

W O O A

017
APP 4/29

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 9 1990

CLERK, SUPREME COURT
Deputy Clerk

WALLACE BOUDREAUX,
Petitioner,

v.

CASE NO. 75,163

STATE OF FLORIDA,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LAWRENCE M. KORN #0714798
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE (S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I PRELIMINARY STATEMENT	1
II STATEMENT OF THE CASE AND FACTS	2
III SUMMARY OF ARGUMENT	4
IV ARGUMENT	5
<u>ISSUE PRESENTED</u>	
WHETHER A CONTEMPORANEOUS OBJECTION TO CONDI- TIONS OF PROBATION IS NECESSARY TO PRESERVE THE ISSUE OF THE PROPRIETY OF THOSE CONDITIONS FOR APPELLATE REVIEW?	
	5
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE(S)</u>
<u>Boudreaux v. State</u> , 553 So.2d 376 (Fla. 1st DCA 1989)	2
<u>Carroll v. State</u> , 530 So.2d 454 (Fla. 5th DCA 1988)	7
<u>Coulson v. State</u> , 342 So.2d 1042 (Fla. 4th DCA 1977)	6
<u>Crews v. State</u> , 456 So.2d 959 (Fla. 5th DCA 1984)	7
<u>Dailey v. State</u> , 488 So.2d 532 (Fla. 1986)	7
<u>Diorio v. State</u> , 359 So.2d 45 (Fla. 1978) receded from on other grounds, <u>Goodson v. State</u>	6
<u>Goodson v. State</u> , 400 So.2d 791 (Fla. 2d DCA 1981)	6
<u>Joyce v. State</u> , 466 So.2d 433 (Fla. 5th DCA 1985)	7
<u>Merchant v. State</u> , 509 So.2d 1101 (Fla. 1987)	7
<u>Miller v. State</u> , 407 So.2d 959 (Fla. 4th DCA 1982)	6
<u>State v. Rhoden</u> , 448 So.2d 1013 (Fla. 1984)	5,7
<u>Walcott v. State</u> , 460 So.2d 915 (Fla. 5th DCA 1984), <u>approved</u> , 472 So.2d 741 (Fla. 1985)	7
 <u>STATUTES</u>	
Section 924.06, Florida Statutes (1975)	7
Section 924.06, Florida Statutes (1977)	7
Section 924.06, Florida Statutes (1979)	7
 <u>OTHER AUTHORITIES</u>	
Rule 9.140(b)(1)(B), Florida Rules of Appellate Procedure	7

IN THE SUPREME COURT OF FLORIDA

WALLACE BOUDREAUX,

Petitioner,

v.

CASE NO. 75,163

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Wallace Boudreaux was the defendant in the trial court, 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

Pursuant to plea negotiations, the petitioner, Wallace Boudreaux entered pleas of nolo contendere to charges of conspiracy to escape, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony [R 29, 78]. As part of the agreement, Boudreaux agreed to be sentenced to an upward departure from the recommended guidelines term in exchange for the state's entrance of a nolle prosequi of a conspiracy to commit first degree murder charge. The agreement further called for a maximum sentence of ten years in prison [R 78].

The trial court sentenced Boudreaux to consecutive five year terms of imprisonment [R 31-33]. In addition, the court imposed fifteen years of probation to be served consecutively to the prison terms. Several special conditions were imposed specifically that, at the probation officer's sole discretion Boudreaux would submit to random urinalysis and substance abuse treatment; that Boudreaux abstain from the consumption of any alcohol during probation; and that Boudreaux work full-time during the period of probation [R 47]. No objection to these conditions, or to the probation term itself, appears on the record.

On direct appeal the First District Court of Appeal held, "because the appellant failed to object, the remaining conditions [of probation] are not preserved for review." Boudreaux v. State, 553 So.2d 376 (Fla. 1st DCA 1989). Boudreaux filed a

timely notice to invoke discretionary review, this Court
accepted jurisdiction, and this proceeding follows.

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.

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 cutlived 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 recalled 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)¹, 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

¹This statute remains unchanged to this date, and applies to the case sub judice as well.

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 involving substance abuse screening and counseling at the sole, unchecked discretion of the probation officer: the prohibition of the consumption of alcohol during the term of probation; and the requirement that the petitioner work full-time during the probation term².

Petitioner does not ask this Court to determine the propriety or impropriety of these conditions at this stage of the proceedings. Rather, petitioner respectfully requests that this case be remanded to the district court to allow the appellate process to take its course. Because the district court erred in holding the contemporaneous objection rule

²The first condition is invalid because it constitutes an unlawful delegation of exclusive judicial authority to impose a condition of probation to the probation officer. *Carson v. State*, 531 So.2d 1069 (Fla. 4th DCA 1988); *Hutchinson v. State*, 428 So.2d 739 (Fla. 2d DCA 1983). The condition that petitioner not consume alcoholic beverages during the duration of the probation term is illegal because such a condition is not reasonably related to the offenses for which he was convicted, and because the record clearly states that he has no alcohol or drug dependency program. *See Sodden v. State*, 411 So.2d 1391 (Fla. 1st DCA 1982). The final condition is improper because it would be a violation of probation to look for a full-time job but fail to gain such employment despite all reasonable efforts to do so. *Cowan v. State*, 527 So.2d 305 (Fla. 1st DCA 1988). A probationer can only be required to actively seek full-time employment, and then obtain prior approval from the probation officer before changing full-time jobs.


applicable to the context of conditions of probation, petitioner submits that the judgment of that court should be quashed, and this case remanded to the district court for a proper appellate determination of the propriety or impropriety of those conditions of probation.

V. CONCLUSION

For the foregoing reasons, the petitioner, Wallace Boudreaux, respectfully requests this Court to quash the district court's opinion below, and remand this case to that court for further appellate proceedings.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT


LAWRENCE M. KORN #0714798
Assistant Public Defender
Leon County Courthouse
Fourth Floor North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief on the Merits of Petitioner has been furnished by hand-delivery to Mr. William Hatch, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Wallace Boudreaux, at his last known address, on this 9th day of May, 1990.


LAWRENCE M. KORN