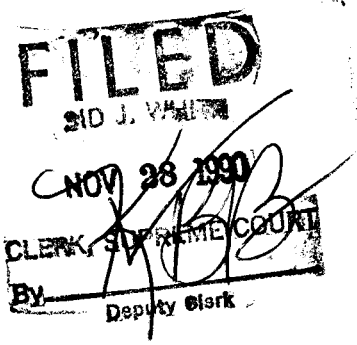
D.A. 2-7-91

IN THE SUPREME COURT OF FLORIDA



RAYMOND EUGENE CLARK, :

Petitioner, :

vs. : Case No. 76,006

STATE OF FLORIDA, :

Respondent. :

_____:

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On April 3, 1986, the Polk County state attorney charged the appellant, RAYMOND EUGENE CLARK, with having committed arson on November 26, 1985. (R3) On November 10, 1986, after a no contest plea, adjudication was withheld for attempted arson, and Clark was placed on community control for two years. (R8-9, 12-13) On November 12, 1986, the court -- in chambers and ex parte -- modified this community control by adding a condition that he enter and complete the residential program at the Lakeland Probation and Restitution Center (hereinafter PRC). (R10, 28) The court did not hold a hearing on this modification because Clark had, without counsel and before a notary public, signed a consent to the modification and a waiver of his rights to a hearing and the assistance of counsel. (R10-11)

On January 22, 1986, Clark's community control officer filed an affidavit of community control violation, alleging that Clark had left PRC without permission at different times, had disobeyed other PRC rules, and had apparently left PRC permanently on January 16. (R16-17) At the revocation hearing on March 26, 1987, probation officer Charlotte Phillips testified that Clark had left PRC without permission on the various alleged dates without permission. (R22-29) He did return to PRC on January 22, when he was arrested. (R26)

The defense moved to dismiss the affidavit of violation because it was based on an illegal modification of Clark's community control. (R30) The court denied the motion. (R33) Clark

then testified that, when he was first placed on community control, he did not have a place to stay and his probation officer said he had no choice but to go to PRC. (R34) His probation officer said nothing about going to court or his right to have a lawyer appointed for him. (R34, 40) When he signed the paper, he was confused about what was going on. (R39) He admitted violating the requirement that he stay at the center. (R35-37)

The court revoked community control, adjudicated him guilty of attempted arson, and sentenced him to three years in prison. (R40-41) On appeal, the second district court of appeal affirmed. Clark v. State, 559 So.2d 1272 (Fla. 2d DCA 1990). This court accepted jurisdiction on October 30, 1990.

SUMMARY OF THE ARGUMENT

The statutory procedures must be followed before a condition can be added to a person's probation or community control. Failure to follow the statutory procedures violates the double jeopardy doctrine because it increases punishment after the person has started serving a lawful sentence. Clark did not validly waive his rights because the statutory procedures were mandatory and the court did not make a thorough inquiry into his waiver of counsel.

ARGUMENT

ISSUE

REVOCATION OF COMMUNITY CONTROL COULD NOT BE BASED ON THE VIOLATION OF AN ILLEGAL CONDITION WHICH WAS ADDED TO THE COMMUNITY CONTROL ORDER WITHOUT COMPLIANCE WITH THE MANDATORY PROCEDURES AND IN VIOLATION OF THE DOUBLE JEOPARDY DOCTRINE.

The revocation of community control in this case was based on Clark's failure to comply with the rules of the Lakeland Probation and Restitution Center (PRC). The requirement that he stay at the PRC, however, was originally added to his community control not in court but ex parte in chambers, after Clark signed a written waiver of his rights to the assistance of counsel and court hearing. This enhancement to his community control was illegal because it did not follow the statutory procedures and violated the double jeopardy doctrine. Revoking community control for violating this illegal condition was improper.

The trial court had no statutory authority to add the PRC condition. The only statutory authorities for modifying probation or community control were section 948.06, Florida Statutes (1987) and section 948.03(8), Florida Statutes (1987). The second district in this case correctly said that section 948.06's hearing requirement did not come into play because no affidavit of community control violation was filed. The second district likewise correctly did not mention section 948.03(8), because that statute allowed modification only of a condition that the court had

previously ("theretofore") imposed. Carmo v. State, 378 So.2d 850 (Fla. 4th DCA 1979). Consequently, section 948.03(3) did not apply because the trial court in this case had not previously imposed a PRC condition.

Because these statutory authorities were not applicable, the logical conclusion would have been that the trial court in this case had no authority to add the PRC condition, just as the trial court in Carmo had no authority to add a restitution condition and the trial court in Anderson v. State, 444 So.2d 1109 (Fla. 3d DCA 1984) had no authority to add a condition prohibiting gambling. The first district drew this logical conclusion in several cases involving a PRC. Holcombe v. State, 553 So.2d 1337 (Fla. 1st DCA 1989); Ford v. State, 553 So.2d 1340 (Fla. 1st DCA 1989); Dover v. State, 558 So.2d 101 (Fla. 1st DCA 1990). The second district, however, drew the illogical conclusion (without any analysis) that, because the community control officer did not activate the statutory requirement by filing an affidavit of community control violation, no hearing was necessary to modify community control.

This reasoning put the cart before the horse. Although section 948.06 did require the filing of an affidavit before a hearing could be held, it also required a hearing before community control could be modified. "After such hearing, the court may revoke, modify, or continue the probation or community control or place the probationer into community control." § 948.06(1), Fla. Stat. (1987) (emphasis added). The correct conclusions to draw from the absence of the affidavit of violation were not only that

no hearing could be held but also that community control could not be modified because no hearing could be held.

The consequences of the second district's reasoning illustrate its illogic. By the simple expedient of not filing an affidavit of violation, a probation officer can ignore the statutory procedures and yet have probation "modified" to include many onerous conditions, including time in a chain gang at hard labor or additional time in the county jail. See Buckbee v. State, 378 So.2d 39 (Fla. 3d DCA 1979) (trial court could not amend probation order to include jail sentence)[1]. While the present case involved a PRC rather than a county jail, no substantive distinction exists in this context between "modifying" probation to require successful completion of a PRC program and "modifying" probation to require successful completion of a work release program at the county jail. Allowing trial courts to deprive probationers of their liberty in this manner without the mandatory hearing breaches the statutory framework and violates the "minimum requirements of due process." Gagnon v. Scarpelli 411 U.S. 778, 786 (1973) (notice and hearing required for probation revocations which cause loss of liberty).

The second district distinguished its own case of Marsh v. State, 559 So.2d 411 (Fla. 2d DCA 1990) as well as such other decisions as Carter v. State, 516 So.2d 331 (Fla. 1st DCA 1987), and Gurganus v. State, 391 So.2d 806 (Fla. 5th DCA 1980), because these cases involved an extension of probation rather than a

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[1]Rodriguez v. State, 441 So.2d 1129 (Fla. 3d DCA 1983) overruled the reasoning of Buckbee but not the result.

modification. The second district, however, cited no statutory support for this distinction. Moreover, no significant difference exists for this purpose between (1) extending the length of supervision and (2) increasing its severity. In either case, the conditions of the probationer's supervision are more onerous.

In the present case, by entering the PRC program, Clark had to live at PRC and could not live at home or with relatives. He was subject to the many regulations of the PRC, including a prohibition of cigarette smoking in most areas of the PRC grounds. (R18) He was required to pay rent to PRC and submit budgets for the money he earned at work. (R19) He evidently was not allowed to spend any money without permission. (R19) This court should take judicial notice that PRC's typically have many other regulations which most community controllees and probationers would not have to satisfy. Requiring Clark to stay at PRC did not merely "modify" his community control but instead increased the severity of his supervision. Accordingly, the second district's distinction in this case between extending and modifying probation was insubstantial and devoid of statutory support.

Because the addition of the PRC condition intensified Clark's supervision and thereby enhanced his penalty, the imposition of this condition was not only a violation of the statute but also of the double jeopardy doctrine. The original community control was a lawful penalty. Any enhancement of this lawful penalty was prohibited, because a court may generally amend a sentence only to mitigate the punishment, not to increase it. Troupe v. Rowe, 283

So.2d 857 (Fla. 1973); Tessier v. Moe, 485 So.2d 46 (Fla. 4th DCA 1986) (increase of penalty from payment of costs to fifty hours of community service). Aggravating the terms of probation by adding a PRC condition violated the double jeopardy doctrine unless a proper evidentiary record supported the added condition. Anderson v. State, 444 So.2d 1109 (Fla. 3d DCA 1984). Although Anderson did not say what this evidentiary record would consist of, it relied on Buckbee v. State, 378 So.2d 39 (Fla. 3d DCA 1979), which required an evidentiary hearing on the probationer's violations of his supervision before an additional condition could be imposed. Consequently, because no hearing occurred in this case, the double jeopardy doctrine was violated.

Clark's supposed waiver of his rights to a hearing and the assistance of counsel does not change this analysis. As the court held in Carter, "[s]ection 948.06, Fla. Stat. provides the sole means by which a probationary term may be modified. A probationer cannot agree with his probation officer to an extension of probation in lieu of compliance with the procedures set forth in § 948.06." 516 So.2d at 332 (citation omitted). Similarly, the Gurganus court said that "[i]t is not for a probation supervisor to make agreements with probationers about the length of the term of probation. In fact, even a judge cannot extend the probationary term without a hearing, with due process, and having the accused violator before the court." 391 So.2d at 807. See also Knapp v. State, 405 So.2d 786, 787 (Fla. 4th DCA 1981) ("Probation orders

are not subject to modification except for violation of conditions and then only upon notice and hearing.")

Although Carter and Gurganus involved extensions of probation rather than additional conditions, the reasoning underlying these cases apply equally well to the present case. Just as only judges may increase the length of a probationer's supervision, so also only judges may increase the severity of the supervision. Allowing probation officers to make these decisions gives them too much power. They are not trained in the law and may not know whether probationers legally deserve to have their punishment increased. For example, the probationer in Gurganus may have had a valid defense to the alleged violations if a proper hearing with the assistance of counsel had been held.

Furthermore, the probationer in most cases will feel coerced to waive his right to a hearing. In the typical case, the probationer will already have committed some violations of his probation.[2] The probation officer will then say that he intends to file an affidavit of probation violation unless the probationer agrees to enter a PRC and waive his right to a hearing. Faced with a potential prison sentence, most probationers will do what the probation officer wants and sign the waiver. Waivers of this sort,

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[2]The present case was atypical because Clark did not willfully violate his community control. Instead he apparently did not have an acceptable place to stay. Even in this case, however, the community control officer could presumably have tried to revoke Clark's community control because he did not have an approved place of residence. This attempt to revoke community control probably would not have worked because there was no willful violation, but Clark, of course, would not have known that.

however, cannot be considered legally voluntary, because they are obtained at the implied threat of additional prison time and the express promise of no prosecution. Williams v. State, 441 So.2d 653 (Fla. 3d DCA 1983); In the interest of K. H., 418 So.2d 1080 (Fla. 4th DCA 1982); Foreman v. State, 400 So.2d 1047 (Fla. 1st DCA 1981).

Finally, probationers have the right to the assistance of counsel at the probation revocation or modification hearing. State v. Hicks, 478 So.2d 22 (Fla. 1985). Before a probationer can waive this right, the court must comply with Faretta v. California, 422 U.S. 806 (1975), and Florida Rule of Criminal Procedure 3.111(d). Morgan v. State, 505 So.2d 504 (Fla. 4th DCA 1987); Swift v. State, 440 So.2d 655 (Fla. 2d DCA 1983). Specifically, rule 3.111(d) provides:

> (2) A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into accused's comprehension of that offer and his capacity to make that choice intelligently and understandingly has been made.
>
> (3) No waiver shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors.

Probation officers are not familiar with Faretta and rule 3.111(d) and cannot be expected to know all of their intricate requirements, including the requirement that the probationer be informed of the disadvantages of self-representation. Swift. Consequently, the rule requires the judge to make the requisite

thorough inquiry in open court. The judge in this case made no inquiry whatsoever before accepting the waiver of counsel. She could not possibly have made this inquiry she was in chambers and Clark was not there. She had before her only a notarized form document signed by Clark that he waived his right to the effective assistance of legal counsel. (R11) This document was patently insufficient to satisfy the requirements of Faretta and rule 3.111(d). Consequently, Clark's supposed waiver of his rights was legally invalid and makes no difference to the result of this case.

Some judicial procedures are so basic to elementary due process that they are mandatory in all cases. Notice and hearing before a person's legal punishment is increased are an integral part of this due process of law, because "in matters concerning the fundamental principles of justice and liberty of individuals, the record must be absolutely clear on the question of the legality of the proceedings." Buckbee, 378 So.2d at 41. Clark's failure to receive this required notice and hearing in this case violated the statute and the state and federal constitutions. This court should now reverse.

CONCLUSION

Clark asks this court to reverse the decision of the second district court of appeal and remand for further proceedings.