IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. F.S.C. No.: 85,322

FREDERICK GLENN SHEFFIELD,

Respondent.

_____/

DISCRETIONARY REVIEW OF CERTIFIED CONFLICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

For purposes of the issue briefed in the case at bar, Respondent adopts the statement of case and facts as set forth by Petitioner in Petitioner's Brief on the Merits.

SUMMARY OF THE ARGUMENT

Because the Rules of Civil Procedure require a sentence to be orally pronounced, since oral pronouncements at sentencing take precedence over the written order, as well as the fact that the written sentence is only a record of the actual oral sentence pronouncement of the court, and recognizing that there is a due process "notice" requirement in imposing conditions of probation, Respondent would submit that all conditions of probation, with the exception of Statutorily mandated ones, should be orally pronounced in open court so as to satisfy due process. However, if this court chooses to follow the delineation between general and special conditions acknowledged by the district courts, Respondent would submit that special conditions not found in a statute, irrespective of whether or not they are included in the probation form found in the Rules of Criminal Procedure, should be orally pronounced at sentencing, and that only those laws published in the laws of Florida or in the Florida Statutes give Defendants appropriate constructive notice to satisfy due process concerns. Finally, since probation conditions cannot be added to an existing sentence unless there is a finding of violation of probation, and since sentencing courts are only authorized to modify already imposed terms of probation, those conditions of probation which were improperly imposed without oral pronouncement at sentencing should be stricken from the sentence and the trial court should not have the opportunity to re-instate them at a new sentencing hearing.

ARGUMENT

ISSUE I

DOES THE SUPREME COURT'S PROMULGATION OF THE FROM "ORDER OF PROBATION" IN FLA. RULES CRIM. P. 3.986 CONSTITUTE SUFFICIENT NOTICE TO PROBATIONERS OF CONDITIONS 1 THROUGH 11 SUCH THAT ALL PRONOUNCEMENT OF THESE CONDITIONS BY THE TRIAL COURT IS UNNECESSARY? (CERTIFIED QUESTION)

Petitioner argues that "special conditions" of probation imposed upon a Defendant need not be orally pronounced at the time of sentencing as long as they are included within the "Order of Probation" form promulgated by this court. See In re Amend. to the Fla. Rules Crim. P., 603 So.2d 1144, 1145 (Fla. 1982). The Petitioner reasons that oral pronouncements are not necessary since defense counsel would be on notice as to what these conditions of probation would be, and therefore the due process requirement of "notice" would be satisfied. In addition, Petitioner argues that even if this Court finds that such "special conditions" must be orally pronounced at sentencing, the trial court should be allowed an opportunity to re-impose the challenged conditions upon remand. Respondent would submit otherwise.

Fla. Rules Crim. P. 3.700, in subsections a & b, state that "(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 guilt. (b) Pronouncement and Entry. Every sentence or other final disposition of the case shall be pronounced in open court. The final disposition of every case shall be entered in the minutes in courts in which minutes are kept and shall be docketed in court that do not maintain minutes."

Furthermore, it has been held that "a trial court's oral pronouncement controls over its written order". See Roland v. State, 548 So.2d 812 (Fla. 1st DCA 1989), at page 814. In addition, in Kelly v. State, 414 So.2d 1117 (Fla. 4th DCA 1982), that court held that "...the written sentence is merely a record of the actual sentence pronounced in court. Fla. Rules Crim. P. 3.700. As stated in Toombs v. State, 404 So.2d 766, 768 (Fla. 3rd DCA 1981), `the oral pronouncement, although not reflected in the written order, controls.'..." at page 1118. Moreover, it has been recognized that there are due process "notice" requirements to a defendant when the court imposes conditions of probation. See Olvey v. State, 609 So.2d 640, 642 (Fla. 2nd DCA 1992). Due process requires this notice because, if nothing else, a defendant has to have an opportunity to object to the conditions, since an objection is required to preserve the record for appeal. Only if the probation condition is illegal or so egregious as to be the equivalent of fundamental error, is an objection not needed. See Larson v. State, 572 So.2d 1368, 1370-1371 (Fla. 1991).

In light of the aforementioned authorities, Respondent would submit that in all cases where a court has the discretion of imposing a condition of probation, the court should be required to orally pronounce every condition of probation at sentencing (Respondent would agree that if a condition of probation is mandated by Statute, oral pronouncement is not necessary. See State v. Beasley, 580 So.2d 139 (Fla. 1991), and Hayes v. State, 585 So.2d 397 (Fla. 1st DCA 1991)). This is consistent with the

requirement of Rule of Criminal Procedure 3.700 that the sentence be pronounced in open court, and with the long held precedents that the written sentence is only a record of the actual oral sentence, and that the oral sentence promulgated takes precedence over the written sentence.

Respondent recognizes that the District Courts have determined that there are two types of probationary conditions. The first of these are standard conditions. These are conditions listed by a Statute by the Legislature. The second are special conditions. These can be added by the court, but are not listed in a Statute. The courts have indicated that defendants have constructive notice of standard conditions listed in Statutes, but not special conditions. Consequently, courts must orally pronounce special conditions at sentencing in order to satisfy due process requirements. See Tillman v. State, 592 So.2d 767, 768 (Fla. 2nd DCA 1992), and Olvey v. State, 609 So.2d 640, 641 (Fla. 2nd DCA 1992). See also Hart v. State, 651 So.2d 112 (Fla. 2nd DCA 1995), and Nank v. State, 646 So.2d 762 (Fla. 2nd DCA 1994). The constructive notice rationale is based on the case of State v. Beasley, 580 So.2d 139 (Fla. 1991), in which this court indicated that "...as to notice, publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions..." citations omitted at page 142. Petitioner would not only ask this court to follow the ruling of the district courts, but would ask that the exception to oral pronouncement of conditions of probation be extended to all the

conditions of probation included in the "Order of Probation" form found in Fla. Rules Crim. P. 3.986, arguing that notice to a defendant's lawyer is enough for the due process "notice" requirements to be satisfied. Respondent would urge this court not to follow this reasoning. The Beasley case indicated that as long as it was published in the Laws of Florida or the Florida Statutes, all citizens were given constructive notice. In this case, since the standard probation form was not published in the Laws of Florida or the Florida Statutes, it cannot be said that it gives all citizens constructive notice of those same conditions. Nothing in Beasley indicates that constructive notice to lawyers is enough to satisfy due process "notice" requirements. In addition, if no oral pronouncement was needed for any other conditions of probations which are included the form, then we would have a situation where in most circumstances, no oral pronouncement of any condition would be necessary at all (unless they were not included in a Statute or in the forms). This is in direct conflict with Rule of Criminal Procedures 3.700 and the principal that oral pronouncements of a sentence take precedence over the written order, as well as the fact that the written order is merely the written record of the oral pronouncement of the court. The tables would in fact be turned, and the written order would control over the oral pronouncement. Respondent would submit that this reversal creating a precedence for the written order over the oral sentence, should not be allowed; due process requires more. Moreover, you could very easily have situations in which it would be very

difficult for defendant's counsel to object to specific conditions of probation, since they would not be required to be orally pronounced, and Defendant may not always know which of the conditions of probation which the court can elect from, were actually issued as part of the sentence.

Petitioner also briefly argues that if this court holds that conditions of probation must be orally pronounced at sentence, that the trial court should be allowed the opportunity to re-impose those conditions as long as they orally pronounced them, instead of ordering the lower court to strike the unannounced conditions. This issue has been certified before this court in Justice v. State, 20 F.L.W. D1697 (Fla. 5th DCA 1995). We would submit that the appropriate procedure would be to order the lower courts to strike the conditions of probation not orally pronounced at the original sentence, and would urge this court to follow the dissent in the Justice case, which very succinctly spells out why Petitioner's contention is incorrect. In his descent in the Justice case, Judge Griffin, after recognizing that Fla. Rules Crim. P. 3.700 require an oral pronouncement by the court, also recognizing that the written sentence is only a record of the actual oral sentence pronounced in open court, states that "the Florida Supreme Court has not considered a case such as this wherein 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 of finding a 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 pronounced sentence. Id. It seems to follow that, just as a 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 note 3 (Fla. 1991). Consistent with these pronouncements of the higher court, our sister district courts of appeal have correctly ordered stricken on appeal any special condition of probation not orally pronounced." At page 1699. Griffin then went on to say that "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 charges. 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 which 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." at page 1699.

Because the Rules of Civil Procedure require a sentence to be orally pronounced, since oral pronouncements at sentencing take precedence over the written order, as well as the fact that the written sentence is only a record of the actual oral sentence pronouncement of the court, and recognizing that there is a due process "notice" requirement in imposing conditions of probation, Respondent would submit that all conditions of probation, with the exception of Statutorily mandated ones, should be orally pronounced in open court so as to satisfy due process. However, if this court chooses to follow the delineation between general and special conditions acknowledged by the district courts, Respondent would submit that special conditions not found in a statute, irrespective of whether or not they are included in the probation form found in the Rules of Criminal Procedure, should be orally pronounced at sentencing, and that only those laws published in the laws of Florida or in the Florida Statutes give Defendants appropriate constructive notice to satisfy due process concerns. Finally, since probation conditions cannot be added to an existing sentence unless there is a finding of violation of probation, and since sentencing courts are only authorized to modify already imposed terms of probation, those conditions of probation which were improperly imposed without oral pronouncement at sentencing should be stricken from the sentence and the trial court should not have the opportunity to re-instate them at a new sentencing hearing.

CONCLUSION

In Conclusion, based on the foregoing facts, arguments, and citations of authorities, Respondent respectfully requests that this Honorable Court answer the certified question at bar in the negative, and furthermore order that all conditions of probation (exception for statutorily mandated ones) which were not orally pronounced at sentencing, be stricken.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to the Office of the Attorney General, 2002 North Lois Avenue, West Wood Center, Seventh Floor, Tampa, Florida 33607, this 24th day of August, 1995.

DOMINGO G. ALVAREZ, III, ESQ.