IN THE SUPREME COURT OF FLORIDA

JERRY JAY CHICONE, III,

Petitioner,

v. CASE NO. 85,136

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIFTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

On December 2, 1994, the Fifth District Court of Appeal affirmed Pettiioner's convictions for possession of cocaine and paraphernalia, but remanded the cause for resentencing. The trial court had imposed a sentence of one year of community control to be followed by three years of probation on both counts to be served concurrently. Possession of paraphernalia is a first degree misdemeanor and, therefore, the concurrent sentence imposed on that conviction was illegal. The District Court also remanded the possession of cocaine conviction for resentencing because some of the special conditions of probation were not orally announced. (Appendix I -- Chicone v. State, 19 Fla. L. Weekly D2538 (Fla. 5th DCA December 2, 1994). It is that decision which is now before this Court on discretionary review. The three issues raised by Petitioner are the same three raised on direct appeal to the Fifth District Court of Appeal. Respondent conceded on direct appeal that, despite the lack of objection thereto, the sentence imposed on the misdemeanor conviction for possession of paraphernalia was illegal.

STATEMENT OF THE FACTS

Respondent would note that the record on appeal does not include the transcript of the trial below. It is impossible to deduce from this inadequate record provided to the appellate court what testimony and other evidence was presented during Petitioner's trial to establish that he possessed cocaine and paraphernalia on August 4, 1992 in Orange County, Florida. Petitioner has placed great emphasis in his brief on the element of scienter and yet, from this record, it is impossible to conclude whether Petitioner's possession was exclusive or joint, whether the contraband was discovered on his person, whether he was in his home or in public and whether he was actually using the paraphernalia to ingest the cocaine at the time of his arrest. All of these facts would be of great significance in determining the adequacy of the jury instructions on knowledge given below. Error cannot be presumed where the record provided to the appellate court is inadequate.

SUMMARY OF ARGUMENT

Under Section 893.13(1)(f), there is no element of guilty knowledge. If the general intent is present, a person found to have possession of a controlled substance may be guilty regardless of whether the person actually knows the substance is cocaine. The crime of simple possession is a "strict liabiliity" offense; guilty knowledge is not an element of the crime, and the State need not include a knowledge element in the Information. The standard jury instructions on knowledge were given to the jury. No additional special instructions were necessary or appropriate.

The Fifth District Court of Appeal remanded this cause to the trial court so that it could reimpose the special conditions of probation included in the written order but not orally mentioned during the sentencing hearing. If such special conditions will be of value in accomplishing the purposes of the probation, the defendant should be given another hearing at which he can be advised concerning those special conditions and at which he can offer any objections thereto. A blanket rule requiring the deletion of all special conditions not orally pronounced is not legally required and is a disservice to the probationer himself.

ARGUMENT

POINT I AND II -- RESTATED

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THE INFORMATION FOR FAILURE TO ALLEGE KNOWLEDGE AND IN INSTRUCTING THE JURY FROM THE FLORIDA STANDARD JURY INSTRUCTIONS ON THIS OFFENSE.

Petitioner was charged by Information with the third degree felony of possession of cocaine under Section 893.13(1)(f), Florida Statutes (1991), and the first degree misdemeanor of possession of paraphernalia under Section 893.147(1), Florida Statutes (1991). (R84). Possession of a controlled substance under Section 893.13 is considered a general intent crime, that is, the statute does not include a criminal knowledge provision. This type of general intent crime is distinguished from specific intent crimes such as drug trafficking under Section 893.135(1)(b)1, Florida Statutes (1991), in which the element of guilty knowledge has been specifically included by the legislature. Guilty knowledge is not an element of the statutory offense of possession of cocaine. Therefore, the Information need not have included a knowledge element. See Green v. State, 602 So. 2d 1306, 1308-1309 (Fla. 4th DCA 1992); review denied 613 So. 2d 4 (Fla. 1992).

As Judge Farmer noted in his dissent in Gartrell v. State, 609 So. 2d 112, 118-119 (Fla. 4th DCA 1992):

> Unlike the trafficking statute, there is no element in the simple possession statute of guilty knowledge. Under this latter statute, if the general intent is

> present, a person found to have possession of a controlled substance may be guilty regardless of whether the person actually knows the substance is cocaine. The crime of simple possession is a "strict liabiliity" offense; guilty knowledge is not an element of the crime, and the state has no burden in a prima facie case to show that the defendant knew precisely what the substance was.

However, that does not mean that the defendant cannot place his general intent in issue where, for example, he argues that the premises where the contraband was found were in joint, rather than exclusive, possession. Under that circumstance, the defendant's knowledge of the contraband's presence and his ability to control it will not be inferred merely from the fact of his ownership of the premises. Brown v. State, 428 So. 2d 250, 252 (Fla. 1983); cert. denied 463 U.S. 1209, 103 S.Ct. 3541, 77 L.Ed.2d 1391 (1983). That is why the standard jury instructions include the following:

> If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed. If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

In the instant case, the jury was instructed from the standard jury instructions concerning the distinction between the knowledge which can be inferred from exclusive possession of drugs and paraphernalia as opposed to non-exclusive possession. The jury was also instructed that the State must prove that: "Mr. Chicone had knowledge of the presence of the substance".

(T40-42). Petitioner's requested special instructions were unnecessary.

Petitioner has not seen fit to include in the record on appeal the transcript of the evidence adduced against him at his trial. It is impossible to conclude from the record provided to the District Court whether Petitioner's possession was exclusive or joint, whether the contraband was discovered on his person or property, whether he was in his home or in public, whether he was actually using the paraphernalia to ingest the cocaine at the time of his arrest and what other circumstances relevant to the knowledge issue have been excluded from the record now before this Court.

The appellate courts of Florida have long held that where the transcripts provided to the reviewing court are inadequate, error cannot be presumed. Howell v. State, 337 So.2d 823 (Fla. 1st DCA 1976); Yearty v. State, 354 So.2d 76 (Fla. 4th DCA 1978). The burden is on the appellant to produce a sufficient record to demonstrate reversible error. State v. G.P., 588 So. 2d 253, 254 (Fla. 1st DCA 1991), citing Sapp v. State, 411 So. 2d 363 (Fla. 4th DCA 1982). Given the lack of a trial transcript and given the general inadequacy of the record, Petitioner cannot establish that the trial court erred in its instructions to the jury concerning the evidence adduced at his trial.

It should be noted that, at his sentencing hearing in this case, Petitioner also entered a no contest plea to possession of cocaine in Orange County Circuit Court Case No. CR91-3308. (R73-83). (In Florida Supreme Court Case No. 84,780, this Court

declined to accept jurisdiction to review that conviction and sentence.) Charges for possession of cocaine and paraphernalia had been pending for a considerable period of time in that case when Petitioner was arrested for possession of cocaine and paraphernalia in the instant case. That fact would certainly have some bearing on whether Petitioner's possession of cocaine and paraphernalia was "knowing" in the instant case. Petitioner has failed to establish that the Information was fatally defective or that the trial court erred in instructing the jury on knowledge.

POINT III --RESTATED

ON REMAND, THE TRIAL COURT SHOULD BE ALLOWED TO REIMPOSE SPECIAL CONDITIONS OF PETITIONER'S PROBATION CONTAINED IN ITS WRITTEN PROBATION ORDER BUT NOT ORALLY PRONOUNCED DURING THE SENTENCING HEARING.

At Petitioner's sentencing hearing on October 6, 1993, the trial court judge withheld adjudication of guilt and placed Petitioner on one year of community control to be followed by three years of probation. Petitioner was fined $1000 and court costs of $255 were imposed. Petitioner was ordered to pay an additional $100 to a drug rehabilitation agency. He was further ordered to do 300 hours of community service work. He was told that he would be subject to random urinalysis and that he would be required to attend and complete a drug treatment program. (R78-81, 138). The trial judge signed the court minutes on the day of sentencing, but did not file its written "Order Placing Petitioner on Community Control Followed by Probation", until November 12, 1993, "NUNC PRO TUNC 10/6/93". (R135, 139-141). Petitioner and Respondent agree that the offense of possession of drug paraphernalia is a first degree misdemeanor and the sentence imposed for that offense was illegal and the cause should be remanded for resentencing on that count. The issue before this Court is whether special conditions of the probation included in the written probation order on the felony conviction and not orally mentioned during the sentencing hearing must be stricken or whether they may be reimposed on remand.

Initially, Respondent would note that it seems to be well settled that statutorily authorized conditions of probation may be included in a written order of probation even if not orally pronounced at sentencing. Zeigler v. State, 647 So. 2d 272, 273 (Fla. 4th DCA 1994); Nank v. State, 646 So. 2d 762, 763 (Fla. 2d DCA 1994). In Nank, the Second District Court concluded that the statute provides constructive notice of the conditions and that fact together with the opportunity to be heard at the sentencing hearing satisfy the requirements of procedural due process, citing Tillman v. State, 592 So. 2d 767, 768 (Fla. 2d DCA 1992). The Second District Court went on to reiterate its position that special conditions of probation not statutorily authorized must be orally pronounced during the sentencing hearing before they can be included in the written probation order, citing Cumbie v. State, 597 So. 2d 946 (Fla. 1st DCA 1992). However, the real bone of contention arises from the Court's conclusion that those special conditions not orally pronounced must be stricken.

Writing for the majority of the Court in his opinion on rehearing en banc in Justice v. State, 5th DCA Case No. 94-501, Opinion filed July 21, 1995, Judge Harris explained the conflict among the district courts on the issue of whether or not the unannounced special conditions can be reimposed on remand. (Appendix II -- Justice v. State, 5th DCA Slip Opinion filed July 21, 1995). All the district courts agree that the probationer should have the opportunity to object to special conditions of his probation. The Fifth District Court of Appeal has remanded cases where the special conditions of probation were not orally

pronounced at sentencing to permit the trial court to orally pronounce those conditions and to give the probationer the opportunity to object to them. See Brooks v. State, 649 So. 2d 329, 330 (Fla. 5th DCA 1995); Cleveland v. State, 617 So. 2d 1166 (Fla. 5th DCA 1993); Anderson v. State, 616 So. 2d 200 (Fla. 5th DCA 1993). Other district courts simply order the special conditions not orally pronounced stricken from the probation order.

Judge Harris explained that, because the sentence is not final until reduced to writing and filed with the clerk, remanding the case to allow the trial court to orally pronounce the special conditions and to give the defendant the opportunity to object to them does not constitute an enhancement of an existing final order of probation under this Court's decisions in Lippman v. State, 633 So. 2d 1061 (Fla. 1994) and Clark v. State, 579 So. 2d 109 (Fla. 1991). Both of those cases refer to "previously entered orders of probation or community control". The order in question was not "entered" or "rendered" until it was filed with the clerk. The terms of Petitioner's community control and probation were not enhanced after rendition.

As this Court noted in Harris v. State, 645 So. 2d 386, 388 (Fla. 1994): "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Failure to announce special conditions orally should not create a "gotcha'" situation which would preclude the trial court from including in its written probation order special conditions which it feels may aid in the

probationer's rehabilitation. It merely means that the defendant should be afforded a hearing and opportunity to object to those special conditions not orally pronounced. In Justice, Supra, Judge Harris suggests that, if the situation arises where the trial court decides to impose conditions not orally pronounced, he should conduct a second hearing prior to signing the written order.

In Hart v. State, 651 So. 2d 112 (Fla. 2d DCA 1995), decision pending on discretionary review Florida Supreme Court Case No. 85,168, the Second District cited Tillman, Supra, for the general proposition that the prospective probationer has notice of all probation conditions contained in the applicable probation statutes and, therefore, those conditions need not be orally pronounced. However, the District Court was concerned that some of the "general conditions" contained in the approved probation order in Rule 3.986 are not mentioned in the statute and was unsure whether those "general conditions" must be orally pronounced or whether the 1992 amendments to Rule 3.986 provided sufficient notice so as to make oral pronouncement unnecessary. In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE -- RULES 3.140 AND 3.986, 603 So. 2d 1144, 1154-1158 (Fla. 1992). See Biller v. State, 618 So. 2d 734, 735 Ftnt. 1 (Fla. 1993); Emond v. State, 652 So. 2d 419, 420 (Fla. 2d DCA 1995), citing State v. Beasley, 580 So. 2d 139 (Fla. 1991).

Florida Rules of Criminal Procedure 3.986(e) and (f) set forth the form orders for probation and community control including the standard and special conditions thereof.

Conditions (1) through (8) of Petitioner's probation order are essentially the same as the standard conditions contained in the form probation order. Respondent would assert that promulgation of Rule 3.986 effective May 28, 1992 constituted sufficient notice of those standard conditions to Petitioner who committed his offenses on August 4, 1992 and who was sentenced in 1993. In any event, conditions (1), (7) and (8) are statutorily authorized under Section 948.03(1), Florida Statutes (1993). Condition (9), (11), (13) and (20) were specifically designated as conditions of the community control which would be deleted upon successful completion of that program. (R140). Condition (9) merely provides for reporting to the community control officer. That is a standard condition under the Rule and is a statutorily authorized condition of community control under Sections 948.03(1)(a) and 948.03(2)(a)1, Florida Statutes (1993). Condition (10), relating to community service work was orally pronounced and is a standard condition under the Rule and authorized by Section 948.031, Florida Statutes (1993). Condition (11) is likewise a standard condition of community control and is authorized by Sections 948.03(1)(d) and 948.03(2)(a)2, Florida Statutes (1993), providing that the probationer should remain in a specified place, i.e. at his residence when he is not working. Condition (15) relates to restitution. There was none in this case. Conditions (16) and (18) are statutorily mandated costs. Conditions (19) and (20) allow electronic monitoring if found to be necessary. Those are special conditions of community control under the Rule, but they

are authorized by Section 948.03(2)(a)4, Florida Statutes (1993). Condition (21) providing that Petitioner shall not illegally possess controlled substances is encompassed by standard condition (5) providing that Petitioner should live without violating the law. Condition (12) relates to random testing for drugs and alcohol and is statutorily authorized under Section 948.03(1)(j)1, Florida Statutes (1993). Random urinalysis as part of a drug treatment program was discussed orally during the sentencing hearing and is also listed as condition (26). (R79). Condition (22) also mentions random testing for drugs and alcohol, but includes provision for reasonable searches not orally mentioned or included in the standard or statutory conditions. Special conditions (23) through (25) relating to the fine, costs and mental health treatment, were orally pronounced at the sentencing hearing. (R78-82).

It is Respondent's position that the applicable probation and community control statutes and Rule 3.986 give the defendant adequate notice of the standard conditions of community control and probation. Given the practical problem of the time constraints under which the criminal trial courts operate, requiring the repeated recitation of the standard conditions of probation to every defendant who enters a guilty or no contest plea at arraignment or calendar call and who is placed on probation would serve only to create unnecessary log jams and delays. Every defendant in felony court is entitled to the representation of counsel. There is no reason why counsel could not familiarize his client with the standard conditions of

probation and discuss questions and objections relating thereto outside the presence of the court. Hopefully, this Court's answer to the certified question in Hart, Supra, will resolve once and for all the issue of the necessity for the oral pronouncement of the standard and statutory conditions.

Petitioner concedes that the standard conditions of probation and community control included in Sections 948.03, 948.031, 948.032, and 948.034, Florida Statutes (1993), need not be orally pronounced. However, he apparently does not agree that the form probation and community control orders in Rule 3.986 give him adequate notice of the standard conditions included therein. He feels that conditions (4) and (6) should be stricken and that he should be allowed to possess and carry firearms and weapons and to use intoxicants to excess during his community control and probation despite the fact that he is also being required to participate in a drug treatment--mental health program as part of his probation. (R79-81). See Jaworski v. State, 650 So. 2d 172 (Fla. 4th DCA 1995). Petitioner contends that condition (7) should require Petitioner to "work faithfully at suitable employment insofar as may be possible" rather than to "work diligently at a lawful occupation". The wording of that condition is the same as that included in standard condition (8) of Rules 3.986 (e) and (f). In any event, according to the sentencing transcript, Petitioner is employed by his father. (R75). The present wording of condition (7) would not appear to create any dilemma for Petitioner. The Fifth District Court has in the past simply ordered the modification of that condition to

include the words "in so far as possible". Burke v. State, 642 So. 2d 677 (Fla. 5th DCA 1994). Condition (8) relating to complying with the instructions of the community control officer is verbatim from standard condition (9) of those rules. This Court's decision in Hart should resolve any questions relating to the necessity for deletion or reimposition of these standard conditions of Petitioner's probation.

Assuming that the standard and statutory conditions need not be orally pronounced, according to Respondent's analysis, that would leave only four special conditions of community control to be either orally pronounced at Petitioner's resentencing or deleted, conditions (13), (14), (17) and part of condition (22). Condition (13) relating to maintaining a daily log to be submitted to the community control officer and condition (14) concerning participation in self-improvement programs are listed special conditions of community control under Rule 3.986(f). They are not contained in the applicable statutory provisions and were not orally pronounced at the sentencing hearing. Likewise, condition (17) concerning the option of placement in a probation and restitution center is not mentioned in the applicable statutes and was not orally pronounced at sentencing. That portion of condition (22) relating to reasonable searches is also a special, non-statutory condition not orally pronounced. (R139-140).

Petitioner argues that these special conditions not orally pronounced should be stricken. Respondent would suggest that this Court should adopt the logic of Judge Harris's opinion in

Justice and allow reimposition of those four special conditions not orally pronounced. A sentencing judge's oversight in failing to mention a special condition should not create a "gotcha'" situation in which the trial court, on reflection prior to entry of the judgment, is precluded from imposing conditions it deems necessary even if they were not previously pronounced at the sentencing hearing. This Court's decisions in Lippman and Clark do not preclude the imposition of special conditions not orally pronounced. Respondent would assert that those decisions preclude the addition of new conditions after the written probation order prepared pursuant to Rule 3.986 is rendered.

Petitioner's basic premise that the special conditions not orally pronounced must be stricken from the subsequently filed written probation order is founded in the proposition that the "trial court's oral pronouncement controls over its written order". Virtually all of the cases cited by Petitioner for that general proposition stem from the First District's decision in Rowland v. State, 548 So.2d 812 (Fla. 1st DCA 1989).[1] The Rowland decision cites Timmons v. State, 453 So. 2d 143 (Fla. 1st DCA 1984) and Williams v. State, 542 So. 2d 479 (Fla. 2d DCA 1989), for the proposition that the oral pronouncement controls over the subsequent written order. In Timmons, the trial court orally imposed a prison sentence and fine within the statutory

[1] Hamilton v. State, 653 So. 2d 1068 (Fla. 2d DCA 1995); Quinones v. State, 634 So. 2d 173 (Fla. 2d DCA 1994); Catholic v. State, 632 So. 2d 272 (Fla. 4th DCA 1994); Dycus v. State, 629 So. 2d 275 (Fla. 2d DCA 1993); Gregory v. State, 616 So. 2d 174 (Fla. 2d DCA 1993); Olvey v. State, 609 So. 2d 640 (Fla. 2d DCA 1992); Cumbie v. State, 597 So. 2d 946 (Fla. 1st DCA 1992) and Tillman v. State, 592 So. 2d 767 (Fla. 2d DCA 1992)

limits. The subsequent written sentence was in excess of the statutory maximum. The First District Court resolved this discrepancy by holding that: "...the oral pronouncement of sentence controls and the written order must be corrected to conform with the oral pronouncement." Timmons cites Kelly v. State, 414 So. 2d 1117, 1118 (Fla. 4th DCA 1982), which explains the rationale for that rule: "The written sentence is merely a record of the actual sentence pronounced in open court."

The Williams decision, also cited in Rowland, stems from the Second District's earlier decision in Gatti v. State, 324 So. 2d 193 (Fla. 2d DCA 1975). In Gatti, there appeared to be a clerical error in the written order and the Court said that the written order should be corrected to conform with the sentence orally pronounced. It would appear that in both Timmons and Gatti, the appellate court was not so much concerned with the oral prevailing over the written, as it was concerned about the legal sentence prevailing over the illegal sentence and the correct sentence actually imposed prevailing over a later scrivener's error.

In the instant case, there is no question that the sentence imposed orally and subsequently by written order was one year of community control to be followed by three years of probation. (R78, 139). This general rule about the oral prevailing over the written could be applied if there was some discrepancy in that regard, but there is none. The issue here is which of the standard and special conditions of probation must be orally pronounced and whether or not those conditions not pronounced can

be reimposed on remand. The general rule that the oral prevails over the written based upon the rationale that the written sentence is merely a record of the actual sentence pronounced in open court was intended to rectify inconsistencies between the actual sentence imposed and the later memorialization thereof in the written order. That simplistic rule is of no value in resolving the issues here before this Court.

In his Initial Brief, Petitioner concludes that it would be "fundamentally unfair" to allow reimposition of the conditions of probation not orally pronounced. Assuming that the purpose of probation and community control is the rehabilitation of the probationer, it would seem unfair to delete conditions that may be of value in that effort in blind obedience to the rule that "the oral prevails over the written". Again as this Court pointed out in Harris, sentencing should not be a game. If the sentencing judge forgets to orally pronounce any of the special conditions of probation during the sentencing hearing, that should not preclude their imposition. Prior to filing the written probation order, the judge should conduct a second hearing, orally advise the probationer of those conditions and give him or her the opportunity to object to them. This procedure would satisfy the requirements of due process and would not violate the proscriptions against amending an existing final order of probation found in Lippman and Clark.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court approve and adopt the decision of the Fifth District Court of Appeal in the case subjudice.

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 the Merits has been mailed to James M. Russ, Esquire, and Terrence E. Kehoe, Esquire, Counsel for Petitioner, 18 West Pine Street, Orlando, Florida 32801, this 28th day of July, 1995.

Anthony J. Golden
Assistant Attorney General

Appendix Part 1

Criminal law—Possession of cocaine and drug paraphernalia—State not required to prove that defendant knew substance he possessed was cocaine or that he knew object he possessed was drug paraphernalia in order to convict defendant on possession charges—Jury instructions—Trial court properly refused to instruct jury that knowledge of nature of substance or object was necessary in order for there to be a conviction—Standard jury instruction on reasonable doubt adequately defines reasonable doubt and does not dilute quantum of proof required to meet reasonable doubt standard—Sentencing—Trial court imposed illegal sentence on misdemeanor offense of possession of drug paraphernalia—Error to include in written order special conditions of probation or community control which were not orally pronounced

JERRY JAY CHICONE, III, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2659. Opinion filed December 2, 1994. Appeal from the Circuit Court for Orange County, James C. Hauser, Judge. Counsel: 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 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 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.)

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[1] § 893.13(1)(f), Fla. Stat. (1991).
[2] § 843.147(1), Fla. Stat. (1991).
[3] Fla. Std. Jury Instr. (Crim.) 227.
[4] Fla. Std. Jury Instr. (Crim.) 245.

* * *

Criminal law—Speedy trial—Right to speedy trial can be waived—Defendant waived speedy trial by failing to move to dismiss information which was filed outside speedy trial period after initial information had been nolle prossed, agreeing to reinstatement of previous bond and moving for continuance at bond hearing, requesting additional continuance at later time, and filing waiver of speedy trial

JAMES PAUL BRYANT, JR., Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2297. Opinion filed December 2, 1994. Appeal

Appendix Part 2

D1
94-559

A/B 7-25-94

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1995

LAURIE G. JUSTICE,

Appellant,

v.

CASE NO. 94-501
L. Cr #91-327 CFMH

STATE OF FLORIDA,

Appellee.

Opinion Filed July 21, 1995

Appeal from the Circuit Court for Lake County, Mark J. Hill, Judge.

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ON MOTION FOR REHEARING *EN BANC* AND CERTIFICATION

HARRIS, C. J.

We grant appellant's Motion for *En banc* Rehearing and Certification.

Even though the original panel reversed her sentence, Laurie Justice, takes issue with that portion of the original opinion that remanded the matter back to the trial court for resentencing rather than merely directing that the previously unannounced conditions of

probation be stricken. Because our practice is different from that of the other district courts, we agree that the issue should be certified to the supreme court.[1]

The issue, quite simply, is whether the trial court, after conducting the sentencing hearing, may thereafter add previously unannounced conditions of probation in its written judgment if it calls the defendant back into court to be advised of the new conditions before such written judgment is entered. We hold that the trial court has that authority.

Due to extremely heavy criminal case loads and constant pressure of time standards, trial judges often schedule several sentencing hearings during the same block of time. Appellate issues rarely occur because of this procedure. However, on occasion and after additional reflection afforded by the delay between the sentencing hearing and the preparation of the written judgment, a trial court may conclude that, in order for probation to have a reasonable chance to succeed, conditions other than those previously orally announced must be imposed. Such was the case here.[2]

It is appellant's position that, having successfully run the gauntlet at oral sentencing, she now enjoys immunity from corrective action even though the "sentence" has not been

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[1]We recognize that the other appellate courts, apparently without considering whether the trial court should have the option to resentence and properly add previously unannounced conditions, have merely remanded with directions that the sentencing court delete the unannounced conditions from the judgment. We think it is preferable to give the trial court the option to conduct a new sentencing hearing so that it may properly announce and impose any conditions that it deems appropriate.

[2]It may well be that the new conditions added in this case are invalid as not being sufficiently related to the crimes for which Justice was convicted. But suppose this was a case involving sexual abuse of a child in which the court forgot at the sentencing hearing to condition a probationary portion of the sentence on the defendant's undergoing counseling or avoiding contact with the victim or other children. Should it be precluded thereafter from adding these conditions? If the judge imposes previously unannounced conditions upon resentencing, then such conditions may be attacked the same as had they been pronounced at the original sentencing hearing.

rendered and thus has not yet begun to run. This position is based on a principle of law which this court and all of the other appellate courts in this state recognize: that the "oral pronouncement of sentence prevails over the written order" when there is a conflict..[3] This principle is based on due process concerns. As the court explained in *Olvey v. State*, 609 So. 2d 640 (Fla. 2d DCA 1992), special conditions of probation must be pronounced in open court so that the defendant will know the conditions and have an opportunity to object to them.

But *Olvey* does not explain why the oral pronouncement itself cannot be timely corrected. We know of no reason -- be it based on a constitutional provision, a statute, a rule or precedent -- that would prohibit a trial court from calling the defendant back into court to correct a previous sentence before the judgment of sentence is made final by the rendition of a valid written order and thus before the "sentence" is commenced. Due process concerns are satisfied because the defendant will then "know" of the added conditions and will have the same opportunity to object that he would have had if the conditions had been announced at his original sentencing. Further, his appeal period will not begin to run until the "corrected" sentence is reduced to writing and filed.

We start from the proposition that sentencing has traditionally been the exclusive province of the trial court and its sentence will not be disturbed so long as it is within the statutory maximums and otherwise comports with the requirements of law. This also should be true of resentencing after remand. Certainly the resentencing may not be used

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[3]Here there is no conflict in the sense that the later conditions alter or conflict with earlier announced conditions. The only "conflict" is that the new conditions simply were not mentioned at the sentencing hearing.

to "punish" one for taking an appeal,[4] nor may it be used (or abused) to avoid the consequences of statutory sentencing guidelines.[5] Neither is the case here. A sentence is not final until rendered -- reduced to writing and filed with the clerk. Before that time, there is no legal sentence to add to or modify. The fact that this sentence had not been rendered at the time the new conditions were added distinguishes this case from *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994), and *Clark v. State*, 579 So. 2d 109, 110 n.3 (Fla. 1991).

Nor does the imposition of previously unannounced conditions punish the defendant for exercising any constitutional right. The only "right" affected is the defendant's "due process" right to have the special conditions of probation announced in open court so that objections can be made. *Olvey*, *supra*. As the supreme court stated in *Harris v. State*, 645 So. 2d 386, 388 (Fla. 1994): "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Failing to pronounce conditions should not create a "gotcha" situation in which a trial court is precluded from imposing conditions it later, upon reflection, deems necessary merely because they were not previously pronounced at the sentencing hearing. It simply means that the defendant must be given an opportunity to make his or her objections of record before such conditions can be validly imposed. Therefore, if the court intends to impose previously unannounced conditions, it must call the defendant back into court for a new sentencing hearing prior to signing the judgment. If the court fails to do so, we have no

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[4] *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

[5] *Pope v. State*, 561 So. 2d 554 (Fla. 1990).

alternative but to reverse for resentencing. But even after reversal, sentencing remains the trial court's function, and the determination of what conditions are necessary for probation, if properly pronounced, should be left to it.

Appellant urges us to follow the path taken by the supreme court in *Pope v. State*, 561 So. 2d 554, 556 (Fla. 1990), in which the court imposed a prophylactic rule to prevent "multiple appeals, multiple resentencings and unwarranted efforts to justify an original departure." We believe that such prophylactic rules which limit the authority of the trial court should be used only in the most extreme situations. We do not see the imposition of unannounced conditions of probation as a major source of appeals.[6] And the requirement of resentencing itself, because of the trial court's heavy docket, encourages the court to get it right the first time. Further, we do not perceive the trial bench as resisting the requirement to orally pronounce special conditions. Rather, this appears to be a problem of oversight created by the volume of criminal sentencings. It might be, because of large dockets, the trial court will sometimes prefer merely to strike the unannounced condition rather than resentence. But the trial court should have the authority, if it so desires, to impose such conditions as it deems appropriate after conducting a new sentencing hearing which provides the defendant with his or her due process right to object to the special conditions.

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[6]When we consider that there were 15,858 appeals filed in our intermediate appellate courts during the year 1994, the very few cases involving this issue show that this problem does not greatly impact the courts.

We therefore reject appellant's contention that she has a "right" to expect that her sentence, once orally pronounced, will be final and unchangeable. We are unaware of any such right and are unwilling to establish one in this case.

The defendant's only "right" at resentencing is to be sentenced within the statutory maximum and in accordance with the law. If these added conditions are contrary to the law (as they may well be), the defendant can object to them and appeal on that basis. If they are merely unacceptable to her, she may wish to reject probation. In any event, by requiring that the special conditions be announced in open court, the defendant will have the opportunity due process requires.

We agree that the cause must be reversed because these options were not given the defendant in this case. We hold, however, that on remand the trial court is free to impose such conditions as are appropriate so long as it pronounces such conditions at a new sentencing hearing.

We certify the following question:

WHERE A SENTENCE IS REVERSED BECAUSE THE TRIAL COURT FAILED TO ORALLY PRONOUNCE CERTAIN SPECIAL CONDITIONS OF PROBATION WHICH LATER APPEARED IN THE WRITTEN SENTENCE, MUST THE COURT SIMPLY STRIKE THE UNANNOUNCED CONDITIONS, OR MAY THE COURT ELECT TO "REIMPOSE" THOSE CONDITIONS AT RESENTENCING?

PETERSON, C.J, DAUKSCH, COBB, SHARP, W., GOSHORN, and THOMPSON, JJ., concur.
GRIFFIN, J., dissents, with opinion.

GRIFFIN, J., dissenting. 94-501

Our court's approach to a lower court's error in imposing written conditions of probation not orally announced is unique. The First, Second and Fourth Districts all have consistently held that where a defendant appeals a written order containing unannounced special conditions of probation, the order must be amended to conform to the oral pronouncement of judgment and sentence by striking the unannounced conditions. *See, e.g., Bartlett v. State*, 638 So. 2d 631 (Fla. 4th DCA 1994); *Christobal v. State*, 598 So. 2d 325 (Fla. 1st DCA 1992); *Turchario v. State*, 616 So. 2d 539 (Fla. 2d DCA 1993).[1] The lower court is not free at a sentencing to add the previously unannounced conditions.

Alone among the districts, under our prior decision in *Cleveland v. State*, 617 So. 2d 1166 (Fla. 5th DCA 1993), this court would vacate the sentence but would remand for the trial court to resolve the discrepancy between the oral pronouncement and the written order. If the lower court had "intended" to impose the written conditions that it had never orally announced, the court, on remand, could simply add these missing conditions.

As is reflected in prior case law of this court on which *Cleveland v. State* was grounded, this court contemplated the possibility that where there was a discrepancy between the record of the oral pronouncement and the judgment and sentence as written

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[1] *See also Williams v. State*, 653 So. 2d 407 (Fla. 2d DCA 1995); *Nank v. State*, 646 So. 2d 762 (Fla. 2d DCA 1994); *Peterson v. State*, 645 So. 2d 84 (Fla. 2d DCA 1994); *Chicone v. State*, 644 So. 2d 532 (Fla. 5th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995); *Sweet v. State*, 644 So. 2d 176 (Fla. 5th DCA 1994); *Willis v. State*, 640 So. 2d 1188 (Fla. 5th DCA 1994); *Jamail v. State*, 637 So. 2d 362 (Fla. 1st DCA 1994); *Skiff v. State*, 627 So. 2d 614 (Fla. 4th DCA 1993). By now, these cases appear so frequently in Florida Law Weekly that no effort has been made to catalogue them all.

down, the error might have, in fact, resided in the record of the oral pronouncement. *Harden v. State*, 557 So. 2d 926, 927 (Fla. 5th DCA 1990) (Cobb, J., concurring). Rather than mechanically apply the "oral prevails over the written" rule, by ordering the written to conform to the oral, this court has preferred to send the matter back to the trial court to verify what was, in fact, orally pronounced. This notion was quickly expanded, however, to provide that where there existed some unexplained conflict between the written sentence and the oral pronouncement, the lower court would be permitted to impose what it "intended" to pronounce even if it were not what was, in fact, pronounced.[2] *See, e.g., Whitfield v. State*, 569 So. 2d 528 (Fla. 5th DCA 1990).

Even at its most expansive, however, the underlying rationale of this prior case law has no application to the situation presented here. Here, there is no reasonable possibility either that the sentencing proceeding record erroneously failed to report the oral pronouncement of multiple special conditions of probation or that there is a "conflict" between the oral pronouncement and the written sentence. The special conditions simply were not pronounced at sentencing.[3]

The majority seems to suggest that a lower court has the unfettered power to alter sentences up until the moment the judgment and sentence are "rendered," *i.e.* signed and filed, by the simple expedient of calling the defendant back in and changing the sentence. Dubious as that proposition is, it is not what happened here. Here the trial court never

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[2] Also, this court's treatment of such cases has not been entirely consistent. *See Lowell v. State*, 649 So. 2d 364 (Fla. 5th DCA 1995); *Macon v. State*, 639 So. 2d 206 (Fla. 5th DCA 1994).

[3] The State implicitly concedes in its brief that the conditions at issue are "special" conditions that were not orally announced.

called the defendant back to pronounce the originally omitted conditions of probation before the judgment and sentence were rendered, before appellant began to serve the sentence or before the appeal was filed. The issue here is whether unannounced conditions that were properly struck on appeal because they had not been orally pronounced can be added, on remand, by invoking our "discrepancy" case law.

The definition of "sentence" in Florida found in Florida Rule of Criminal Procedure 3.700(a)(b) is:

> (a) **Sentence Defined.** The term sentence means the *pronouncement* by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty [emphasis supplied].

The written sentence is merely a record of the actual sentence pronounced in open court. *Kelly v. State*, 414 So. 2d 1117 (Fla. 4th DCA 1982).

The Florida Supreme Court has not considered a case such as this where the sentencing court has attempted to include in the *original* written sentence conditions of probation that were not announced, but the court has held that probation conditions cannot be added to an existing sentence, absent a finding of violation of probation. *Lippman v. State*, 633 So. 2d 1061, 1063 (Fla. 1994). The addition of conditions of probation is as impermissible as any other augmentation of a previously announced sentence. *Id.* It seems to follow that, just as the lower court could not later add probation to an announced sentence of a term of years, or increase the number of years of probation, it cannot later add a condition of probation. The court has explained that the sentencing court is authorized only to modify "theretofore imposed" terms. *Clark v. State*, 579 So. 2d 109, 110

n.3 (Fla. 1991). Consistent with these pronouncements of the high court, our sister district courts of appeal have correctly ordered stricken on appeal any special condition of probation not orally pronounced.

An order of probation, like any other aspect of sentencing, ought not be a work in progress that the trial court can add to or subtract from at will so long as he or she brings the defendant back in and informs the defendant of the changes. To permit this would mean a lack of finality for no good reason and multiple appeals. *See Pope v. State*, 561 So. 2d 554 (Fla. 1990). It is not too much to ask of a sentencing judge to decide on and recite the special conditions of probation at the sentencing hearing, just as is done with the balance of the sentence. If the court has omitted a condition it wishes it had imposed, its chance has passed unless the defendant violates probation. Even if the majority is correct that the sentencing judge can keep resentencing the defendant by bringing him back in and changing the sentence until he actually renders it by signing and filing it, surely the failure to do so by the time of rendition brings this opportunity to an end.

The majority posits that this case illustrates why the trial court ought to have the ability to add additional conditions of probation after the sentencing hearing -- that during the time of "additional reflection afforded by the delay between the sentencing hearing and the preparation of the written judgment, a trial court may conclude that, in order for probation to have a reasonable chance to succeed, conditions other than those previously orally announced must be imposed." Whatever may be the justification for a delay in rendering the sentence, in fact, this case illustrates the opposite. Here, the initially imposed conditions were valid and relevant; it is the non-standard conditions contained in

the written order that are almost entirely invalid. *See Biller v. State*. 618 So. 2d 734 (Fla. 1993).

Laurie Justice was the founder of God's Love Center, a mission established to help needy people in Lake County by providing emergency aid, called "outreach," consisting primarily of food and clothing. It was a small operation, partly financed by Justice, through an inheritance she had received, and by her husband. The by-laws of the Center, however, required two signatures for any expenditure over $65. Laurie Justice wrote two checks from the Center bank account to the City of Mount Dora to pay her home electric bill because the City was threatening to turn off her power. When she was unable to contact another authorized signatory to obtain the second signature, she forged the signature of another board member. Forgery of the signatures on those two checks is the crime for which she was prosecuted and convicted.

Initially, the trial court orally imposed only two probation conditions -- that Justice pay certain costs and that she not have a checking account. Also contained in the written order, however, are special conditions such as a prohibition against the possession of "any weapon" and a prohibition against using "intoxicants to excess." Far from illustrating the beneficial effect of allowing the trial court time for reflection to improve on their probationary scheme, this case appears, instead, to illustrate that it can, and in this case did, have the opposite effect.[4] If these later conditions[5] were not subject to being stricken

[4] Truth to tell, what almost certainly happened in this case is that the trial judge simply entered the local form order without considering whether its "standard" conditions were, in fact, non-standard. To some extent, this case presents a problem like the one discussed in *Hart v. State*, 651 So. 2d 112 (Fla. 2d DCA), *review granted*, No. 85,168 (Fla. June 22, 1995).

for the reason we have already held, they should have been stricken anyway. *Biller*. I would simply strike any unannounced special conditions of probation.

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[5] Other special conditions include a requirement to submit to a warrantless search of her person, residence or property; a requirement that she undergo drug testing at her expense and participate in a drug treatment program as directed by the probation officer; and payment of $1 for each month of supervision to First Step, Inc.