IN THE SUPREME COURT OF FLORIDA

CHERYL SHIPLEY

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

Case No. 71,371

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

During 1982, Petitioner, CHERYL SHIPLEY, was charged by various informations in Polk County Circuit Court with seven counts of obtaining property by worthless check and one count of grand theft, contrary to sections 832.05, 812.014 Florida Statutes (1981). (R1-4,9-16,24-27) On October 14, 1982, Shipley pleaded guilty, adjudication was withheld, and she was placed on probation for ten years. (R36)

On November 26, 1985, Shipley was charged by information with possession of a firearm by a convicted felon, two counts of obtaining property by worthless check, and one count of issuing a worthless check, contrary to sections 790.23, 832.05 Florida Statutes (1983). (R41) On November 21 and December 30, 1985, she was charged by affidavit with having violated her probation, because she moved without telling her probation officer, possessed a firearm, issued bad checks, and had a bank account. (R46,52)

On April 22, 1986, the information was amended to consolidate numerous bad checks into one grand theft charge. (R58-60) That same day, Shipley pleaded guilty to the firearm possession and grand theft charges and admitted violating her probation. (R57,61) In return, the State agreed to nol prosse all other cases pending against her and to have all sentences for the probation violations run concurrently. (R61)

At the sentencing hearing on May 21, 1986, the court revoked Shipley's probation and sentenced her to the maximum possible extent under the plea agreement. (R145) Shipley received five years concurrent on each of the 1982 offenses, five years consecutive on the 1985 grand theft, and fifteen years consecutive on

the 1985 firearm possession. (R93-94) The court directed the probation officer to determine the appropriate restitution. (R94) Costs pursuant to sections 960.20 and 943.25(4), Florida Statutes (1985) were imposed in nine different judgments for a total of $202.50. (R106,110,114,118,122,126,130,134,138) The court also ordered Shipley to perform eighty hours of community service, pursuant to section 27.3455 Florida Statutes (1985). (R93)

Shipley appealed. (R146) In an opinion dated September 23, 1987, the Second District Court of Appeals decided that the trial court had improperly delegated to the probation officer its duty to determine the appropriate amount of restitution. Shipley v. State, 512 So.2d 1135 (Fla. 2d DCA 1987). The second district also found that the trial court had improperly imposed court costs without notice or hearing. The defendant had had no opportunity to object because the costs were not orally announced. The second district, however, determined that Shipley's failure to object to the absence of notice and a hearing on the oral announcement of community service foreclosed this issue from appellate review.

Shipley petitioned the Supreme Court of Florida to accept jurisdiction in her case. This court accepted jurisdiction on January 14, 1988.

SUMMARY OF THE ARGUMENT

The lack of notice and hearing when community service is imposed may be raised on appeal despite the absence of contemporaneous objection below, because (1) the error is a due process error which is fundamental and (2) it is a sentencing error apparent from the face of the record.

ARGUMENT

ISSUE

CONTEMPORANEOUS OBJECTIONS ARE NOT NEEDED FOR DUE PROCESS SENTENCING ERRORS APPARENT FROM THE FACE OF THE RECORD.

In this case, Ms. Shipley was not given any notice that community service might be imposed on her at the sentencing hearing, nor was she given a hearing when the trial court actually imposed the community service. (R93) This absence of notice and hearing was contrary to Jenkins v. State, 444 So.2d 947,950 (Fla. 1984), which requires "adequate notice . . .with full opportunity to object" not only for court costs but also by implication for community service imposed pursuant to section 27.3455 Florida Statutes (1985). On appeal, the second district held that, absent a contemporaneous objection to this absence of notice and hearing, the issue could not be reviewed on appeal. Shipley v. State, 512 So.2d 1135 (Fla. 2d DCA 1987). The opinion expressly noted conflict with Outar v. State, 508 So.2d 1311 (Fla. 5th DCA 1987) and Harris v. State, 498 So.2d 1371 (Fla. 1st DCA 1986).

Outar reasons that lack of notice and a hearing is a due process error which is therefore fundamental and does not require an objection. According to Castor v. State, 365 So.2d 701 (Fla.1978) an error is fundamental if it amounts to a denial of due process. Adequate notice and hearing are a part of fundamental due process and therefore do not require contemporaneous objections because, absent notice and hearing, the defendant has no reason to prepare objections and no opportunity to make them. If a defendant has had no chance to prepare and make objections, he can

hardly be faulted for not making them.

Outar's reasoning is supported by Cucco v. State, 356 So.2d 58 (Fla. 4th DCA 1978) and Touson v. State, 382 So.2d 870 (Fla. 5th DCA 1980), which hold that the absence of notice and hearing prior to revocation of probation is a fundamental due process error. Outar is also supported by Harris, which in turn relies on Jenkins. Although the majority opinion in Jenkins does not discuss the lack of objection, the dissenting opinion shows that the trial court orally imposed costs without objection from the defendant. Jenkins, 444 So.2d at 950 (Alderman, J., dissenting) Despite this absence of contemporaneous objection, however, this court decided to vacate the costs because they had been imposed without giving the defendant his due process right to a notice and hearing. This court's decision in Jenkins clearly means therefore that the issue of notice and hearing does not require a contemporaneous objection to be preserved for appellate review.

Although it is not cited in the opinion, the instant decision also conflicts with the reasoning of Webber v. State, 497 So.2d 995 (Fla. 5th DCA 1986). Relying on State v. Whitfield, 487 So.2d 1045 (Fla.1986), the court in Webber held that the ex post facto application of court costs could be addressed on appeal despite the lack of objection below because this error was a sentencing error apparent from the face of the record. In the instant case, the term of community service was a part of Petitioner's sentence, because it was announced at her sentencing hearing and was included in one of the written judgments against her. (R138) Consequently, the absence of notice and hearing when this term of community service was imposed was a sentencing

error apparent from the face of the record which could be appealed without objection below.

The second district's decision in this case was contrary to Jenkins and Whitfield and should now be reversed.

CONCLUSION

Petitioner requests this court to hold that a contemporaneous objection was not necessary to preserve for appeal the violation of her right to notice and hearing when community service was imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg., 8th floor, 1313 Tampa Street, Tampa, FL 33602, this the 5th day of February, 1988.

Steve Krosschell
STEPHEN KROSSCHELL

SK:ksw