IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,316

LINCOLN WOODS, III,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent was sentenced as a habitual offender after pleading guilty to burglary of a dwelling. Respondent signed a plea form which set forth that a hearing may be held to determine if respondent was a habitual felony offender, what the maximum sentence respondent was facing as a habitual offender and that he would not be eligible for gain time if found to be a habitual offender. The Fifth District Court of Appeal vacated the habitual offender sentence and remanded the case for resentencing. In doing so the court relied on Santoro v. State, 644 So. 2d 585 (Fla. 5th DCA 1994), and Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994). Woods v. State, 20 Fla. L. Weekly D455 (Fla. 5th DCA February 17, 1995). The state timely filed a notice to invoke discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

This court has accepted jurisdiction in Santoro, supra, and Thompson, supra, and the two cases, as well as several others, are currently pending review by this court. The Fifth district relied on those cases in reaching its decision. This court should accept jurisdiction in this case.

ARGUMENT

POINT ON APPEAL

THE DECISIONS RELIED UPON BY THE DISTRICT COURT IN VACATING THE SENTENCE IMPOSED ARE PENDING REVIEW BEFORE THIS COURT; THERE IS PRIMA FACIE EXPRESS CONFLICT AND THIS COURT SHOULD EXERCISE ITS JURISDICTION.

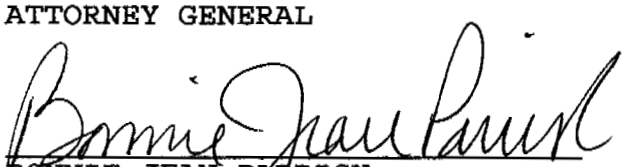
A district court decision that is either pending review in or has been reversed by this court constitutes prima facie express conflict and allows this court to exercise its jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). In vacating the habitual offender sentence imposed in this case, the Fifth District relied upon Santoro, supra, and Thompson, supra. Both cases are currently pending review in this court. See case nos. 84,758 and 83,951 respectively. This court should exercise its jurisdiction in this case. Jollie, supra.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner requests this court exercise its jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Petitioner has been furnished by delivery to Nancy Ryan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 15th day of March, 1995.

Bonnie Jean Parrish
Of Counsel

Criminal law—Probation—Conditions—Community control and probation condition prohibiting possession of weapon or firearm without probation officer's consent to be stricken because convicted felon may not possess a firearm lawfully—Portion of condition prohibiting excessive use of intoxicants to be stricken because court did not announce it in open court—Condition requiring defendant to maintain activity log while on community control to be stricken because it is special condition that court failed to announce orally in open court—Condition requiring payment to First Step to be stricken because court provided no statutory reference for imposition of such cost—Portion of condition requiring submission to evaluation and treatment programs at defendant's expense to be stricken as a special condition not orally pronounced—Conflict certified—Condition requiring payment of court costs to be stricken because record contains no statutory authority for the assessment

JOHN F. CURRY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 93-01827. Opinion filed February 15, 1995. Appeal from the Circuit Court for Pinellas County; Robert E. Beach, Judge. Counsel: James Michael Walls of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., St. Petersburg, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michele Taylor and Stephen D. Ake, Assistant Attorneys General, Tampa, for Appellee.

(PARKER, Judge.) John F. Curry appeals his sentences for two counts of handling and fondling a child and five counts of lewd and lascivious acts. We affirm the sentences but remand for corrections to Curry's Order of Community Control Followed by Probation.[1]

In addition to numerous other conditions applicable to community control and probation, the order contained the following conditions:

> (4) You will neither possess, carry, or own any weapons or firearms without first securing the consent of your Community Control/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.
>
> . . . .
>
> (11) While on Community Control you will maintain an hourly accounting of all your activities on a daily log which you will submit to Community Control Officer upon request.
>
> . . . .
>
> (15) You will pay to First Step, Inc. the sum of Twelve Dollars ($12.00) per year for each year of Community Control/Probation ordered, on or before ninety days from the date of this Order.
>
> . . . .
>
> (18) You shall submit to and pay for an evaluation to determine whether or not you have any treatable problem with alcohol and/or 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.
>
> (19) You will pay $50.00 per month towards court costs in the amount of $300.00 as ordered by this Court commencing with the first month of probation or community control under the terms of this Order until paid in full.

We direct that Condition 4 be struck because a convicted felon may not possess a firearm lawfully. *See Jennings v. State*, 645 So. 2d 592 (Fla. 2d DCA 1994). That portion of Condition 6 that Curry will not use intoxicants to excess must be struck because the trial court did not announce it to Curry in open court. Otherwise, the remaining requirements of Condition 6 are valid. *See Tomlinson v. State*, 645 So. 2d 1 (Fla. 2d DCA 1994). We direct that Condition 11 be struck because it is a special condition that the court failed to announce orally to Curry in open court. *See Vinyard v. State*, 586 So. 2d 1301 (Fla. 2d DCA 1991). We conclude that Condition 15 must be struck because the trial court provided no statutory reference for the imposition of this cost. *See Nank v. State*, 19 Fla. L. Weekly D2324 (Fla. 2d DCA Nov. 4, 1994). That portion of Condition 18 requiring Curry to submit at his own expense to evaluation and treatment programs must be struck because this was a special condition not announced orally in Curry's presence. *See Nank*; *but see Navarre v. State*, 608 So. 2d 525 (Fla. 1st DCA 1992) (requirement of drug evaluation, screening, and treatment is a standard condition of probation). We certify conflict with *Navarre*. We hold that Condition 19 must be struck because the record contains no statutory authority for the imposition of these costs. *See Nank*. It, however, is without prejudice to the state to seek reimposition of these costs on remand based upon proper statutory authority.[2]

We affirm the sentences in this case but remand to the trial court to modify the Order of Community Control Followed by Probation by striking Conditions 4, 11, 15, and 19 and modifying Conditions 6 and 18 in accordance with this opinion. Condition 19 should be struck without prejudice to the state to seek reimposition of those costs. (CAMPBELL, A.C.J., and LAZZARA, J., Concur.)

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[1]Curry raised other points on appeal which we have concluded did not constitute reversible error.

[2]Curry challenged two other conditions of probation, but we hold that the trial court lawfully imposed these valid conditions.

* * *

Criminal law—Sentencing—Habitual offender

LINCOLN WOODS, III, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1577. Opinion filed February 17, 1995. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin Compton Jones, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) We vacate the habitual offender sentences appealed and remand for resentencing. *Santoro v. State*, 644 So. 2d 585 (Fla. 5th DCA 1994); *Thompson v. State*, 638 So. 2d 116 (Fla. 5th DCA 1994), *review granted*, No. 83,951 (Fla. Nov. 23, 1994); § 775.084(3)(b), Fla. Stat. (1993).

JUDGMENT AFFIRMED; SENTENCES VACATED and REMANDED. (HARRIS, C.J., PETERSON and GRIFFIN, JJ., concur.)

* * *

HARRIMAN v. STATE. 5th District. #94-1405. February 17, 1995. Appeal from the Circuit Court for Osceola County. AFFIRMED. *See Pallas v. State*, 636 So. 2d 1358 (Fla. 3d DCA 1994), *rev. granted*, No. 84,006 (Fla. Nov. 7, 1994); *Bouters v. State*, 634 So. 2d 246 (Fla. 5th DCA 1994), *rev. granted*, 640 So. 2d 1106 (Fla. 1994). *See also Steffa v. State*, 645 So. 2d 552 (Fla. 2d DCA 1994); *State v. Kahles*, 644 So. 2d 512 (Fla. 4th DCA 1994); *Varney v. State*, 638 So. 2d 1063 (Fla. 1st DCA 1994), *rev. granted*, No. 84,172 (Fla. Nov. 21, 1994).

* * *

Criminal law—Restitution—Error to require payment of restitution for a ring not included in plea and not agreed to in negotiated sentence

WILLIAM LEIGHTON DENNY, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2783. Opinion filed February 17, 1995. Appeal from the Circuit Court for Orange County, Alice Blackwell White, Judge. Counsel: James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, C. J.) William Leighton Denny appeals that portion of his sentence requiring him to pay restitution for a ring not included within his *nolo contendere* plea and not agreed to in the negotiated sentence. We reverse.

Although the ring was found to be missing at about the same time Denny admits taking certain property, there was no proof or admission that he took this particular ring. *See Dyer v. State*, 622 So. 2d 1158 (Fla. 5th DCA 1993).

REVERSED and REMANDED to remove restitution for this ring from the judgment. (COBB and THOMPSON, JJ., concur.)

* * *