IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,940

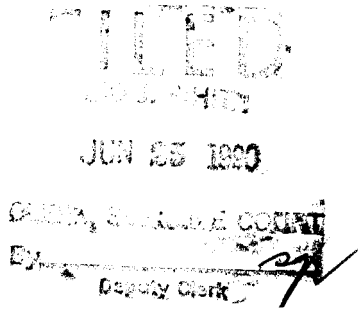
PATRICK MORGANTI,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.



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ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The following symbols will be used:

"R" Record on Appeal

"IB" Initial Brief

All emphasis has been added by Respondent.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is acceptable to Respondent as a non-argumentative portrayal of the lengthy procedural history of the instant case.

SUMMARY OF ARGUMENT

The trial court pursuant to 8775.083 Fla. Stat. (1985) imposed a $10,000 fine as a condition of probation. The fine is not an impermissible enhancement of Petitioner's original sentence. Unconstitutional enhancement refers to an increase in incarceration, consequently, subsequent fines are inapplicable to this claim.

The trial court in its discretion sentenced Petitioner to one and one half (1 1/2) years of probation irrespective of Petitioner's protest.

ARGUMENT

ISSUE

WHETHER THE IMPOSITION OF A FINE FOR THE FIRST TIME ON A RESENTENCING MUST CONSTITUTE *AN* UNCONSTITUTIONAL ENHANCEMENT OF SENTENCE. (CERTIFIED QUESTION).

The foregoing question was certified to this Honorable Court as a question of great public importance. This is the third time Mr. Morganti's case has been reviewed by this tribunal for one reason or another. Morganti v. State, 524 So.2d 641 (Fla. 1988); State v. Morganti, 509 So.2d 929 (Fla. 1987). As noted by the Fourth District, this is a third appeal from sentences imposed following a violation of probation.[1] Morganti v. State, **557** So.2d 593, 594 (Fla. 4th DCA 1990).

Petitioner initially contends that the imposition of a $10,000 fine as a condition of probation constitutes an improper enhanced sentence after his success on appeal. As expected, Petitioner relies on the United States Supreme Court's well-established decision in North Carolina v. Pearce, 395 U.S. 711, **726** (1969) for the proposition that "[w]here a trial court imposes an increased penalty upon a defendant who has been successful on appeal, the factual basis for the harsher sentence must be apparent of record." I.B. at 8. However, this principle presupposes the sentence imposed is more severe. Indeed, as in the lower court, Petitioner here has failed to

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[1] According to the Department of Corrections, Petitioner was released form prison on January 30, 1989. Thus, his 18 month probationary sentence expires in July, 1990.

demonstrate that the imposition of a 5 1/2 year sentence followed by 18 months probation with a $10,000 fine is more severe than a sentence of 30 years incarceration (as originally imposed) or 15 years incarceration (imposed on resentencing). Respondent contends it is not!

As a preface to the argument, the State would note that this issue was not preserved for appellate review as no objection to the monetary condition was interposed at the trial level at sentencing or in the form of a subsequent motion to correct sentence. Hedrick v. State, 15 FLW D317 (Fla. 2nd DCA February 2, 1990); Brunson v. State, 537 So.2d 692 (Fla. 1st DCA 1989); Jacobsen v. State, 536 So.2d 373 (Fla. 2nd DCA 1988); Burns v. State, 513 So.2d 165 (Fla. 2nd DCA 1987); Walker v. State, 461 So.2d 229 (Fla. 1st DCA 1984). Although the record demonstrates that defense counsel made an objection at the conclusion of the oral pronouncement of sentencing, a cursory review thereof makes it clear that such objection was directed toward the imposition of probation following incarceration (R 17), and not toward the assessment of a $10,000 fine. Petitioner thus has waived any right to challenge the sentence on this basis.

Turning alternatively to the verily unpreserved merits, Respondent submits that the Fourth District properly held that the imposition of a $10,000 fine as a condition of probation for the first time upon resentencing following reversal of sentences previously imposed, where Petitioner had rejected a previously

imposed longer term of incarceration, was not an unconstitutional penalty. Vindictiveness played no role in Petitioner's resentencing.

Florida courts have consistently found enhancements of punishment related to increases in time of incarceration as impermissible. Westover v. State, 521 So.2d 344 (Fla. 2nd DCA 1988); Del Rio v. State, 549 So.2d **766** (Fla. 3rd DCA 1989); Gonzalez v. State, **384** So.2d **57** (Fla. 4th DCA 1980). However, no court has ever held that the imposition of a fine as a condition of probation on resentencing is an enhancement of the previously imposed sentence. To the contrary, when faced with almost identical circumstances as here, the First District, in a unanimous decision, held that the imposition of $4,500 in court costs as a condition of probation in an amended sentence without any increase in the term of prison time was not an impermissible enhancement of punishment. Johnson v. State, 502 So.2d 1291 (Fla. 1st DCA 1987). In *so* holding, the Court certified a question similar to the one now before this Court. 502 So.2d at 1292. However, as noted by Judge Letts in his dissenting opinion in this case, the Court was never called on to answer the question. Morganti, supra at 595.

Nevertheless, the problem remains the same. Petitioner's attempt to distinguish Johnson from the case at hand falls short. He contends that "unlike court costs a fine is a penalty." Petitioner's brief at 12. This is a distinctiop without a

difference! Both costs and fines are part of a potential sentence since both are discretionary. See 8775.083 and §939.01(5), Fla. Stat. (1989). Thus, the lower court was proper in relying on Johnson as controlling case law.

Moreover, although the trial court imposed this fine as a condition of probation, its authority and discretion to do *so* is pursuant to 8775.083, Fla. Stat. (1989). The fact that Petitioner is indigent does not preclude imposition of such fines. Stewart v. State, 523 So.2d 518 (Fla. 2nd DCA 1988). If Petitioner is unable to pay the fine promptly, he is not without recourse pursuant to §775.083(2). Nash v. State, 434 So.2d 33 (Fla. 2nd DCA 1983). There was no abuse of discretion by the trial court since "it is not unreasonable to consider that the fine was related to the length of the initial terms of incarceration and the fact that the initial longer sentences were not coupled with a successive period of probation." Morganti, at 594.

Finally, Petitioner makes the collateral argument that the trial court impermissibly imposed probation in this case over Petitioner's objection. The lower court, after considering the case law presented, properly rejected Petitioner's argument on this basis. Morganti at 594.

The trial court possesses broad discretionary authority to grant probation. Smith v. State, 513 So.2d 1367 (Fla. 1st DCA 1987). Such discretion is subject only to the test of

reasonableness. Smith, 513 So.2d 1368. Consequently, Petitioner's consent is immaterial to the legality of it's imposition. Id. As the Fourth District stated:

> In reality a defendant has little say in determining the terms of his probation.

Dearth v. State, 390 So.2d 108 (Fla. 4th DCA 1980).

Although logically one would assume that a defendant would prefer probation as opposed to jail, this "offer" by a trial court is not subject to a defendant's permission. "By his or her conviction, the probationer has already demonstrated a need for supervised control." Grubs v. State, 373 So.2d 905 (Fla. 1979). Whether the supervision will be conducted in jail or not is a judicial determination. See Woods v. State, 542 So.2d 443 (Fla. 5th DCA 1989) (trial court, not defendant, had ultimate option to determine whether defendant would receive incarceration or probation); Evans v. State, 544 So.2d 1160 (Fla. 5th DCA 1989) (defendant is not entitled to be sentenced to prison rather than probation, even if he so requests).

CONCLUSION

WHEREFORE, in light of the foregoing, Respondent respectfully urges this Honorable Court to answer the certified question in the negative and affirm the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Respondent" has been forwarded by courier to: **MARCY K. ALLEN,** Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida, 33401, 21st day of June, 1990.

Of Counsel

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