasonable efforts to comply" with the terms. *Thomas v. State*, 672 So. 2d 587, 589 (Fla. 4th DCA 1996) (citing *Steiner v. State*, 604 So. 2d 1265, 1268 (Fla. 4th DCA 1992)). The undisputed fact that Appellant completed only "a couple" of the hours late shows Appellant made reasonable efforts to comply with the probationary terms.

Furthermore, based on the totality of the evidenced adduced below, we find Appellant's failure to complete only "a couple of hours" of community service on time, particularly in light of the fact that Appellant completed all of the required fifty hours, to not be a "substantial" violation. *Cf. Emery v. State*, 13 Fla. L. Weekly Supp. 853a (Fla. 6th Ct. June 20, 2006) (finding failure to complete a single hour of ordered community service constituted "material violation" of probation). Indeed, the trial court's "failure to make any findings about the substantial nature of the violation bolsters our conclusion that [Appellant's] alleged violations were not substantial." *Filmore v. State*, 133 So. 3d 1188, 1195 (Fla. 2d DCA 2014).

Because the State failed to present competent, substantial evidence to support the determination that Appellant's violation of probation was willful and substantial, the trial court's revocation of Appellant's probation constituted an abuse of discretion. Accordingly, we reverse Appellant's conviction of Violation of Probation. As Appellant's one-year probationary term would have expired on February 27, 2016, on remand, the trial court shall discharge Appellant

from probation. *See Turner v. State*, 132 So. 3d 378, 379 (Fla. 4th DCA 2014) (citing *Thompson v. State*, 974 So. 2d 594, 599–600 (Fla. 2d DCA 2008)).

REVERSED and **REMANDED**.

KASTRENAKES, BURTON, and WEISS, JJ., concur.

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Opinion/Decision Filed: SEP 2 5 2017

Appeal from County Court in and for Palm Beach County, Florida;
Judge Leonard Hanser

Appealed: October 4, 2016

DATE OF PANEL: JUNE 26, 2017

PANEL JUDGES: KASTRENAKES, BURTON, WEISS

AFFIRMED/REVERSED/OTHER: AFFIRMED

DECISION BY: PER CURIAM

CONCURRING:	DISSENTING:	CONCURRING SPECIALLY:
	With/Without Opinion	With/Without Opinion
9/18/17		
Date:	Date:	Date:
9/18/17		
Date:	Date:	Date:
9/25/17		
Date:	Date:	Date: