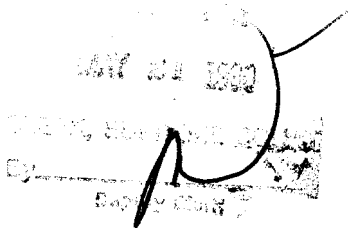
No Request Case

IN THE SUPREME COURT OF FLORIDA



MYREN WAYNE LARSON,

Petitioner,

v. CASE NO. 75,085

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Myron Wayne Larson was the defendant in the trial court and the appellant in the district court, and will be referred to in this brief as the petitioner or by his proper name. The State of Florida was the prosecution and the appellee below and will be referred to herein as the state. The record on appeal will be referred to by use of the symbol "R", followed by the appropriate page number in brackets. All trial court proceedings in this case were in the Second Judicial Circuit Court, in and for Leon County, Florida, the Honorable L. Ralph Smith, Circuit Judge, presiding. Initial appeal was before the First District Court of Appeal. All emphasis in this brief is supplied unless otherwise indicated.

11. STATEMENT OF THE CASE AND FACTS

The appellant, Myron Wayne Larson, was charged by information with the felony of tampering with a witness [R l]. Pursuant to plea negotiations with the state, Larson entered a plea of nolo contendere to the lesser offense of misdemeanor witness tampering, with a joint recommendation of one year of probation [R 35, 42, 541.

At the sentencing proceeding, the state announced that it was not going to honor its agreement with Larson and recommended that the court impose one year in the county jail, due to Larson's violation of his bond conditions [R 36-37]. Larson responded that he wished to withdraw his plea [R 371. The trial court gave Larson the following alternatives: Larson could either let his plea of nolo contendere to the misdemeanor stand and be sentenced to one year in the county jail, or he could plead guilty to the felony charge of witness tampering and receive five years of probation [R 42-53].

Larson then withdrew his plea to the misdemeanor and pleaded nolo contendere to the felony charge of witness tampering [R 551. The court withheld adjudication of guilt and placed Larson on five years of probation, orally imposing the following conditions of probation:

> No contact with the victim. No contact with the witness who testified at [Larson's] bond hearing. Stay away from FSU campus under all circumstances: do this probation outside Leon County: do not come back to Leon County during the five year probation period. Under no circumstances will the residence be approved to come back to Tallahassee. Have a psychological

> evaluation; obtain psychological counseling on your release from custody; that you provide to the psychologist who is approved by your probation officer in Fort Myers a copy of this evaluation by Dr. Stimel. Court costs of $200; $20 to the Crimes Compensation Trust Fund, and $2 to the Law Enforcement Education Fund. [R 59-66].

Larson appealed to the First District Court of Appeal, arguing that he was coerced into pleading to the felony witness tampering charge, that the court did not conduct an adequate plea colloquy, and that several conditions of probation were illegally imposed. The district court affirmed the imposition of probation and its conditions, holding that there was no error in the trial court's methods in accepting the plea to the felony, and that because Larson did not object to the imposition of the probation conditions at the time of sentencing, the issue was not preserved for appellate review.[1] Larson v. State, So.2d (Fla. 1st DCA 1989). Larson filed a timely notice to invoke discretionary jurisdiction and this proceeding follows.

[1] Larson also argued, and the district court agreed, the court should not have imposed costs absent adequate notice and hearing.

111. SUMMARY OF ARGUMENT

Because the underlying basis for the contemporaneous objection rule is nonexistent in the context of conditions of probation, no contemporaneous objection is necessary in order to preserve those points for appeal. The propriety of conditions of probation involve pure questions of law, thus requiring no determination of fact on the part of the trial judge. The purpose of the contemporaneous objection rule is to permit the trial court to rule while the testimony is fresh. This reasoning does not apply to pure questions of law such as this, thus obviating the need for an objection to conditions of probation in order to preserve appellate review. This case presents the same issue for review as Boudreaux v. State, Case No. 75,163.

IV. ARGUMENT

ISSUE PRESENTED

WHETHER A CONTEMPORANEOUS OBJECTION TO CONDITIONS OF PROBATION IS NECESSARY TO PRESERVE THE ISSUE OF THE PROPRIETY OF THOSE CONDITIONS FOR APPELLATE REVIEW?

When a rule is blindly applied in excess of the scope of its accepted purpose, it has outlived much of its usefulness. Such is the case with the contemporaneous objection rule in the context of conditions of probation. When the contemporaneous objection rule, as any rule, is applied inflexibly, without exception, it is applied unjustly. Its use becomes an exercise of form over substance. With this in mind, this Court should examine the stated purpose of the contemporaneous objection rule and determine whether it ought to be applied to probation conditions so as to preclude appellate review.

In State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984), this Court stated succinctly the accepted purpose and goal of the contemporaneous objection rule:

> The primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. The purpose of the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

The reasoning of this holding is compelling: Where a trial court has made a mistake purely of law, involving no application of the facts, the need for a contemporaneous objection diminishes. The memory of a witness will not fade with time

because the question of law does not involve witnesses or faded memories. On the other side of the coin, where a trial court makes a non-fundamental error involving the admission of testimony, or some other factual question, the need for a contemporaneous objection is much greater. This gives the trial court the opportunity to correct the error while the witness is still on the stand.

The question of the propriety of probation conditions is purely one of law. No witness would have to be tecalled to testify. No issues of fact would have to be resolved on remand in order to correct the imposition of improper conditions of probation. The only action the trial court could take on remand would be to simply strike the improper conditions.

Two of the district courts of appeal have specifically held that no contemporaneous objection is required in order to preserve the issue of the improper imposition of probation conditions for appeal. Miller v. State, 407 So.2d 959, 960 (Fla. 4th DCA 1982); Diorio V. State, 359 So.2d 45, 46 (Fla. 1978), receded from on other grounds, Goodson V. State, 400 So.2d 791 (Fla. 2d DCA 1981); Coulson v. State, 342 So.2d 1042, 1043 (Fla. 4th DCA 1977). These courts reasoned that, because the right to appeal conditions of probation is secured by section 924.06, Florida Statutes (1975, 1977, 1979),[2] as well

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[2]This statute remains unchanged to this date, and applies to the case sub judice as well.

as Florida Rule of Appellate Procedure 9.140(b)(1)(B), the lack of a contemporaneous objection could not preclude such statutory right to appeal.

Pursuant to this Court's decision in Rhoden, the Fifth District Court of Appeal flatly held that the contemporaneous objection rule does not apply to sentencing errors. Joyce v. State, 466 So.2d 433, 434 (Fla. 5th DCA 1985); Walcott v. State, 460 So.2d 915 (Fla. 5th DCA 1984), approved, 472 So.2d 741 (Fla. 1985); Crews v. State, 456 So.2d 959 (Fla. 5th DCA 1984). Furthermore, this Court has held that, where the sentencing error is apparent from the four corners of the record, no contemporaneous objection is necessary to preserve the error for appellate review. Merchant v. State, 509 So.2d 1101, 1102 (Fla. 1987); Dailey v. State, 488 So.2d 532, 533 (Fla. 1986). See Carroll v. State, 530 So.2d 454, 455 (Fla. 5th DCA 1988).

The petitioner respectfully submits that, while some sentencing issues might involve disputed issues of fact, improper conditions of probation do not. Such error is clear from the four corners of the record, in light of applicable law. Thus, where a sentencing error involves no issues of fact, but rather centers on purely legal questions, the contemporaneous objection rule serves no purpose other than to improperly preclude appellate review of illegal conditions of probation.

On appeal to the First District Court of Appeal, the petitioner contested the imposition of conditions of probation

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MYREN WAYNE LARSON,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 88-753

Opinion filed November 14, 1989.

An Appeal from the Circuit Court for Leon County.
L. Ralph Smith, Jr., Judge.

Michael E. Allen, Public Defender; and Phil Patterson, Assistant Public Defender, for Appellant.

Robert A. Butterworth, Attorney General; and Carolyn J. Mosley, Assistant Attorney General, for Appellee.

ERVIN, J.

The defendant appeals an order withholding adjudication of guilt and placing him on probation, imposed for the felony offense of tampering with a witness entered following his plea of nolo contendere. We reverse only that point relating to the lower court's imposition of costs in the absence of notice or opportunity to be heard, and remand the cause to the trial court for further proceedings. The probation order is otherwise affirmed.

Appellant was initially charged with felony tampering with a witness. He pled nolo to the lesser included offense of misdemeanor tampering with a witness, with the understanding that the state would recommend a term of probation to the court. The court, after first ascertaining that appellant understood the nonbinding effect of the plea negotiations, determined that appellant's plea was voluntarily made and, therefore, accepted the plea. The trial court deferred sentencing until a presentence investigation could be completed, however, it did modify the conditions of appellant's bond to include 'a provision that appellant not contact the witness with whom he was charged. with tampering and that he stay away from the Florida State University campus, where the witness resided, until sentencing was imposed.

Upon appellant's later return to court for sentencing, it was reported to the court that appellant had, during the interim, violated the conditions of his bond by going to the university campus on at least two occasions, and in fact had been seen inside the dormitory where the witness resided. The prosecutor thereupon announced that he was withdrawing his original recommendation of probation due to appellant's conduct following the arraignment, and instead recommended that the court impose the maximum sentence of one year in county jail. In the colloquy between the court and appellant, the court asked appellant whether he wished to withdraw his nolo plea to the misdemeanor charge and proceed to trial on the felony count of tampering with

a witness. Appellant never answered, explaining instead that he wished to be a medical doctor.[1]

After a brief recess, appellant, through his attorney, announced that he wished to withdraw his plea to the lesser included misdemeanor offense and to instead plead no contest to the felony charge, conditioned upon the imposition of five years' probation, together with psychological counseling. As part of the plea agreement, he agreed not to reside in Leon County during the probationary period and to stay away from both the victim and the Florida State campus. Appellant indicated that he understood that the maximum penalty he faced on the felony charge was five years;-that if he violated any of the terms or conditions of his probation, he could be adjudicated a felon and sentenced to the maximum term: that he waived his rights to trial; and he advised the court that no one had threatened or coerced him into entering his plea to the felony charge. The trial court thereupon found that the plea was entered freely, intelligently, and voluntarily, and placed appellant on five years' probation, with the conditions that he stay out of Tallahassee, Florida, during the term of his probation; that he reimburse Leon County $200 as partial costs of prosecution, as directed by the probation officer: that he submit to mental health counseling, as directed by the probation officer: and that he undergo a psychological

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'Apparently, appellant was fearful that a felony conviction would hinder his chances of being admitted to medical school.

evaluation and, if deemed necessary, obtain and satisfactorily complete counseling, as directed by the probation officer.

Appellant first argues that the trial court coerced him into withdrawing his previously entered plea to a misdemeanor and substituting a plea to a felony, and that the plea, therefore, was invalid, because it was not voluntary. We disagree. In Geiger v. State, 532 So.2d 1298 (Fla. 2d DCA 1988), the Second District Court of Appeal held that once the defendant withdraws his guilty plea, the state has the right to reinstate all charges, even those previously nolle prossed pursuant to a plea agreement. The court observed that if a plea that was entered as a result of a plea bargain is thereafter withdrawn, "the bargain is 'abrogated' and the defendant must 'accept all of the consequences which the plea originally sought to avoid.'" Id. at 1300 (quoting Fairweather v. State, 505 So.2d 653, 655 (Fla. 2d DCA 1987)).

In the present case, appellant was faced with two options once the court indicated to him that it would not accept the recommendation of one year probation that was originally offered by the prosecutor: 1) to adhere to his original plea without being bound to any conditions of the initial plea agreement, or 2) withdraw his former plea, with the result that he could either proceed to trial on the original charge or, with the concurrence of the court, enter a plea thereto. See Davis v. State, 308 So.2d 27, 29 (Fla. 1975). The appellant chose the latter course. The record also reflects that appellant, with advice of counsel,

elected to plead to the felony charge. We therefore find no merit, under the circumstances, to the argument that the trial court coerced appellant into withdrawing his plea of nolo contendere to a misdemeanor and pleading to the greater felony offense.

Appellant next argues that the trial court's probation order, containing the condition that he stay out of Tallahassee for five years, violates his constitutional right to petition the government for redress of grievances. Appellant additionally argues that the condition is not reasonably related to the offense for which he was convicted and restricts what is otherwise lawful behavior without having any appreciable effect on his criminal conduct. We do not address the merits of this cause, because the error of which appellant now complains was not appropriately preserved for appellate review. The defendant may not appeal conditions of his probation which he neither objected to nor filed a motion to strike or to correct. See Brunson v. State, 537 So.2d 692 (Fla. 1st DCA 1989).

Appellant additionally urges that that portion of the trial court's probation order, containing the condition that appellant submit to mental health counseling as directed by his probation officer, constitutes an unlawful delegation of judicial authority to an officer of the executive branch. This issue was resolved by this court's recent opinion in Rowland v. State, 548 So.2d 812 (Fla. 1st DCA 1989), in which the court stated that a reasonable interpretation of the "as directed by" language of a condition

does not mean that the court unlawfully delegated the judicial responsibility of setting forth terms and conditions of probation to the probation officer, but simply means "that the probation officer should routinely supervise and monitor the evaluation and counseling." Id. at 813.

As to the final issue, relating to the court's assessment of costs without prior notice to appellant, the state concedes the error, and the cause is remanded to the trial court for the purpose of conducting an evidentiary hearing to determine appellant's ability to pay such costs. See Collins v. State, 546 So.2d 123 (Fla. 1st DCA 1989).

AFFIRMED in part, REVERSED in part and REMANDED.

WENTWORTH AND ZEHMER, JJ., CONCUR.