IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 85,168

ANTHONY HART, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN GIAMBALVO
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 239399

Public Defender's Office
Pinellas County Courthouse
5100 144th Avenue North
Clearwater, FL 34620
(813) 464-6595

ATTORNEYS FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

Because as a practical matter probationers usually learn the terms of their probationary period after sentencing upon their first visit to the probation office, they have no opportunity to make the contemporaneous objection necessary to preserve for appellate review the propriety of a particular condition. In practice defense attorneys seldom inform their clients of their probationary conditions prior to sentencing and the form provided in Fla.R.Crim.P. 3.986 is not always tracked exactly in the forms utilized by various trial courts. As a result, knowledge of any conditions, general or special, cannot necessarily be imputed to trial counsel or implied to the probationer. The best practice would be for the probationer to read the order and conditions of probation and acknowledge he or she had done so on the form prior to sentencing.

ARGUMENT

In its decision below, the District Court of Appeal, Second District certified the following question:

> **DOES THE SUPREME COURT'S PROMULGATION OF THE FORM 'ORDER OF PROBATION' IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.986 CONSTITUTE SUFFICIENT NOTICE TO PROBATIONERS OF CONDITIONS 1-11 SUCH THAT ORAL PRONOUNCEMENT OF THESE CONDITIONS BY THE TRIAL COURT IS UNNECESSARY?**

Petitioner's view is that this question should be answered ,"yes" and that the promulgation of a standard order of probation under Fla.R.Crim.P. 3.986 is sufficient notice to all concerned of any and all conditions contained therein. Respondent contends that if all courts utilized exactly the same form and if all defense attorneys explained the probationary conditions to their clients prior to sentencing, then "yes" should be the answer. However, the vagaries of the real world and due process compel an answer of "no".

Because a defendant must make a contemporaneous objection to all but those conditions considered illegal or so egregious as to be fundamentally erroneous, or waive the right to contest them on the appellate level, he or she must be informed of the conditions being imposed at the time of sentencing. Olvey v. State, 609 So. 2d 640 (Fla. 2d DCA 1992) (en banc); Devine v. State, 636 So. 2d 179 (Fla. 5th DCA 1994). As the District Court noted in its opinion below, notice of the probation conditions is required because defendants placed on probation normally do not see the probation order until they report to the probation office sometime after the

sentencing. At this point it is too late to complain about a specific condition.

The fact the probationer's attorney is presumed to know the standard probationary conditions and this knowledge is imputed to the defendant, is not wholly realistic either. In practice, very few attorneys discuss any of the probationary conditions, general or special, with their clients before sentencing, unless it is some special,unique condition that is a specific part of a plea agreement.

Petitioner's stance that use of a standard form pursuant to rule 9.986 negates the need for oral pronouncement of any of the conditions listed therein, is not totally satisfactory either. In the instant case, the probation form used, while similar to the standard form in many respects, doesn't track it exactly. [eg., standard condition #4 as set forth in rule 3.986 and condition #4 of respondent's probation order vary materially] (R47-49) Unless there is complete uniformity among all trial courts, then knowledge on the part of the probationer's attorney and implied knowledge by the defendant cannot be presumed.

The Second District in Olvey, id. recognized, "that requiring trial courts to provide defendants with oral notice of the conditions of probation and an opportunity to object is a time-consuming process which must seem both endless and meaningless to the trial court, especially in cases in which the defendant has listened to and not obeyed those conditions numerous times in the past." Nevertheless the court concluded,"due process requires

special conditions of probation to be pronounced in open court in a manner sufficient for the defendant to know of these conditions and to have an opportunity to object to them." The court also noted the creation of a standard form pursuant to the Florida Rules of Criminal Procedure which contained an acknowledgment to be signed by the defendant, stating that the conditions have been explained to the defendant and he or she agrees to abide by them. It should be noted that although the acknowledgment appears on respondent's probation order, it was not signed by him.

Parallel with the procedure utilized for plea forms, it would seem relatively simple and expedient for the probationer to read over the probation order and listed conditions, or have his attorney read and or explain them to him and then acknowledge he has done so by signing at the bottom. The trial judge could subsequently inquire if the probationer had read over the order of probation and its attendant conditions and whether he or she understands what is expected. The court could then briefly explain any special conditions being imposed, other than the pre-printed ones. The probationer could then voice his or her objections, if any, in a timely fashion. This procedure would forestall any subsequent claims, that the probationer was unaware of any condition, general or special.

CONCLUSION

In view of the foregoing arguments made and authorities cited, respondent asks this court to answer the certified question in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been mailed to Fleur J. Lobree, 401 N.W. 2nd Avenue, Suite N921, P.O. Box 013241, Miami, FL 33101, and Anthony Hart, 4237 8th Avenue South, St. Petersburg, FL 33711 this 12th day of April, 1995.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 464-6594

ALLYN GIAMBALVO
Assistant Public Defender
Florida Bar Number 239399
5100 144th Avenue North
Clearwater, FL 34620