IN THE SUPREME COURT OF FLORIDA

JERRY JAY CHICONE III,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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SUPREME COURT CASE NO. 85,136
5TH DCA CASE NO. 93-02659

ON NOTICE TO INVOKE DISCRETIONARY REVIEW
OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

On October 6, 1993, Petitioner was before the trial court for sentencing on his convictions after jury trial for possession of cocaine and possession of drug paraphernalia in Orange County Circuit Court Case No. CR92-8163. The trial court withheld adjudication of guilt and placed Petitioner on one year of community control to be followed by three years probation. Those convictions were affirmed, but the cause was remanded for resentencing in 5th DCA Case No. 93-02659, opinion filed December 2, 1994. (Appendix I -- 5th DCA Opinion). It is from that opinion that Petitioner now seeks discretionary review.

It should be noted that, October 6, 1993, there was also a plea and sentencing in a related case involving the same defendant and the same issue concerning the special conditions of his probation. That case was before this Court in Chicone v. State, Florida Supreme Court Case No. 84,780. This Court declined to accept jurisdiction in that case by order dated February 2, 1995.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal on the issue of the sufficiency of the charging document and the jury instructions on "scienter" is not in express and direct conflict with any of the cases cited by Petitioner. The Information tracked the statutory language and the instructions read were from the approved Florid Standard Jury Instructions.

Some of the special conditions of Petitioner's drug offender probation contained in the written probation order such as the prohibitions against using intoxicants to excess and against carrying firearms were not orally pronounced at the time of the entry of the plea in open court. The District Court remanded the matter to the trial court for reconciliation of the conflicts between the oral and written sentences. Petitioner relies on cases that hold that a previously entered order of probation cannot be modified absent proof of a violation. The trial court included conditions not orally pronounced in the written probation order, but did not amend a "previously entered" order. In a related case, Chicone v. State, Florida Supreme Court Case No. 84,780, this Court declined to accept jurisdiction over this same issue. Discretionary review of the District Court's decision on this issue is not warranted in this case either.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE SUBJUDICE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ANY OF THE THIRTY OTHER CASES CITED BY PETITIONER.

Under Article V, Section 3(b)(3), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court held that the conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. In Department of HRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986), this Court said that inferential or implied conflict no longer may serve as the basis for jurisdiction. In Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980), this Court quoted from its earlier decision in Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed...It was never intended that the district courts of appeal should be intermediate courts...To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to

> the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Given the fact that the Fifth District Court is a court of final appellate jurisdiction and given the very limited and restricted bases for this Court's exercise of its discretionary jurisdiction based on conflict, it cannot be said that Petitioner has established any good cause for the exercise of that jurisdiction in the instant case. The opinion of the Fifth District Court of Appeal in the case sub judice is not in express and direct conflict with any of the some thirty state and federal court cases cited by Petitioner.

The District Court cited State v. Medlin, 273 So. 2d 394 (Fla. 1973) and State v. Ryan, 413 So. 2d 411 (Fla. 4th DCA 1982), review denied 421 So. 2d 518 (Fla. 1982), for the proposition that knowledge is not an essential element of the crimes of possession of cocaine and possession of drug paraphernalia in concluding that the charging document and jury instructions were adequate. The District Court distinguished these types of possession offenses from a violation of the trafficking statute, Section 893.135(1)(b), Florida Statutes, which specifically includes a knowledge element, citing State v. Dominguez, 509 So. 2d 917 (Fla. 1987).

Petitioner has attempted to circumvent the requirements of Reaves that the conflict must be express and direct and must appear within the four corners of the majority decision by arguing that this case involved constructive possession and by

analogizing to trafficking cases. The Information charged actual or constructive possession of cocaine and use or possession of drug paraphernalia. (Appendix II -- Information). The record on appeal prepared at the direction of Petitioner does not include a transcript of the trial testimony. The majority decision in this case includes absolutely no reference to constructive possession and now, contrary to Reaves, Petitioner seeks to go outside the four corners of the District Court opinion and outside the record on appeal to argue constructive possession. Also, contrary to Reaves, Petitioner seeks to establish express and direct conflict by analogizing to trafficking cases. The instant case is a case of possession, not trafficking. As explained in the District Court's opinion, the statutory elements of the two offenses are not the same. There is no express and direct conflict between the District Court's opinion in this possession case and Dominguez and the other trafficking cases he cites. The Information charging simple possession tracked the language of the statute and the jury was instructed using the approved standard jury instructions. Those instructions included the Florida Standard Jury Instruction on Section 893.13(1)(f), Florida Statutes, and included instructions on knowledge as it applies to both exclusive and non-exclusive possession. (Appendix II -- Information and Appendix III -- Jury Instructions Pp. 39-41). Further review of these matters is unnecessary.

The District Court did remand the cause for resentencing to correct the discrepancies between the probationary sentence as orally imposed and the subsequent rendered written probation

order. On direct appeal, Petitioner had argued that eight special conditions of his probation relating to possession of firearms, use of intoxicants, employment, visits by the community control officer, self-improvement, electronic monitoring (if necessary), retained jurisdiction and search without a warrant were not orally imposed. Petitioner suggested that the appropriate remedy was to strike all of these special conditions of his probation which were not orally pronounced at the sentencing hearing. The State argued that the appropriate remedy was to remand the cause to the trial court so that it could orally advise Petitioner concerning these special conditions of his drug offender probation. At that time, Petitioner could raise any objections he might have to those special conditions. All of the special conditions Petitioner seeks to have stricken are designed to effect his rehabilitation. A defendant is not required to accept probation and may reject the trial court's attempts to effect his rehabilitation by conditions of probation rather than by imprisonment. Bentley v. State, 411 So. 2d 1361, 1366 (Fla. 5th DCA 1982), review denied 419 So. 2d 1195 (Fla. 1982).

Petitioner feels that remanding the case to the trial court to resolve these concerns directly and expressly conflicts with this Court's decisions in Lippman v. State, 633 So. 2d 1061 (Fla. 1994) and Clark v. State, 579 So. 2d 109 (Fla. 1991). Those cases do not meet the requirements for express and direct conflict as set forth in Reaves, Supra. In Clark, this Court held that the trial court may not place additional terms on a

"previously entered" order of probation absent proof of a violation. Id. at 110. That case is not in conflict with the instant case. At the sentencing hearing on September 6, 1993, trial court announced that it was withholding adjudication of guilt and placing Petitioner on one year of community control to be followed by three years of probation. Although the trial court did sign the court minutes from that hearing, the probation order was not formally "entered" by being reduced to writing and being filed until November 12, 1993 and, therefore, the court did not place any additional terms on a "previously entered" order of probation contrary to the dictates of Clark.

The other case relied on for conflict jurisdiction is Lippman. In that case, the trial court had modified a previously entered order of probation by prohibiting contact between the probationer and his victim despite the fact that the probationer had not violated the terms of his probation. This Court referred to its earlier decision in Clark in finding that, absent proof of a violation, the terms of probation could not be changed. Again, the State would argue that, in the instant case, the initial probation order had not yet been "entered" and, therefore, it was never modified. The instant case is not in express and direct conflict with either Clark or Lippman and, as in Chicone v. State, Florida Supreme Court Case No. 84,780, this Court should decline to accept jurisdiction for further review of this issue.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent would suggest that this Court should decline to exercise its discretionary jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been mailed to James M. Russ and Terrence E. Kehoe, Esquires, 18 West Pine Street, Orlando, Florida 32801, this 3rd day of March, 1995.

Anthony J. Golden
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

JERRY JAY CHICONE III,

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APPENDIX

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Appendix Part 1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

JERRY JAY CHICONE, III,

Appellant,

v. Case No. 93-2659

STATE OF FLORIDA,

Appellee.

Opinion filed December 2, 1994

Appeal from the Circuit Court for Orange County, James C. Hauser, Judge.

James M. Russ of James M. Russ, P.A., and Terrence E. Kehoe of Law Office of Terrence E. Kehoe, Orlando, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

THOMPSON, J.

Jerry Jay Chicone, III, was tried and convicted of possession of cocaine, a felony,[1] and possession of drug paraphernalia, a first degree misdemeanor.[2] He appeals the trial court's order withholding adjudication of guilt and the disposition imposed. We affirm the conviction and reverse the disposition.

Chicone argues that the trial court erred, first by not

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[1] § 893.13(1)(f), Fla. Stat. (1991).

[2] § 843.147(1), Fla. Stat. (1991).

dismissing the information because neither count of the information alleged the essential element of knowledge, and, second, because the court did not instruct the jury that the state had to prove Chicone knew the substance he possessed was cocaine and knew that the object he possessed was drug paraphernalia. Chicone relies upon State v. Dominguez, 509 So. 2d 917 (Fla. 1987) and Drain v. State, 601 So. 2d 256 (Fla. 5th DCA 1992), however, these cases do not support Chicone's arguments.

In Dominguez, the defendant was charged with trafficking in cocaine, a violation of section 893.135(1)(b), Florida Statutes. Because the trafficking statute explicitly required knowledge, the Florida Supreme Court held that the state had to plead and prove that the defendant knew the substance was a controlled substance. Unlike the trafficking statute, the possession statute under which Chicone was charged does not require "knowing" possession of a controlled substance in order to obtain a conviction. State v. Ryan, 413 So. 2d 411 (Fla. 4th DCA) (the state is not required to prove intent or knowledge in a simple delivery or possession of a controlled substance case), review denied, 421 So. 2d 518 (Fla. 1982); State v. Medlin, 273 So. 2d 394 (Fla. 1973).

In Drain, the only issue before this court was the proper interpretation to be given section 817.564(3), Florida Statutes, which makes it unlawful for any person to possess with intent to sell any "imitation controlled substance." This court held that the amended information entirely failed to adequately allege an offense pursuant to section 817.564 because the amended information failed to state

several essential facts constituting a violation of the statute, including "the defendant's essential knowledge of the imitative character of the substance in question." Id. at 62. Unless the state alleged and proved that the defendant knew the substance was counterfeited, he could not be convicted. We reversed. Those are not the facts here. This case involves simple possession. The state neither had to prove, nor allege in its information, that Chicone knew the substance he possessed was cocaine, or that he knew the object he possessed was drug paraphernalia. Ryan, 413 So. 2d 411; Medlin, 273 So. 2d 396. We affirm the ruling of the trial court.

The second issue raised by Chicone is similar to the first issue. Chicone argues that the trial judge should have read his special jury instructions. He proffered instructions that required the jury to find on the issue of "knowledge" that the substance possessed by Chicone was known to him to be cocaine and that the object he possessed was known to him to be drug paraphernalia in order for there to be a conviction. The trial court denied these instructions and gave the standard jury instruction for section 893.13(1)(f)[3] and section 893.147(1)[4] along with the standard jury instructions on reasonable doubt, which the trial judge read twice. Because "knowledge" of the nature of the substance or object possessed was not an essential element of either count, the trial judge refused to instruct the jury that the state had to prove that Chicone knew the

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[3] Fla. Std. Jury Instr. (Crim.) 227.

[4] Fla. Std. Jury Instr. (Crim.) 245.

substance was cocaine and that he knew the object was drug paraphernalia. The trial judge did not err. See Williams v. State, 591 So. 2d 319 (Fla. 3d DCA 1991) (granting or denying a jury instruction is addressed to the sound discretion of the trial judge, and it is within the trial judge's discretion to deny a defendant's special instruction where the standard instructions adequately cover the issue). We affirm the trial court's denial of the special instructions.

The supplemental argument of Chicone, that the standard instruction does not adequately define "reasonable doubt," has been addressed and rejected by the Florida Supreme Court. In Brown v. State, 565 So. 2d 304 (Fla.), cert. denied, 498 U.S. 992, 111 S. Ct. 537, 112 L. Ed. 2d 547 (1990), abrogated on other grounds, Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994), the court held that the standard reasonable doubt instruction, read in its totality, "adequately" defines "reasonable doubt" and does not dilute the quantum of proof required to meet the reasonable doubt standard. This ruling is supported by the Supreme Court's recent decision in Victor v. Nebraska, __ U.S. __, 114 S. Ct. 1239, 127 L. Ed. 583 (1994) which held that where, "taken as a whole," the instruction correctly conveys the concept of reasonable doubt to the jury, there is no constitutional violation.

We do, however, remand the case for resentencing. After his conviction, Chicone was scheduled for sentencing. At the sentencing hearing, the court orally announced that it was withholding adjudication and placing Chicone on one year of community control to

be followed by three years of probation. The trial court orally announced several special conditions of probation and community control. The trial judge did not state to which count or both probation applied, or to which count or both community control applied. Subsequently, the court entered a written order which ordered that Chicone serve the same conditions of probation on each count, the sentences to run concurrently. Additional conditions not announced orally were also included in the written order. We reverse.

In this case, because the trial judge imposed an illegal sentence on the misdemeanor offense of possession of drug paraphernalia, and because the special conditions which were not orally announced were included in the written order, we quash the sentencing order and remand for resentencing and resolution of the discrepancies. Cleveland v. State, 617 So. 2d 1166 (Fla. 5th DCA 1993).

Conviction AFFIRMED; Sentencing REVERSED.

HARRIS, C.J. and GRIFFIN, J., concur.

Appendix Part 2