IN THE SUPREME COURT OF FLORIDA

BILL H. HEWETT,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

DCA Case No. - 90-1724

SUPREME COURT CASE NO. -

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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~~PETITIONER'S BRIEF ON JURISDICTION~~

STATEMENT OF THE CASE AND FACTS

On May 3, 1990, an affidavit **was** filed alleging Petitioner had violated his probation by failing to make restitution and failing to pay public defender liens and court costs. **(R** 36) Appellant had earlier been placed on probation for a period of two years for the offense of grand theft. **(R 36)** On August 10, 1990, a violation of probation hearing was conducted before the Honorable Warren **Edwards,** Circuit Judge. **(R** 1-35) At this hearing, Petitioner testified in his own behalf concerning his employment and his ability to make restitution and cost payments. **(R** 1-17) At the conclusion of Petitioner's testimony, the trial court initially found him guilty of the violation, but set this aside since it was proven that Petitioner did not have the ability to make the payments. **(R 19-20)** Despite this, and over Petitioner's objection, the trial court extended Petitioner's probation for a period of two years and waived all supervision costs but reimposed the restitution. **(R**

33-34) There is no order finding Petitioner to be in violation of his probation. (R 52)

Petitioner filed a timely notice of appeal to the District Court of Appeal, Fifth District, on August 15, 1990. (R 57-58) Petitioner was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R 63-64, 65-66) On appeal, Petitioner argued that unless a trial court finds that a probationer has willfully violated his probation, there is no authority for extending the probation even with the probationer's consent. In Hewett V. State, 16 FLW D2687 (Fla. 5th DCA October 17, 1991), the Court affirmed Petitioner's judgment and sentence. Petitioner filed a timely motion for rehearing and or certification which was denied on November 20, 1991. Petitioner filed his notice to invoke discretionary jurisdiction on December 20, 1991.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal in Hewett v. State, 16 FLW D2687 (Fla. 5th DCA October 17, 1991) directly conflicts with the decision of this Honorable Court in Clark v. State, 579 So.2d 109 (Fla. 1991). In Clark, this Court held that:

> Absent proof of violation, the Court cannot change an order of probation or community control, by enhancing the terms thereof.

In the instant case, although the trial court found no willful violation of probation, it nevertheless extended Petitioner's probation for two years. This decision cannot be squared with the decision of this court in Clark, and thus conflict clearly exists.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN HEWETT V. STATE, 16 FLW D2687 (Fla. 5th DCA October 17, 1991) DIRECTLY CONFLICTS WITH THE DECISION BY THIS HONORABLE COURT IN CLARK V. STATE, 579 So.2d 109 (Fla. 1991) SO AS TO PERMIT THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION AND ACCEPT THE INSTANT CASE FOR REVIEW.

At a hearing on an alleged violation of probation, Petitioner presented evidence that his failure to pay restitution and court costs was not willful in that he did not have the present ability to make these payments. Without making any specific finding that Petitioner willfully violated the terms of his probation, the trial court entered an order extending his probation for a period of two years and reinstated the restitution condition. On appeal, Petitioner argued that a period of probation cannot be extended absent a specific finding of a willful violation of probation. The Fifth District Court of Appeal rejected this argument and held that Section 946.06(4), Florida Statutes (1984) permits a trial court to extend a term of probation for a non-willful failure to pay previously imposed financial obligations.

In Clark v. State, 579 So.2d 109 (Fla. 1991), this Court dealt with the issue of enhancing the terms of a previously ordered term of probation. This court noted:

> Section 948.06, Florida Statutes (1987) provides the sole means by which the court may place additional terms on a previously entered order of probation or community control. Before probation or

> community control may be enhanced, either by extension of the period or by addition of terms, a violation of probation or community control must be formally charged and the probationer must be brought before the court and advised of the charge following the procedures of section 948.06. Absent proof of a violation, the court cannot chancre an order of probation or community control bv enhancing the terms thereof, even if the defendant has agreed in writing with his probation officer to allow such a modification and has waived notice and hearing.

Id. at 110-111. (emphasis added) Despite this clear statement, the District Court of Appeal chose to ignore it. In Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), this Court held that a District Court of Appeal had no authority to overrule or ignore controlling precedent of the Supreme Court. To do so would be to create chaos and uncertainty in the judicial forum. The failure of the District Court of Appeal below to follow the clear dictates of this court's opinion in Clark creates conflict. Pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, this court should exercise its discretionary jurisdiction to solve this express and direct conflict between the instant case and this Honorable Court's opinion in Clark v. State.

CONCLUSION

BASED **UPON** the foregoing reasons and authorities, this Honorable Court should exercise its discretionary review on the basis of direct and express conflict with this court's previous opinion in Clark v. State, **579 So.2d 109** (Fla. **1991).**

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

Michael S. Becker

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert **A.** Butterworth, Attorney General, 210 **N.** Palmetto Ave., **Ste 447, Daytona Beach, FL** 32114 via his basket at the Fifth District Court of Appeal and **mailed: Bill H. Hewett,** 1720 ***Cox*** Road, Cocoa, FL **32922,** this **30th day of December, 1991.**

Michael S. Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC **DEFENDER**

IN THE SUPREME COURT OF FLORIDA

BILL H. HEWETT, Petitioner, vs. STATE OF FLORIDA, Respondent.	DCA Case No. - 90-1724 Sup. Ct. Case No.

Appendix

A. Hewett v. State, 16 FLW D2687 (Fla. 5th DCA October 17, 1991)

B. Clark v. State, 579 So.2d 109 (Fla. 1991)

ing evidence; were entitled to a *Miranda* warning prior to such questioning. (emphasis added).

The language of this order strongly suggests that in ruling on this motion the court relied principally on the authorities cited by Alioto's counsel, *Jenkins v. State*, 533 So.2d 297 (Fla. 1st DCA 1988), *rev. denied*, 542 So.2d 1334 (Fla. 1989) and *Mosley v. State*, 503 So.2d 1356 (Fla. 1st DCA), *rev. denied*, 511 So.2d 999 (Fla. 1987). The state relied at the suppression hearing on *State v. Whitfield*, 444 So.2d 1154 (Fla. 2d DCA 1984). All of these cases either expressly or impliedly rely on a test to determine whether or not a person was in custody for purposes of *Miranda* warnings that is now obsolete. *See, e.g., B.L. v. State*, 425 So.2d 1178, 1179 (Fla. 3d DCA 1983). The test involves consideration of (1) probable cause to arrest, (2) subjective intent of the police, (3) subjective belief of the defendant, and (4) the focus of the investigation.[3] Not all four prongs needed to be present for a suspect to be "in custody". 425 So.2d at 1179.

Under the current standard, *Miranda* warnings must only be given when a reasonable person in the suspect's place would believe he or she were not free to leave.[4] *United States v. Long*, 866 F.2d 402 (11th Cir. 1989); *Caso v. State*, 524 So.2d 422 (Fla.), *cert. denied*, 488 U.S. 870, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988). *See also United States v. Bengivenga*, 845 F.2d 593 (5th Cir.), *cert. denied*, 488 U.S. 924, 109 S.Ct. 306, 102 L.Ed.2d 325 (1988).

In *Caso*, the Florida Supreme Court reiterated the position of the United States Supreme Court that *Miranda* warnings are only required when a person is in custody, engaged in an "inherently coercive custodial interrogation . . . ." 524 So.2d at 423. The *Caso* court explained that to be "in custody" meant that a suspect either had to be under "formal arrest", or had to have their freedom of movement restrained to the extent "associated with a formal arrest." *Id.* The focus is the state of mind of a reasonable person in the suspect's place. *Id.* at 423-424, (*citing* Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985), *cert. denied*, 475 U.S. 1090, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986)). *See also Riechmann v. State*, 581 So.2d 133, 137-138 (Fla. 1991); *Gresh v. State*, 560 So.2d 1266 (Fla. 1st DCA 1990). A "reasonable person" has been defined as one who is "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances."[5] 845 F.2d at 596. The test does not involve consideration of whether a defendant was the focus of an investigation.

In *Long*, the Eleventh Circuit identified three situations in which a reasonable person might believe he or she was not free to leave: if an officer (1) brandished a weapon, (2) touched the suspect, or (3) used language or a tone indicating compliance could be compelled. Questioning at the police station has been found to be "inherently coercive, *see, e.g., Roman*, 475 So.2d 1228, while questioning at a person's home or place of business is likely to be less so. *See Jenkins*, 533 So.2d at 300. *See also Butler v. State*, 544 So.2d 1115 (Fla. 3d DCA 1989).

The order in the instant case indicates that the trial court was led into applying the four-prong analysis rather than the "reasonable person" standard. All of the findings made by the trial court in its order relate to the former test and are not relevant to the current reasonable person test. Accordingly, we remand to the trial court to consider the evidence in light of the reasonable person standard, to resolve the factual disputes pertinent to the current test and, applying this test, to determine whether Alioto was in custody when she made the statements sought to be suppressed.[6]

REVERSED and REMANDED. (HARRIS, J., concurs. COWART, J., concurs in result without opinion.)

[1]He also told her that she was free to refuse to speak with him.

[2]Proctor could not recall exactly how the officers got inside, but testified they "told" Alioto, "Will you come out here and speak with him [Jones]. . ." and King then entered the apartment.

[3]A close reading of *Jenkins* suggests that the court went through the four-prong analysis and determined that at least three of the prongs were present (officer testified that he *intended* to obtain sufficient *probable cause to arrest* suspect and that *suspect was the focus of the unwarned interview*).

[4]The abrogation of the four-prong test was confirmed in United States v. Corral-Franco, 848 F.2d 536, 539-542 (5th Cir. 1988).

[5]The dissent in *Corral-Franco* has slightly rephrased this test to be "whether an innocent similarly situated individual would have believed he was not free to go." 848 F.2d at 543.

[6]We acknowledge that the Supreme Court in *Caso* searched the record for competent substantial evidence that would support the trial court's ruling under the correct theory. The *Caso* court was not faced with disputed facts as in this case. For a finding that Alioto was in custody to be possible, her testimony would have to be believed and the testimony of the two police officers rejected.

* * *

Criminal law—Probation—Extension—Term of probation may be extended upon a nonwillful violation for failing to pay restitution and costs

BILL HEWETT, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-1724. Opinion filed October 17, 1991. Appeal from the Circuit Court for Brevard County, Warren H. Edwards, Senior Judge. James B. Gibson, Public Defender, and Michael S. Becker, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David G. Mersch, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Bill Hewett appeals an order extending his period of probation in circuit court case number 88-1625. We affirm.

In that case, on December 8, 1988, Hewett was placed on two years' probation for grand theft and was ordered to pay $220 court costs, a $350 public defender fee, and $714 restitution as conditions of probation. On May 3, 1990, the state filed an affidavit alleging that the defendant had violated his probation by failing to pay these costs.

The record indicates Hewett also had been ordered to pay $7,000 in restitution as a condition of probation in another case, number 89-1308, and that he failed to pay that restitution. Inexplicably, it appears the state ignored that violation when it enforced the conditions in case number 88-1625.

At the hearing on August 10, 1990, Hewett's defense was his inability to pay. The trial court subsequently entered an order extending the term of probation for two years to allow Hewett an opportunity to make the past-due payments. Relying on *Smith v. State*, 377 So. 2d 250 (Fla. 3d DCA 1979), Hewett argues that the court should not have ordered the extension when no violation was specifically found. In *Smith*, the district court held that a period of probation can be extended only upon a showing of a willful violation of probation following proper notice and hearing.

Section 948.06, Florida Statutes, was amended in 1984 by the addition of subsection (4). Subsection (4) allows a court to consider alternative measures of punishment other than imprisonment if a probationer cannot pay restitution or cost of supervision despite sufficient bona fide efforts. We believe that the amendment supersedes the *Smith* rule by allowing an extension of a term of probation for a nonwillful failure to pay as to the original punishment. This alternative punishment is subject to the limitation that the sum of all penalties, to-wit: jail or prison time, community control, and probation, does not exceed the prescribed statutory limit for the crimes. In so holding, we recognize the supreme court's statement in *Clark v. State*, 579 So. 2d 109, 111 (Fla. 1991): "Absent proof of a violation, the court cannot change an order of probation or community control, by enhancing the terms thereof. . . ." *Clark* did not involve a failure to pay restitution; it dealt with the issue of the requirement of a hearing before terms of probation or community control can be enhanced. Thus, there was no need in *Clark* to distinguish between willful and nonwillful violations of restitution conditions. We do not believe that the supreme court in *Clark* was directing that alternative punishment could not be given under subsection (4) after proper notice and hearing where the court finds the violation

of a probation condition of restitution was not willful.

AFFIRMED. (SHARP, W., and DIAMANTIS, JJ., concur.)

* * *

Administrative law—Where aviation authority challenged issuance of permits for construction of an array of radio towers in county on ground that county issued permits without protecting or considering airspace needed for future airport site, aviation authority's administrative appeal was properly heard by county commission sitting as Board of Adjustment rather than by the Board of Building Examiners—Provisions of county code pertaining to structures which might be hazardous to aviation applied to aviation authority's appeal rather than provisions pertaining to standards for buildings and construction in general—Circuit court acting in its appellate capacity improperly dismissed review petition on ground that aviation authority should have appealed issuance of building permits to Board of Building Examiners—Attorney's fees—Injunctions—Circuit court properly denied permittee an award of attorney's fees on basis of absence of justiciable issues in view of complexity of controversy—Aviation authority was forced to bring injunction action against permittee after permittee ignored self-executing automatic stay which became effective pursuant to terms of county code upon filing of aviation authority's appeal—Where circuit court granted injunction and neither the propriety of its ruling nor the posting of the injunction bond was challenged on appeal, the law of the case establishes that the injunction was properly issued and the bond was properly required—Injunction bond to be discharged where injunction has been dissolved and adverse party is not entitled to recover attorney's fees or costs against bond

GREATER ORLANDO AVIATION AUTHORITY, Appellant/Cross-Appellee, v. LAKE COUNTY BOARD OF COUNTY COMMISSIONERS, a political subdivision and GUY GANNETT PUBLISHING CO., a Florida corporation, Appellees/Cross-Appellants. 5th District. Case Nos. 90-1613; 90-2057; 90-2425; 90-2426. Opinion filed October 17, 1991. Appeal from the Circuit Court for Lake County, Don F. Briggs, Judge. Elaine G. Fishman, Ellen S. Camenker and John R. Hamilton, of Foley & Lardner, van den Berg, Gay, Burke, Wilson & Arkin, Orlando, for Appellant/Cross-Appellee. Jerri A. Blair of Blair & Cooney, P.A., Tavares, for Appellee/Cross-Appellant Guy Gannett Publishing Company. No Appearance for Appellee/Cross-Appellant Lake County Board of Commissioners, etc.

(SHARP, W., J.) In this proceeding, we have consolidated four appeals involving the Greater Orlando Aviation Authority (G.O.A.A.) and Guy Gannett Publishing Company (Gannett). G.O.A.A. appeals from the circuit court's denial of its petition for certiorari review of the Lake County Commission's approval (sitting as the Board of Adjustment) of permits[1] issued to Gannett to build an array of radio towers in Lake County. G.O.A.A. also appeals from the court's denial of its motion for costs and its motion to discharge a bond required at an earlier injunction proceeding, which halted Gannett from constructing the towers. Gannett appeals from an order denying it attorney's fees in the injunction proceeding. We reverse two but affirm the other rulings.[2]

This case involves such a thicket of over-lapping authorities and regulations that even Brier Rabbit would have trouble penetrating and then extracting himself by an appeal. We do not intend to reach (in any regard) the merits of the controversy concerning Gannett's right to build the tower array. We only decide here that the circuit court should have granted an appellate review of the Board's decision affirming issuance of the building permits for the towers pursuant to Chapter 17 of the Lake County Code. The circuit court erred in dismissing the review petition on the ground that G.O.A.A. should have appealed the issuance of the building permits to the Board of Building Examiners pursuant to Chapter 6, Lake County Code.

The record in this case shows that in 1989, Gannett purchased property in Lake County close to the west Orange County line, for the purpose of relocating its radio stations and tower array. Six towers were planned. It notified the F.A.A. in April, and later obtained its approval. In July, Gannett obtained a zoning change on the property and in September, Lake County approved the site plan and issued building permits for the first two towers. Gannett commenced construction.

Following shortly behind Gannett's footsteps, G.O.A.A. found and selected (but did not buy) a site for a future airport in Orange County, West Site One, some two and one-half miles from Gannett's planned tower array. It notified the F.A.A. in June of 1989. It also told the Lake County Planning Director in August about its plans for West Site One. Within thirty days after the building permits for the first two towers were issued, G.O.A.A. appealed the issuance of the permits, under Chapter 17 of the Lake County Code.

Chapter 17 requires the issuance of permits and variances for construction in Lake County near three existing airports in Lake County. The code also contains broader language which could be interpreted as requiring permits and variances for other future airports in Lake County, as well as airports built in neighboring counties. It was adopted to comply with Chapter 333, Florida Statutes, which requires local zoning bodies to protect airports and airspace, or be regulated by D.O.T. and the F.A.A.[3]

To halt the ongoing tower construction in Lake County, G.O.A.A. filed an injunction suit against Gannett, relying on Chapter 17. Chapter 17, section 17-45(c) of the Lake County Code, provides for an automatic stay when the issuance/non-issuance of a permit to build a structure, which might be hazardous to aviation, is in controversy. The court granted the automatic stay, pending review by the Lake County Commissioners, the final zoning board of appeal, under Chapter 17. Gannett appealed the injunction order to this court, but took a voluntary dismissal before the case was considered by the court on the merits.

Back in Lake County the administrative appeal proceeded before the Lake County Commissioners (sitting as the Board of Adjustment). It issued an order specifically finding that it had jurisdiction under Chapter 17 and that Lake County properly issued the tower building permits without requiring variances or special permits for aviation hazards. Implicitly, it held that Chapter 17 was applicable.

When this decision was appealed by way of certiorari review[4] to the circuit court, Gannett argued there as it does here, that G.O.A.A. should have filed its administrative appeal regarding issuance of the building permits under Chapter 6, Lake County Code, to the Board of Building Examiners. The circuit court agreed and dismissed the cause as untimely. We disagree.

Chapter 6 pertains solely to standards for buildings and construction in general. It regulates licensing contractors and provides minimum codes and standards for construction. Although the construction of the tower array necessarily includes regulation of minimum codes and standards for construction, G.O.A.A.'s attack on the permits has nothing to do with Chapter 6 subject matter.

G.O.A.A.'s claim is that Lake County failed to protect or consider the needed airspace for West Site One under Chapter 17. The need or lack of need for such protection in the form of a requirement for a variance was ultimately decided in Gannett's favor essentially by inaction on the part of Lake County when the building permits issued without them. Logically, the proper review of this decision could only be made by the final administrative zoning authority under Chapter 17.

If a variance is required under Chapter 17, and is either granted or denied, that agency action would trigger the time to take an administrative appeal. But, if no variance is required, the only administrative action which is taken is the issuance of the building permit without a Chapter 17 review. That is what occurred in this case. The administrative appeal was heard by the zoning body with jurisdiction under Chapter 17. That decision should now be reviewed on the merits by the circuit court.

We also hold that the circuit court properly denied Gannett an award of attorney's fees pursuant to section 57.105 in the injunction suit. That statute requires the suit to be frivolous, *i.e.*, there

not limit the ability of cities and counties to require developers of new subdivisions to place their electric power supply facilities underground. We reverse the judgment and remand for entry of a judgment in favor of FPC.

It is so ordered.

SHAW, C.J., and OVERTON, BARKETT, KOGAN and HARDING, JJ., concur.

McDONALD, J., dissents.

Raymond Eugene CLARK, Petitioner,

v.

STATE of Florida, Respondent.

No. 76006.

Supreme Court of Florida.

May 2, 1991.

Defendant's community control placement was revoked by the Circuit Court, Polk County, J. Dale Durrance, J., for violation of community control condition. Defendant appealed. The District Court of Appeal, 559 So.2d 1272, affirmed. Application for review was granted. The Supreme Court, Grimes, J., held that community control conditions could not be modified based on defendant's out-of-court written agreement and waiver without first conducting hearing.

Quashed and remanded.

McDonald, J., dissented.

1. Criminal Law ⇐982.6(3, 4)

Community control conditions could not be modified based on defendant's out-of-court written agreement and waiver of right to assistance of counsel and to hearing on modification without first conducting hearing. West's F.S.A. § 948.06; U.S. C.A. Const.Amend. 6.

2. Criminal Law ⇐982.6(4)

Absent proof of violation, court cannot change order of probation or community control by enhancing terms thereof, even if defendant has agreed in writing with probation officer to allow modification and has waived notice and hearing. West's F.S.A. § 948.06.

James Marion Moorman, Public Defender and Stephen Krosschell, Asst. Public Defender, Tenth Judicial Circuit, Bartow, for petitioner.

Robert A. Butterworth, Atty. Gen. and Brenda S. Taylor, Asst. Atty. Gen., Tampa, for respondent.

GRIMES, Justice.

We review *Clark v. State*, 559 So.2d 1272 (Fla. 2d DCA 1990), for conflict with *Holcombe v. State*, 553 So.2d 1337 (Fla. 1st DCA 1989), and *Ford v. State*, 553 So.2d 1340 (Fla. 1st DCA 1989). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Clark pled nolo contendere to attempted arson and was placed on two years' community control with adjudication withheld. Two days later Clark signed a "Waiver of Rights and Motion to Modify Community Control," requesting the court to modify his community control to require him to enter and satisfactorily complete a program at the Lakeland Probation and Restitution Center (PRC). The waiver and motion form stated that the defendant waived the right to assistance of counsel and to a hearing on the modification. The court modified Clark's community control as requested without a hearing. Approximately two months later, Clark's community control officer filed an affidavit alleging that Clark violated his community control by terminating his residence at the PRC without permission and by failing to remain at the PRC as required. After a probation revocation hearing, the court found Clark in violation as alleged, revoked his community control, adjudicated him guilty of at-

tempted arson, and sentenced him to three years' imprisonment.

On appeal, the district court rejected Clark's claim that the modification was illegal because the trial court added a more onerous condition to his community control without a hearing. The district court concluded that there is no requirement of a judicial proceeding where voluntary modification occurs before the filing of an affidavit pursuant to section 948.06, Florida Statutes (1987), alleging a violation of probation or community control.[1]

In *Holcombe v. State*, 553 So.2d 1337, Holcombe signed two "Acknowledgment and Waiver" forms while on probation, admitting that he had violated his probation on two occasions. By signing the forms, Holcombe waived his right to notice and hearing and agreed to modification of his probation. The trial court twice modified Holcombe's probation without a hearing, first to require him to obtain a mental health evaluation and treatment and later to require him to enter and complete a PRC program. Thereafter, the Department of Corrections filed an affidavit alleging that Holcombe violated the terms of his probation by leaving the PRC without permission. The court terminated his probation and sentenced him to eighteen months' imprisonment.

The district court of appeal reversed, accepting Holcombe's argument that the trial court erred in enhancing the conditions of his original probation without complying with section 948.06. The court relied on cases holding that a probationer cannot agree with his probation officer to an extension of probation in lieu of compliance with the procedures of section 948.06. *Carter v. State*, 516 So.2d 331 (Fla. 1st DCA 1987); *Gurganus v. State*, 391 So.2d 806 (Fla. 5th DCA 1980); *Patrick v. State*, 336 So.2d 1253 (Fla. 1st DCA 1976).[2]

[1, 2] The trial court erred in this case by enhancing the terms of Clark's community control without notice and hearing. Section 948.06, Florida Statutes (1987), provides the sole means by which the court may place additional terms on a previously entered order of probation or community control.[3] Before probation or community control may be enhanced, either by extension of the period or by addition of terms, a violation of probation or community control must be formally charged and the proba-

1. Section 948.06(1), Florida Statutes (1987), provides:

> (1) Whenever within the period of probation or community control there is reasonable ground to believe that a probationer or offender in community control has violated his probation or community control in a material respect, any parole or probation supervisor may arrest such probationer or offender without warrant.... Any committing magistrate may issue a warrant, upon the facts being made known to him by affidavit of one having knowledge of such facts, for the arrest of the probationer or offender, returnable forthwith before the court granting such probation or commuity control.... The court, upon the probationer or offender being brought before it, shall advise him of such charge of violation and, if such charge is admitted to be true, may forthwith revoke, modify, or continue the probation or community control or place the probationer into a community control program.... If such violation of probation or community control is not admitted by the probationer or offender, the court may commit him or release him with or without bail to await further hearing, or it may dismiss the charge of probation or community control violation. If such charge is not at that time admitted by the probationer or offender and if it is not dismissed, the court, as soon as may be practicable, shall give the probationer or offender an opportunity to be fully heard on his behalf in person or by counsel. After such hearing, the court may revoke, modify, or continue the probation or community control or place the probationer into community control.

2. The facts in *Ford v. State*, 553 So.2d 1340 (Fla. 1st DCA 1989), are the same or very similar to those in *Holcombe v. State*, 553 So.2d 1337 (Fla. 1st DCA 1989), except that Ford did not admit a violation of community control. As in *Holcombe*, the district court reversed the order modifying community control and the order revoking probation. *Ford*, 553 So.2d at 1341.

3. We recognize that section 948.03(7), Florida Statutes (1987), permits the court to "rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control." However, that statute is not applicable here because the court did not modify a term or condition previously imposed. Rather, it added an entirely new condition to the order of community control.

tioner must be brought before the court and advised of the charge following the procedures of section 948.06. Absent proof of a violation, the court cannot change an order of probation or community control by enhancing the terms thereof, even if the defendant has agreed in writing with his probation officer to allow such a modification and has waived notice and hearing.

Accordingly, we quash the decision of the district court below. We remand for further proceedings consistent with this opinion and with instructions that the order of modified community control, the order revoking community control, the adjudication of guilt, and the sentence of imprisonment be vacated.

It is so ordered.

SHAW, C.J., and OVERTON, BARKETT, KOGAN and HARDING, JJ., concur.

McDONALD, J., dissents: "I would approve the decision under review."