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IN THE SUPREME COURT OF THE STATE OF FLORIDA

BILL HEWETT,

Petitioner,

v.

CASE NO. 79, 153
DCA NO. 90-1724

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

There is no conflict between the instant case and Clark v. State, 579 So.2d 109 (Fla. 1991). The record reflects that the trial court followed the procedure set forth in Clark, supra.

The record reflects that the State tendered proof of the defendant's probation violation, and that the trial court did find that the defendant willfully violated his probation.

The opinion in Clark, supra, did not address the specific legal question raised and addressed in the instant case. The instant case involves an interpretation of section 948.06(4), Florida Statutes (1989), and not the procedure the trial court must follow in order to extend or modify a defendant's probation or community control.

ARGUMENT

POINT ON APPEAL

WHETHER THE **DECISION** OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN THE **CASE SUB JUDICE** IS **IN** DIRECT CONFLICT WITH THIS COURT'S DECISION IN CLARK V. **STATE,** 579 SO.2D 109 (FLA. 1991).

The decision of the Fifth District Court of Appeal in Hewett v. State, 16 FLW D2687 (Fla. **5th** DCA 1991), is not in conflict with this Court's decision in Clark v. State, 579 So.2d 109 (Fla. 1991), for the following reasons. First, in Clark, supra, this Court held that modification of a defendant's probation or community control could not be based solely on the defendant's written agreement to the modification. Clark, supra at 111. This Court held that in order for the modifications to be legal, three requirements had to be satisfied; to-wit: 1. The violation of community control must be formally charged; **2.** The probationer must be brought before the court and advised of the charge; and 3. Proof of the violation must be tendered by the State [if the probationer denies the charge]. Clark, supra at 110-111. In the instant case, **a** formal charge was filed (R. 36); a violation of probation hearing was held an August 10, 1990 (R. 1-35); and proof that the defendant had failed to **pay** the ordered restitution and costs, and that he had the ability to pay something was tendered by the State (R. 1-15). Accordingly, the requirements of Clark, supra, were in fact met in this **case.**

Second, contrary to the petitioner's patently false assertion, the trial court did find that the petitioner willfully violated his probation. The trial court found,

> THE COURT: The Court's feeling he does have the ability to pay something. That he has made no effort with the exception of the three supervisory payments, and that the probation will be extended for two years.
>
> It's under the same terms as it was, and it's noted that the probation office will waive those payments, the supervisory payments.. Anything further? [Emphasis added].

(R. 33-34).

The trial court also did enter a written judgment order finding that the petitioner had violated his probation. (R. 53-56).

Finally, there is no conflict between the instant case and Clark, supra, as the two cases address two entirely different questions of law. In Holcombe v. State, 553 So.2d 1337 (Fla. 1st DCA 1989), and Ford v. State, 553 So.2d 1340 (Fla. 1st DCA 1989), the First District Court of Appeal held that section 948.06, Florida Statutes was the sole means [procedure] by which the trial court could extend or modify a defendant's probation or community control. The court certified to this Court, in both cases, whether section 948.06, Florida Statutes was the sole means by which the trial court could modify a defendant's probation or community control. Holcombe, supra at 1340; Ford, supra at 1341. In Clark v. State, 559 So.2d 1272 (Fla. 2nd DCA 1990), the Second District Court of Appeal rejected the First District's holdings in Holcombe, supra, and Ford, supra, and held that the trial court could modify a defendant's probation or community control based on a defendant's written agreement, where the agreement occurs prior to the filing of an affidavit af

violation. Clark v. State, 559 So.2d at 1273. In this Court's opinion in Clark, supra, this Court simply resolved the question as to the procedure that must be followed in order for the trial court to extend or modify a defendant's probation. As noted above, that procedure was followed in the instant case.

In the instant case, the Fifth District decided to specifically address the question raised by the respective parties, principally through notices of supplemental authority, as to whether the trial court had to find that the defendant "willfully" violated his probation, where the violations alleged were that the defendant had failed to pay restitution or costs. The Fifth District properly interpreted paragraph four of section 948.06(4), Florida Statutes (1989), in ruling that a trial court need not find that a defendant willfully violated his probation is order to extend or modify a defendant's probation. This Court's opinion in Clark, supra, did not even begin to address this specific legal question. Therefore, there is no conflict between the instant case and this Court's opinion in Clark, supra, and this Court should refuse to accept jurisdiction in the instant case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court to refuse to accept jurisdiction in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief on Jurisdiction has been furnished by delivery to Michael Becker, Assistant Public Defender, in the Public Defender's box at the Fifth District Court of Appeals, on this 21st day of January, 1992.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

BILL HEWETT,

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CASE NO. 79, 153
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APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

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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

(b) Contain a tamper-resistant strap which will guard against removal and an antenna system which guards against body shielding from the RF signal.

(c) Transmitter must weigh no more than 6 ounces and be sealed, water resistant, and shockproof.

(d) Such other necessary and vital specifications as may be set by the department for efficient and economical usage.

The provisions of this subsection do not apply to passive devices.

History.—s. 23, ch. 20519, 1941; s. 5, ch. 77-452; s. 1, ch. 81-198; s. 3, ch. 83-75; s. 16, ch. 83-131; s. 192, ch. 83-216; s. 3, ch. 83-256; s. 8, ch. 84-363; s. 15, ch. 85-288; s. 5, ch. 87-211; s. 11, ch. 88-96; ss. 70, 71, ch. 88-122; s. 37, ch. 89-526.

948.031 Condition of probation or community control; public service.—

(1) Any person who is convicted of a felony or misdemeanor and who is placed on probation or into community control may be required as a condition of supervision to perform some type of public service for a tax-supported or tax-exempt entity, with the consent of such entity. Such public service shall be performed at a time other than during such person's regular hours of employment.

(2) Upon the request of the chief judge of the circuit, the Department of Corrections shall establish a public service program for a county, which program may include, but shall not be limited to, any of the following types of public service:

(a) Maintenance work on any property or building owned or leased by any state, county, or municipality or any nonprofit organization or agency.

(b) Maintenance work on any state-owned, county-owned, or municipally owned road or highway.

(c) Landscaping or maintenance work in any state, county, or municipal park or recreation area.

(d) Work in any state, county, or municipal hospital or any developmental services institution or other nonprofit organization or agency.

History.—s. 1, ch. 76-70; s. 17, ch. 83-131; s. 77, ch. 87-226; s. 30, ch. 89-308.

948.032 Condition of probation; restitution.—If a defendant is placed on probation, any restitution ordered under s. 775.089 shall be a condition of such probation. The court may revoke probation if the defendant fails to comply with such order. In determining whether to revoke probation, the court shall consider the defendant's employment status, earning ability, and financial resources; the willfulness of the defendant's failure to pay; and any other special circumstances that may have a bearing on the defendant's ability to pay.

History.—s. 5, ch. 84-363.

948.04 Period of probation; duty of probationer.—

(1) Defendants found guilty of misdemeanors who are placed on probation shall be under supervision not to exceed 6 months unless otherwise specified by the court. In relation to any offense other than a felony in which the use of alcohol is a significant factor, the period of probation may be up to 1 year. Defendants found guilty of felonies who are placed on probation shall be under supervision not to exceed 2 years unless otherwise specified by the court. No defendant placed on probation pursuant to subsection 948.01(8) is subject to the probation limitations of this subsection.

(2) Upon the termination of the period of probation, the probationer shall be released from probation and is not liable to sentence for the offense for which probation was allowed. During the period of probation, the probationer shall perform the terms and conditions of his probation. The Department of Corrections may recommend early termination of probation to the court at any time before the scheduled termination date.

History.—s. 24, ch. 20519, 1941; s. 5, ch. 21775, 1943; s. 10, ch. 74-112; s. 1, ch. 79-77; s. 18, ch. 83-131; s. 3, ch. 83-228.

948.05 Court to admonish or commend probationer or offender in community control.—A court may at any time cause a probationer or offender in community control to appear before it to be admonished or commended, and, when satisfied that its action will be for the best interests of justice and the welfare of society, it may discharge the probationer or offender in community control from further supervision.

History.—s. 25, ch. 20519, 1941; s. 19, ch. 83-131.

948.06 Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.—

(1) Whenever within the period of probation or community control there are reasonable grounds 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 or request any county or municipal law enforcement officer to arrest such probationer or offender without warrant wherever found and forthwith return him to the court granting such probation or community control. 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 community control. Any parole or probation supervisor, any officer authorized to serve criminal process, or any peace officer of this state is authorized to serve and execute such warrant. 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 probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control. 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. If such probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control.

(2) No part of the time that the defendant is on probation or in community control shall be considered as any part of the time that he shall be sentenced to serve.

(3) Notwithstanding any other provision of this section, a probationer or an offender in community control who is arrested for violating his probation or community control in a material respect may be taken before the court in the county or circuit in which he was arrested. That court shall advise him of such charge of a violation and, if such charge is admitted, shall cause him to be brought before the court which granted the probation or community control. If such violation is not admitted by the probationer or offender, the court may commit him or release him with or without bail to await further hearing. The court, as soon as is 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 shall make findings of fact and forward the findings to the court which granted the probation or community control and to the probationer or offender or his attorney. The findings of fact by the hearing court are binding on the court which granted the probation or community control. Upon the probationer or offender being brought before it, the court which granted the probation or community control may revoke, modify, or continue the probation or community control or may place the probationer into community control as provided in this section.

(4) In any hearing in which the failure of a probationer or offender in community control to pay restitution or the cost of supervision as provided in s. 945.30, as directed, is established by the state, if the probationer or offender asserts his inability to pay restitution or the cost of supervision, it is incumbent upon him to prove by clear and convincing evidence that he does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so. If the probationer or offender cannot pay restitution or the cost of supervision despite sufficient bona fide efforts, the court shall consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison a probationer or offender in community control who has demonstrated sufficient bona fide efforts to pay restitution or the cost of supervision.

[1](5) Any parolee in a community control program who has allegedly violated the terms and conditions of such placement is subject to the provisions of ss. 947.22 and 947.23.

[2](6) Notwithstanding any provision of law to the contrary, whenever probation or community control, including the probationary or community control portion of a split sentence, is violated and the probation or community control is revoked, the offender, by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of his release on probation or community control from a state correctional institution. This subsection does not deprive the prisoner of his right to gain-time or commutation of time for good conduct, as provided by law, from the date on which he is returned to prison.

History.—s. 26, ch. 20519, 1941; s. 2, ch. 59-130; s. 2, ch. 61-498; s. 1, ch. 69-71; s. 20, ch. 83-131; ss. 2, 3, ch. 84-337; ss. 8, 9, 38, 48, ch. 89-526; s. 13, ch. 89-531.

[1]Note.—As reenacted by s. 48, ch. 89-526. Section 9, ch. 89-526, also reenacted subsection (5), effective September 1, 1990.

[2]Note.—

A. As created by s. 13, ch. 89-531. Section 8, ch. 89-526, also created subsection (6), which will amend this version, effective September 1, 1990, to read:

(6) Any provision of law to the contrary notwithstanding, whenever probation, community control, or control release, including the probationary, community control portion of a split sentence, is violated and the probation or community control is revoked, the offender, by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of his release on probation, community control, or control release. This subsection does not deprive the prisoner of his right to gain-time or commutation of time for good conduct, as provided by law, from the date on which he is returned to prison.

B. Section 52, ch. 89-526, provides that "[a]ll inmates committed to the department as of September 1, 1990, shall have a control release date established by December 1, 1990. Inmates received after September 1, 1990, shall have a control release date established within 90 days following notification by the department of receipt of the inmate."

948.10 Community control programs.—

(1) The Department of Corrections shall develop and administer a community control program. Such community control program and required manuals shall be developed in consultation with the Florida Conference of Circuit Court Judges and the office of the State Courts Administrator. This complementary program shall be rigidly structured and designed to accommodate offenders who, in the absence of such a program, would have been incarcerated. The program shall focus on the provision of sanctions and consequences which are commensurate with the seriousness of the crime. The program shall offer the courts and the Parole Commission an alternative, community-based method to punish an offender in lieu of incarceration when the offender is a member of one of the following target groups:

(a) Probation violators charged with technical violations or misdemeanor violations.

(b) Parole violators charged with technical violations or misdemeanor violations.

(c) Individuals found guilty of felonies, who, due to their criminal backgrounds or the seriousness of the offenses, would not be placed on regular probation.

(2) The department shall commit not less than 10 percent of the parole and probation field staff and supporting resources to the operation of the community control program. Caseloads should be restricted to a maximum of 20 cases per supervisor in order to ensure an adequate level of staffing. Community control shall be an individualized program in which the offender is restricted to noninstitutional quarters or restricted to his own residence subject to an authorized level of limited freedom.

(3) The department shall develop and implement procedures to diagnose offenders during the prison intake process in order to recommend to the sentencing courts, during the period of retained jurisdiction, suitable candidates for placement in a program of community control.

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."