IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,168

THE STATE OF FLORIDA,

Petitioner,

-vs-

ANTHONY HART,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Second District. Respondent, ANTHONY HART, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. The symbol "R." designates the original record on appeal, which includes the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

On March 13, 1991, Defendant was charged by information with attempted burglary, in violation of §§ 810.02(3) and 777.04, Fla. Stat. (1991). On September 10, 1992, Defendant proceeded to a trial by jury before the Honorable Helen Hansel, Circuit Judge. (R. 90-226). Following the jury verdict, Defendant was adjudicated guilty as charged and imposition of sentence was deferred until October 15, 1992. (R. 42-44).

During the sentencing hearing, counsel for Defendant sought to convey to the trial court facts or circumstances surrounding the case which might mitigate the sentence to be imposed. (R. 232-235). Counsel discussed Defendant's history, making the following statements:

> [DEFENSE COUNSEL:] I would ask the Court to consider as it considers the sentence that it imposes, two -- or one more thing, really.

> The Court would generally, I assume, consider in imposing sentences, the kind of threat or the kind of danger, among other things, that a Defendant imposes or poses to society.
>
> And I'm not suggesting that when you review his prior record, and review this offense, that he's not a danger to -- anyone who commits crimes is a danger to society; they take from all of us. *But in reviewing his record, the Court will note that with one exception, all of these prior felony offenses, at least, have been involved in drugs, either sale or possession of drugs.*
>
> That one exception is, as the Court will see or can see, is a grand theft auto. There are a number of misdemeanors. *I don't intend to address all those, but I do wish to present that his criminal history seems to be centered around his involvement in drugs.* I think that would be supported, as the Court read, by the family-history portion of this pre-sentence investigation report.

(emphasis added) (R. 234-235).

The prosecutor then argued that Defendant should be sentenced as a habitual felony offender and informed the Court of several of Defendant's prior judgments, including his conviction for sale of counterfeit drugs and multiple convictions for both possession and sale of cocaine. (R. 57-58, 66-67, 73-74, 78-79). Following arguments by counsel and statements of Defendant's girlfriend, the Court pronounced Defendant's sentence:

> THE COURT: . . . So, the sentence for you, Mr. Hart, is ten years in the Department of Corrections, five years of which are suspended, which means that if you violate the probation on which I'm going to place you or the Community Control, that you will go back to jail. Do you understand that?
>
> THE DEFENDANT: Yes, ma'am.

> THE COURT: And so, the five years suspended will be served as five years of probation with a condition of two years of Community Control *and that will be with all the drug treatment and evaluation and reporting, and so on, and random testing as necessary or regular testing as necessary. Do you understand that?*
>
> THE DEFENDANT: *Yes, ma'am.*

(R. 254).

The trial court then entered an order sentencing Defendant as a habitual offender and imposing a "split" sentence of a term of ten years in state prison, where the balance of the sentence would be suspended and Defendant placed on probation for five years after he served half of his prison sentence. (R. 45-46). The accompanying order of probation provided in pertinent part that Defendant would have to abide by the following conditions:

> (4) You will neither possess, carry, or own any weapon or firearm without first securing the consent of your Probation Officer.
>
> (6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed or used.

(R. 47-49).

On direct appeal, Defendant challenged the propriety of the imposition of the preceding conditions, contending that they were not orally pronounced at sentencing and did not reasonably relate to the offense committed, his rehabilitation, or the protection of the public.[1] The District Court of Appeal of Florida, Second

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[1] Defendant also challenged the propriety of condition (13) of his probation, requiring that he submit to testing and treatment

District, entered an opinion affirming in part, but striking certain portions of conditions (4) and (6) of Defendant's probation because they were not orally pronounced at sentencing. (See appendix, "App." at p. 5), Hart v. State, 20 Fla. L. Weekly D329, 330 (Fla. 2d DCA Feb. 1, 1995).

In its decision, the court noted a "continuing problem" relating to the probation conditions discussed herein, as it has "consistently held that the only 'general conditions' of probation are those contained within the statutes, [while] in the trial court ... it is assumed that 'general conditions' include all those contained in the approved probation order in [Fla. R. Crim. P.] 3.986." Id. As such, the court certified the following question to be one of great public importance:

> 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?

Id. Accordingly, Petitioner filed a notice to invoke discretionary jurisdiction on February 6, 1995. On February 17, this Court entered an order postponing its decision on jurisdiction and ordering the Petitioner to file a brief on the merits. This brief follows.

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for any alcohol or drug problem. The District Court found that this condition was orally pronounced at sentencing. Hart v. State, 20 Fla. L. Weekly D329 (Fla. 2d DCA Feb. 1, 1995). Therefore the propriety of the imposition of condition (13) is not discussed herein, as the substance of this condition was orally pronounced by the trial court and is specifically authorized by statute. See § 948.03(1)(j), Fla. Stat. (1991).

QUESTION PRESENTED

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

SUMMARY OF THE ARGUMENT

Florida Rule of Criminal Procedure 3.986(a) was amended in 1992 to clarify the requirement that all trial courts must use the form "order of probation" set forth in Fla. R. Crim. P. 3.986(e) when placing a defendant on probation. Therefore, the conditions of probation enumerated one through eleven provided in this form are general conditions of probation of which defendants, through counsel, are presumed to have notice. As such, the trial courts are not required to orally pronounce these conditions prior to their imposition, and the District Court erred by striking portions of conditions which were imposed pursuant to the form.

ARGUMENT

THE PROMULGATION OF THE FORM 'ORDER OF PROBATION' IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.986 CONSTITUTES SUFFICIENT NOTICE TO PROBATIONERS OF CONDITIONS 1-11 SUCH THAT ORAL PRONOUNCEMENT OF THESE CONDITIONS BY THE TRIAL COURT IS UNNECESSARY.

Several of the District Courts of Appeal have repeatedly held that a trial court may not impose "special conditions" of probation upon a defendant without orally pronouncing such at the time of sentencing. The motivation for these holdings is the procedural due process concern that a defendant be provided with notice of these conditions in a fashion which would allow for a timely objection to the sentence imposed. However, by promulgating the form for an "order of probation" which includes the eleven conditions of probation most frequently imposed, this Court has provided probationers with sufficient notice such that the additional oral pronouncement of these conditions by a trial court is rendered unnecessary. See In Re Amend. to the Fla. Rules Cr. Proc., 603 So. 2d 1144, 1145 (Fla. 1992).

In its decision vacating the portions of the conditions of Defendant's probation which are under review, the Second District reiterated its prior holding that defendants have notice of all probation conditions contained in the statutes and therefore that a trial court has no obligation to orally pronounce these conditions. Hart v. State, 20 Fla. L. Weekly D329, 330 (Fla. 2d DCA Feb. 1, 1995). (App., p. 3). The Court acknowledged that the rules require that the trial courts use the form order of

probation set forth in Fla. R. Crim. P. 3.986(e). However, the Court determined that portions of conditions (4) and (6) of Defendant's probation, while similar to conditions (4) and (7) provided in the form of Fla. R. Crim. P. 3.986(e), were invalid because the trial court failed to orally pronounce them at sentencing.

> Although conditions 4 and 7 are not part of the "special conditions" list in the approved form, this court has determined that they are special conditions because they are not statutory conditions, i.e., probation conditions set forth in chapter 948, Florida Statutes (1991).

(App., p. 3). Hart v. State, 20 Fla. L. Weekly D329, 330 (Fla. 2d DCA Feb. 1, 1995); see also Sheffield v. State, 20 Fla. L. Weekly D450 (Fla. 2d DCA 1995) (Altenbrand, J., Concurring) ("We are frequently forced to strike [a condition] because the legislature has not chosen to include such a regulation ... among the statutory conditions of probation in section 948.03").

However, the legislature has provided that a trial "court shall determine the terms and conditions of probation or community control and *may* include among them [conditions which are outlined in the section]." § 948.03(1), Fla. Stat. (1991) (emphasis added). This list is neither mandatory nor exclusive, as subsection (5) of the same section provides:

> The enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto such other or others as it considers proper.

§ 948.03(5), Fla. Stat. (1991). The legislature's intent that Chapter 948 does not exclusively enumerate all general conditions

of probation which a court might impose is demonstrated as the most basic condition of any probation, that a probationer live and remain at liberty without violating any law, is not enumerated therein. However, this condition was included by this Court as condition (5) in the list of general conditions to be applied in all cases through the use of the form order of probation promulgated in Fla. R. Crim. P. 3.986(e).

The trial courts have complied with the requirement that they utilize this form order of probation, or slight variants thereon, and have repeatedly relied on the form by assuming that it provides defendants with notice of the eleven primary conditions listed therein. The district courts' continuing requirement of oral pronouncement of these conditions of probation in spite of the form is apparently due to a due process concern that a defendant know of the conditions and have a meaningful opportunity to object to them. Olvey v. State, 609 So. 2d 640 (Fla. 2d DCA 1992) (en banc). However, as this Court has expressly mandated that the form of Fla. R. Crim. P. 3.986(e) shall be utilized by all courts, defendants are now on notice through their counsel that the eleven conditions specifically enumerated therein will be imposed as a part of every trial court's order of probation.

When analyzing the propriety of the assessment of costs against a defendant in State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991), this Court indicated that "publication in the Laws

of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions." This principle has repeatedly been applied by the district courts when assessing the propriety of the imposition of a condition of probation allowed by statute. Olvey; Tillman v. State, 592 So. 2d 767, 768 (Fla. 2d DCA 1992); Hayes v. State, 585 So. 2d 397, 398 (Fla. 1st DCA), rev. den., 593 So. 2d 1052 (Fla. 1991). The district courts have not hesitated to infer that defendants have constructive notice through their counsel when affirming conditions of probation enumerated in the Florida Statutes.

As all counsel are expected to be equally as familiar with the rules of procedure mandated by the Court as with the laws of Florida and to advise their clients accordingly, probationers should therefore be bound by their counsel's knowledge of both the statutes and the court rules. Currently due to trial counsel's knowledge of general conditions of probation commonly imposed, these general conditions are virtually never pronounced in practice absent a specific question about them. With the universal application of the form order of probation now provided by the rules, a defense attorney would not need to review an order to ask what general conditions would be imposed, as a condition such as condition (4) would not only always be included but also be included at that number. Even in the event that a defendant's counsel did not know what conditions the court applies in all cases, he/she could either review the standard order or ask the trial court for further enumeration.

The rationale for the universal imposition of the condition that a defendant refrain from consuming intoxicants to excess (in addition to the statutory prohibition against involvement where intoxicants or drugs are unlawfully sold), is clearly supported by the facts in the record in the instant case. Although Defendant's current conviction was not for a substance abuse crime, it is clear from arguments made by his counsel at sentencing that excessive drug usage was related to, if not the sole cause of, his crimes. (R. 234-235). Furthermore, the escalation in the use of firearms and other weapons to facilitate the commission of crimes similarly justifies the universal prohibition against a probationer's possession of any weapon without first obtaining the consent of their probation officer.

Finally, even if this Court determines that the District Court properly struck the challenged portions of the conditions at issue for failure to pronounce them with sufficient specificity, such provisions should only be stricken from the order of probation without prejudice. § 948.03(5), Fla. Stat. (1991), specifically states:

> . . . The court may rescind or modify at any time the terms and conditions theretofore imposed by it upon a probationer or offender in community control.

Therefore, the trial court's original order of probation should be reinstated, or the trial court should be allowed the opportunity to reimpose the challenged conditions upon remand following oral pronouncement.

CONCLUSION

Based upon the preceding authorities and arguments, the Petitioner respectfully requests that this Court enter an opinion answering the certified question in the affirmative and directing the District Court to remand the matter to the trial court with instructions to reinstate the original order of probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to ALLYN GIAMBALVO, Assistant Public Defender, Criminal Court Complex, 5100 144th Avenue North, Clearwater, Florida, 34620, on this ~~14th~~ 27th day of March, 1995.

FLEUR J. LOBREE
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,168

THE STATE OF FLORIDA,

Petitioner,

-vs-

ANTHONY HART,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
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SECOND DISTRICT

APPENDIX TO
BRIEF OF PETITIONER ON THE MERITS

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ANTHONY HART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-04257

Opinion filed February 1, 1995.

Appeal from the Circuit Court for Pinellas County; Helen S. Hansel, Judge.

James Marion Moorman, Public Defender, Bartow, and Allyn Giambalvo, Clearwater, Assistant Public Defender, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Fleur J. Lobree, Assistant Attorney General, Miami, for Appellee.

BLUE, Judge.

Once again this court is called upon to determine if conditions of probation must be stricken because the trial court

failed to orally pronounce them at sentencing. Specifically, Anthony Hart challenges the following conditions contained in the order of probation filed on November 17, 1992:

> (4) You will neither possess, carry, or own any weapon or firearm without first securing the consent of your Probation Officer.
>
> (6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed or used.
>
> (13) You shall submit to and pay for an evaluation to determine whether or not you have any treatable problem with alcohol and/or any illegal drug. If you have said problem, you are to submit to, pay for, and successfully complete any recommended treatment program as a result of said evaluation, all to be completed at the discretion of your Probation Officer.

Contrary to Hart's contention, condition 13 was orally pronounced at sentencing and, therefore, we find no merit to his argument on this condition.

Conditions 4 and 6, and variations of these two conditions, are reviewed by this court with great frequency. These two conditions are similar to conditions 4 and 7 in the probation order form approved by the Florida Supreme Court and found in Florida Rule of Criminal Procedure 3.986. The relevant conditions, as stated in rule 3.986, are:

> (4) You will not possess, carry, or own any firearm. You will not possess, carry, or own any weapons without first procuring the consent of your officer.
>
> (7) You will not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician. Nor will you

visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used.

Rule 3.986 contains two lists of probation conditions. The first section, which is not separately titled, lists eleven conditions including numbers 4 and 7 quoted above. The second section is titled "SPECIAL CONDITIONS" and lists nine additional conditions that apply if checked. Although conditions 4 and 7 are not part of the "special conditions" list in the approved form, this court has determined that they are special conditions because they are not statutory conditions, i.e., probation conditions set forth in chapter 948, Florida Statutes (1991). Tillman v. State, 592 So. 2d 767 (Fla. 2d DCA 1992).

Whether probation conditions are special or general is the bright line between conditions that must be orally pronounced at sentencing and those for which oral pronouncement is unnecessary. Notice of 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 sentencing. Because a defendant must make a contemporaneous objection to probation conditions at the time of sentencing, the defendant must be informed of conditions being imposed. Olvey v. State, 609 So. 2d 640 (Fla. 2d DCA 1992)(en banc).

We have held, and continue to hold, that defendants have notice of all probation conditions contained in the statutes; therefore, there is no obligation to orally pronounce these conditions. Everyone is presumed to know the law and if,

as a practical matter, the defendants themselves are not aware of these conditions, the knowledge of their attorney is imputed to them.

We believe the continuing problem of the probation conditions listed above arises from a misunderstanding of what constitutes a general condition of probation. We have consistently held that the only "general conditions" of probation are those contained within the statutes. At the trial court, however, it is apparently assumed that "general conditions" include all those contained in the approved probation order in rule 3.986. We note that the rules require trial courts to use this form when placing a defendant on probation. Thus, trial courts fail to orally pronounce the conditions they assume to be "general conditions" and we continue to strike in whole or in part the very same conditions because we have held that they are "special conditions" not orally pronounced.

Because we reverse trial courts far more often for failure to orally pronounce special conditions of probation than any other district court, it occurs to us that we may have too strictly defined "general conditions" of probation. Additionally, this district's case law striking probation conditions for lack of oral pronouncement developed prior to the amendment of rule 3.986 adding the probation form. It is possible that this addition provides sufficient notice to make oral pronouncement unnecessary. Therefore, we certify the

following question of great public importance to the Florida Supreme Court:

> 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?

As to appellant Hart, we affirm condition 13. We affirm condition 4 insofar as it prohibits Hart, a convicted felon, from owning or possessing a firearm. See § 790.23, Fla. Stat. (1991). We strike the portion of condition 4 implying that Hart's probation officer may consent to Hart's possession of a firearm. See Beckner v. State, 604 So. 2d 842 (Fla. 2d DCA 1992). We also strike the portion of condition 4 that prohibits the possession or ownership of any weapon because it was not orally pronounced at sentencing. We strike the portion of condition 6 that prohibits the excessive use of intoxicants because it was not orally pronounced at sentencing. We affirm the balance of condition 6 as a precise definition of a general prohibition that need not be orally pronounced. See Tomlinson v. State, 645 So. 2d 1 (Fla. 2d DCA 1994).

Affirmed in part, portions of probation conditions stricken, and question certified.

DANAHY, A.C.J., and FULMER, J., Concur.