048

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,574

TIMOTHY LIPPMAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT

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INTRODUCTION

The petitioner, **Timothy Bryan Lippman,** was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The respondent, **the State of Florida,** was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the petitioner will be referred to as the defendant and the respondent as the state.

The symbols "R" and "T" will be used to refer to portions of the record on appeal and the transcripts of the lower court proceedings, respectively. The symbol "S.R." will be used to refer to portions of the supplemental record and the symbol "A" will be used to designate the appendix to petitioner's brief, which is comprised of the decision of the District Court of Appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's statement of the case and facts as a substantially accurate account of the proceedings below with the additional emphasis of the following:

The defendant was charged with three counts of capital sexual battery on August 10, 1987. (R. 1-3A). On September 22, 1987, the defendant entered a negotiated plea of nolo contendere to reduced charges of attempted capital sexual battery. (T.1-7). During the plea colloquy, the State explained the plea as follows:

> Due to the family's parent (sic) desires and actions in this case, the state is prepared to offer a plea of two years probation, a withhold of adjudication with a requirement of any psychiatric treatment as required by the department of Probation should they so determine.

(T. 2).

According to the deal, the defendant was obligated to receive psychiatric treatment until such time as the probation officer determined that such treatment was no longer necessary. (T. 5). The defendant was also instructed by the trial court to do exactly what the probation officer told him to do. (T. 6). Finally, the order granting probation stated the following:

> YOU ARE HEREBY PLACED ON NOTICE THAT THE COURT may at any time rescind or <u>modify</u> any of the conditions of your

> probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the court may revoke your probation and impose any sentence which it might have imposed before placing you on probation.

(R. 18-19)(emphasis added).

On May 26, 1988, the trial court entered an Order of Modification of Probation. (R.22). The Order specified the following requirements:

> 1. That he (the defendant) participate in, pay for, and successfully complete the MDSO Program with Dr. William Samek.
>
> 2. That he not hold any jobs or participate in any programs where he would be wearing a police type uniform or use any police type equipment (e.g. security guard, firearm, rescue worker, civil defense, crime watch, neighborhood watch, etc.).
>
> 3. That he have no contact (written or telephonic) with any minor children, including minor relatives unless approved by his therapists, his sibling's therapist, and his Probation Officer.

(R. 22). The Order modifying defendant's probation stemmed from a letter written by the defendant's therapist and the director of the Sexual Abuse Treatment Outpatient Program ("STOP"), indicating that the defendant's progress had not been satisfactory and suggesting that the inclusion of three special conditions in defendant's probation order is vital to succeed in

treatment. (T. 40-43). The letter explained that "defendant's attendance had not been good, he had not listened to the recommendations made by the group and he had not yet made any significant lasting gains." (S.R. 41). In modifying the conditions of probation, the trial court explained that its interest was in protecting the children, the victims, from a sexual offender, and, therefore, the court was compelled to modify the conditions of probation in order to control the probationer's activities. (T. 42-43).

While the transcript clearly reflects that the defendant, his mother and his attorney were all present in court for the hearing on modifying the conditions of his probation, there was no objection stated on the record from any of them to the trial court's Order modifying the conditions of probation. (T. 34-48). Interestingly, the defendant did not appeal the trial court's order of modification.

QUESTION PRESENTED

WHETHER THE TRIAL COURT'S ORDER MODIFYING PROBATION BY PROHIBITING CONTACT BETWEEN PROBATIONER AND VICTIM OR VICTIM'S MINOR SIBLINGS CONSTITUTES A MODIFICATION OF AN EXISTING PROBATION CONDITION OR AN ADDITIONAL PUNISHMENT PROSCRIBED BY THE DOUBLE JEOPARDY CLAUSE WHERE THE PROBATIONER IS UNDERGOING PSYCHIATRIC TREATMENT FOR A SEXUAL OFFENSE AS A CONDITION OF PROBATION?

SUMMARY OF ARGUMENT

Florida law clearly states that the trial court is authorized to modify at any time the terms and conditions imposed by the original probation order. It is clear from the record that the condition prohibiting contact between the defendant and the victim or victim's minor siblings was reasonably calculated to insure that the defendant would not again violate the law and would benefit from his rehabilitative treatment. The nature of the condition was obviously consistent with the treatment the defendant was required to receive as stated in the order granting probation.

The State also contends that the issue raised before this Court should have been raised on direct appeal from the order entered by the trial court modifying the conditions of probation and, therefore, the issue presented here is procedurally barred from review.

On the merits, the State argues that the order prohibiting contact with the minor victim and the minor victim's siblings was reasonably viewed as a modification of an existing probation condition rather than the imposition of a new condition. The State submits that the first certified question should be answered in the negative as the nature of a probation order compels the trial court to protect the public by imposing written conditions which would reasonably control the probationer's

activites. The second certified question should also be answered in the negative as the record clearly reflects that the modified conditions were essential to achieve the goal of the treatment sought under the initial condition of probation. Accordingly, the judgments and sentences in this cause should be affirmed.

ARGUMENT

THE TRIAL COURT'S ORDER MODIFYING PROBATION BY PROHIBITING CONTACT BETWEEN PROBATIONER AND VICTIM OR VICTIM'S MINOR SIBLINGS CONSTITUTES A MODIFICATION OF AN EXISTING PROBATION CONDITION AND DOES NOT CONSTITUTE AN ADDITIONAL PUNISHMENT PROSCRIBED BY THE DOUBLE JEOPARDY CLAUSE WHERE THE PROBATIONER IS UNDERGOING PSYCHIATRIC TREATMENT FOR A SEXUAL OFFENSE AS A CONDITION OF PROBATION.

The defendant argues that the trial court did not have the authority to enhance the terms of probation by adding new conditions because the added conditions amounted to an increase in the severity of his sentence. The State contends that the trial court was authorized to modify the conditions of defendant's original probation order so that the defendant would be better apprised of those actions which run contrary to the treatment he was receiving and which impede his achievement of the desired goal of the psychiatric treatment.

Before reaching the merits, the State submits that the issue raised by the defendant was procedurally barred from review since it should have been raised on direct appeal from the trial court's modification order. Foster v. State, 400 So.2d 1 (Fla. 1981). Defendant attempted to raise the issue in a supplemental brief filed on appeal of the trial court's revocation of his probation. The record indicates that the Third District Court of Appeal did not grant him leave to file a supplemental brief,

whereby the State maintains that the District Court of Appeal's ruling reflected that the issue defendant intended to raise in his supplemental brief was procedurally barred. Therefore, the State contends that defendant's claim is procedurally barred from further review.

However, in addressing the merits of the issue regarding the trial court's modification of probation, the State contends that the probation order was subject to modification and that the facts in this case compelled the trial court to modify the conditions of probation. (R. 18). The record reflects that the order granting defendant probation included the condition that he would undergo psychiatric treatment required by the Department of Probation. This treatment began in the Sexual Abuse Treatment Outpatient Program ("STOP") on October 6, 1987. (S.R. 41). According to the letter written by the STOP Clinical Therapist and its Director, "defendant's attendance had not been good, he had not listened to the recommendations made by the group and he had not yet made any significant lasting gains." Id.

The trial court subsequently entered an order modifying defendant's probation in accordance with Section 948.03, Florida Statutes. (R.22). The State maintains that Fla. Stat. §948.03(8) (1990) grants the trial court the authority to modify at any time the terms and conditions of probation "theretofore imposed." Section 948.03(8) states:

> The enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto such other or others as it consider proper. The court may rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control.

The clear and unambiguous language of the statute explicitly authorizes the court, "to add thereto such other or others as it considers proper." In this case, the added conditions included in the order of modification reflect those changes necessary for the defendant's treatment by the Department of Probation. The State argues that the third condition imposed in the modification order, the one which is the subject of this appeal, was clearly necessary for the protection of the victim and the victim's siblings and the proper rehabilitation of the defendant.

The defendant was placed on probation on condition that he receive psychiatric treatment from a sex offender therapy program for three charges of sexual battery he committed on a child. Based on the information before him, the trial judge concluded that this condition could not be adequately fulfilled. As stated in Fed. R. Crim. P. 32(b) advisory committee notes (1979), "[p]robation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation." Thus, the State maintains that the written conditions added to the original order of probation in accordance

with section 948.03(8) should be construed as necessary conditions added for the purpose of fulfilling the original objective of the probation order in guiding the defendant toward a successful completion of treatment.

Furthermore, the State contends that the condition that the defendant refrain from contact with his minor siblings logically followed from the imposition of the initial condition that he receive psychiatric treatment for committing sexual offenses on his brother and the fact that the defendant was not making any significant improvement in the program. Therefore, the modification of the conditions of the defendant's probation order was properly entered and the trial court was correct in revoking the defendant's probation for violation of the third condition of the modified probation order.

The defendant contends that the trial court judge did not have the authority to enhance the terms of the probation without a formal charge that the original conditions have been violated. While the State would admit the cogency of that argument under Fla. Stat. § 948.06, dealing with violation of probation and community control, the State contends that under Fla. Stat. § 948.03(8), dealing with terms and conditions of community control, a court can modify a term or condition previously imposed. As such, the State submits that the opinion of the Third District Court of Appeal was correct where it concluded that the proscription against minor sibling contact is fairly

viewed as a modification of an existing probation condition rather than the imposition of a new condition. See also 18 U.S.C.A. § 3651 (West 1985)(where it states that "the court may revoke or modify any condition of probation, or may change the period of probation").

In his brief, the defendant also argues that he had a legitimate expectation that the terms of his probation would not be increased once probation had begun to be served. The State points out that the order granting probation specifically states, "that the court may at any time rescind or modify any of the conditions of your probation." (R.18)(emphasis added). Thus, the defendant had no legitimate expectation of finality in his original probation order since the order of probation clearly stated that the probation could be modified. See Clark v. State, 579 So.2d 109, 110 n.3 (Fla. 1991)(where this court recognizes that a court can modify a term or condition previously imposed). Moreover, the trial court in this case did not add completely new terms in the order modifying probation - it modified an existing condition of probation.

The cases cited by the defendant are easily distinguishable from the case at bar. In Clark v. State, 579 So.2d 109 (Fla. 1991), the court clearly enhanced the conditions of the defendant's probation by adding a completely new condition requiring Clark to enter and satisfactorily complete a program at the Lakeland Probation and Restitution Center. Furthermore, the

defendant's probation was enhanced by these new conditions without notice and hearing. In Clark, the court modified the probation based on defendant's out-of-court written agreement and waiver of his right to counsel and to a hearing.

In the present case, the record clearly reflects that the defendant, his mother and defendant's counsel were present in court when the court held the modification hearing. The transcript clearly indicates that the defendant, his mother and his attorney had ample opportunity to object to the court's order of modification. (T.34-38). The defendant failed to make any objection on the record in regard to the court's modification of probation where it would have been appropriate or expected. The State reasons that the defendant failed to raise an objection because there was a substantial basis to support the court's modification of the order of probation. Furthermore, Clark is distinguishable because it deals with the addition of a completely new term of probation whereas the facts in this case reflect the modification of an existing probation condition. See Clark, 579 So.2d at 110 n.3.

In Rock v. State, 584 So.2d 1110 (Fla. 1st DCA 1991), the trial court added two completely new conditions to the defendant's probation without proper notice and a hearing in court. The trial court clearly failed to comply with the procedures set forth in section 948.06, Florida Statutes when it added a new condition to defendant's probation. Unlike Rock, the

trial court in our case modified probation correctly under section 948.03(8) where the modification was ordered in court with the defendant and his counsel present and where no objection was raised. Furthermore, the State contends that the modification did not amount to a new term but was clearly a modification of a condition previously imposed.

In Weidmann v. State, 582 So.2d 1251 (Fla. 2d DCA 1991), the trial court modified the defendant's probation by imposing a special condition precluding the defendant from living within a three quarter's mile radius of any school for minors. Since the facts in Weidmann are distinguishable from the facts in our case, the nature of the condition added is also distinguishable. In our case the defendant was ordered to receive psychiatric treatment pursuant a condition of his original probation order and the modification order was subsequently entered pursuant to the report on his lack of progress in the program and the need to protect the victim and the victim's siblings.

In Anderson v. State, 444 So.2d 1109 (Fla. 3d DCA 1984), the defendant, who was on probation following a conviction for possession of cocaine, petitioned the court for permission to leave the county to go to New Jersey and enter a rehabilitation program there. The trial court granted the petition but imposed an additional condition on defendant's probation that defendant not engage in gambling activity while in New Jersey. On appeal, this Court ruled that there was no substantial record basis to

support the order enforcing the additional condition of the defendant's probation, therefore, it vacated that portion of the order prohibiting defendant from engaging in gambling activity.

In the present case, the facts clearly support the trial court's order modifying probation. Based on the information contained in Dr. Samek's letter to Judge Moreno concerning defendant's progress in the Sexual Abuse Treatment Outpatient Program, the State contends that the conditions included in the Judge's order modifying probation clearly constituted a modification of the existing probation condition.

Clearly, the special conditions at issue in this case did not reflect additional separate conditions, rather, they reflected the necessary institution of guidelines to keep the defendant in line with the treatment program. Defendant's original order of probation was entered subject to the defendant's receiving of counseling and treatment by a psychologist. In order to properly achieve the objective provided in that probation order, the trial court, in its discretion, modified the defendant's probation order upon the doctor's professional recommendation that the court should clearly notify defendant of three more conditions which must be adhered to for purposes of his treatment. The three conditions recommended were clearly within the spirit of the original condition and the importance of defendant's adherence to them was clearly obvious in view of the goal of the treatment for which he

was placed on probation. Therefore, in this case, the trial court's order modifying the defendant's original probation order was correctly entered.

In Halcombe v. State, 553 So.2d 1337 (1st DCA 1989), the court held that a trial court may not modify or enter probation or community control based solely on a written agreement and waiver by the probationer with his probation officer, made out of court without a hearing or the assistance of counsel. In that case, the trial court erred in failing to strictly follow the statutory procedure where it modified the defendant's original probation order on the basis of a written agreement with his probation officer admitting his violation of probation and waiving notice and hearing.

The present case is easily distinguishable since the modification was made in open court before the defendant, his counsel and his mother. Furthermore, the facts in our case supported the court's order of modification and the record clearly shows that the defendant, his counsel and mother did not raise a word of objection.

In Carrandi v. State, 560 So.2d 245 (Fla. 3d DCA 1990), the court reversed a modification of probation where there was no basis or evidence to conclude that such condition was reasonable in view of the conditions stated in the defendant's probation order. In the present case, however, the additional conditions

included by the modification were appropriate in view of the purpose of rehabilitation and treatment behind defendant's probation agreement. Contrary to defendant's argument, the modification did not reflect the court's dissatisfaction with the original deal with the defendant. It is clearly understood that the defendant was given probation in exchange for his undergoing psychiatric treatment. The doctor, in his expertise, subsequently determined the particular limitations on defendant that directly related to his rehabilitation. Based on defendant's therapist's evaluation and opinion, the court was authorized to modify the conditions of defendant's order of probation. In this case, the additional conditions constituted a modification of conditions "theretofore imposed." Fla. Stat. § 948.03(8) (1991). Accordingly, the decision of the District Court of Appeal was correct and the judgment and sentence in this case should be affirmed

CONCLUSION

Based on the foregoing arguments and authorites, the respondent respectfully requests this Court to affirm the decision of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **LOUIS CAMPBELL**, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 26 day of May, 1992.

AVI J. LITWIN
Assistant Attorney General