IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC NO. 85,322

FREDERICK GLENN SHEFFIELD,

Respondent.
_____/

PETITIONER'S BRIEF 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, Second District. Respondent, Frederick Glenn Sheffield, was the defendant 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

The defendant entered pleas and was sentenced in twelve cases jointly, including or in addition to three probation revocations. (R. 16-17, 258) He had twenty-five previous felony convictions and was charged with twenty-seven more. (R. 208) Notices of intent to habitualize had been filed in two of the cases, and the prosecutor handling them was seeking habitual offender sentences totaling forty years. (R. 2-10, 17, 220) On February 3, 1993, a plea agreement was executed in those cases which permitted that sentence as a maximum, with consecutive probation, and required court costs, restitution, and reimbursement to FDLE. (R. 255-257)

In the rest of the cases, habitualization was not sought. The state was requesting that the full terms be spent on

probation to facilitate restitution, with the understanding that the probation in those cases should be subject to early termination if the amounts due were paid before then. (R. 18-19) These cases were apparently handled separately prior to the plea hearing on February 9, 1993, and the record does not contain a written agreement as to them. (R. 17)

The defendant was told before entering his plea that he would be required to pay court costs of $288, attorney's fees of $250, and whatever restitution was due. (R. 19) The court was advised that it would only be necessary to retain jurisdiction to determine the amount of restitution in Case No. 92-3266, because the amounts due for everything else were already known. (R. 23) The probation order provides for payments of costs and fees in the amounts specified at the plea hearing and does not order any restitution at all to be paid in Case No. 92-3266. (R. 266-270)

At the sentencing hearing on April 15, 1993, the defendant testified and called his parents and two mental health experts, all of whom said much the same thing. He grew up in a conservative, working family that did not indulge in alcohol or drugs. (R. 198) He was a good mechanic and had been an average, well-behaved student until the death of his grandmother when he was about sixteen or seventeen. (R. 163, 205-206, 207-208) That upset him so much that he hibernated for two months then dropped out of school and got a job digging graves. (R. 197-198, 210)

His boss introduced him to crack cocaine and he was "instantly" addicted. He rapidly developed a very expensive habit and his crimes were committed for that reason. (R. 174-175, 211) After going to prison, he kicked the habit for two months, but he went out drinking with friends one night and wound up smoking crack as well. (R. 188-189, 212)

Everyone agreed that he should serve a substantial sentence and undergo long-term drug treatment after his release. Indeed, defense counsel and defendant both requested a twenty-two year guidelines sentence, which was the top of the permitted range, followed by a two year residential drug treatment program. (R. 212-214, 216, 220) The defendant's goal was to avoid an extended habitual offender term as the state was recommending. (R. 212-213) The judge actually imposed a fifteen-year habitual offender sentence on one count, followed by concurrent probation for ten years with a requirement for long-term residential drug treatment as needed. Ten-year probationary terms were imposed for the remaining offenses in the habitual offender cases, which could result in habitual offender prison terms if violated, and the numerous five-year felonies in appellant's nonhabitual cases were all paired up to produce several concurrent ten-year periods, each comprised of two consecutive five-year terms. (R. 221-223, 227-237)

The judge advised the defendant that "all drug-related conditions will apply to the probation" and that he could be searched or tested for drugs at any time. (R. 221-222) The provision for warrantless searches is the only drug-related condition imposed that does not refer to drugs expressly. (R. 266-270) The PSI that would presumably show what conditions were recommended and in what terms and why and explain the restitution amounts was not included in the record. The probation orders violated in three of appellant's prior drug-related cases that would show what drug-related conditions he was familiar with from previous experience are not provided either.

Neither defendant nor defense counsel gave any indication of uncertainty about the conditions the judge was referring to, and no objection was made as to any of them. The defendant had purportedly recognized that he was not capable of giving up cocaine without forced abstinence and long-term deterrence thereafter and had reached the point of welcoming that, as defense counsel's sentencing recommendation suggests. (R. 158-162, 183, 201-202, 206-208, 212-214, 216)

The notice of appeal in this case was only filed in the two habitual offender cases, the clerk was only directed to include documents from those two cases, and there is no indication otherwise that the defendant intended to appeal the non-habitual probationary sentences imposed in any of this other cases. (R.

260-265) There is nothing in the record relating to those cases except the transcripts and documents which are joint, and they apparently were not appealed separately as the docketing statement prepared by trial defense counsel indicates that there are no related appeals.

In view of continuing problems in the Second District between probation conditions that are special versus general, i.e., those that must be orally pronounced at sentencing to be valid, and those that need not, the court again certified the question certified in Hart v. State, 651 So. 2d 112 (Fla. 2d DCA 1995):

> 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?

Pursuant to the Second District's certification of the question of great public importance, the state files its initial brief on the merits.

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 that rule 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 have constructive notice. As such, 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.

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 Crim. P., 603 So. 2d 1144, 1145 (Fla. 1992).

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]." Fla. Stat. §948.03(1) (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.

Fla. Stat. §948.03(5) (1991). The legislative 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 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 Fla. R. Crim. P. 3.986(e) form 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.

In 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 construc-

tive 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 (1st DCA), review denied, 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 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, and, if appropriate deletion.

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. Section 948.03(5), Florida Statutes (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 has been furnished by U.S. Mail to Domingo G. Alvarez, III., 2514 East Jackson Street, Orlando, Florida 32803 on this 12th day of July, 1995.

OF COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

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APPENDIX

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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

FREDERICK GLENN SHEFFIELD, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 93-01818

Opinion filed December 30, 1994.

Appeal from the Circuit Court for Polk County; Dennis P. Maloney, Judge.

Domingo G. Alvarez, III, Orlando, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Anne Y. Swing, Assistant Attorney General, Tampa, for Appellee.

DANAHY, Acting Chief Judge.

The appellant brings for our review the concurrent habitualized probationary terms in two cases, Circuit Court Cases

Nos. 92-3941 and 92-4034.[1] He complains (1) that he did not receive proper credit on the probationary terms reflecting time he previously spent on probation, (2) that several special conditions in the written order of probation were not pronounced at sentencing, and (3) that the restitution ordered is improper. His first issue has no merit since the sentence he received on these two cases was not a reimposition of probation upon a revocation but an initial sentencing. Cf. Summers v. State, 625 So. 2d 876 (Fla. 2d DCA 1993), approved, 19 Fla. L. Weekly S449 (Fla. Sept. 22, 1994) (where further probation imposed upon revocation of probation for one conviction, probation credit must be applied so that total time spent on probation does not exceed statutory maximum). His second issue, however, does have merit requiring us to reverse. We also reverse on his third issue for clarification.

Addressing the second issue, we note that the record is confused by the fact that at the sentencing hearing there were twelve cases, some of them resentencings upon revocation of probation and some initial sentencings. The trial court had also held a prior sentencing hearing which was continued so that the appellant could have a drug treatment evaluation. Unfortunately, the appellant has not provided us with a

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[1]He also seeks to have us review the special conditions of probation and restitution in ten other cases, some of which were sentencings upon revocation of previous probation. These are Circuit Court Cases Nos. 90-5003, 91-0421, 91-2196, 92-3266, 92-3308, 92-3309, 93-3521, 92-3940, 92-4033, and 92-4437. The sentencing in these cases occurred at the same time as the two cases which he appealed. No appeal was filed in these cases.

transcript of this hearing that apparently dealt with some of the restitution issues he raises here. Be that as it may, the transcript of the later hearing shows that the court, in imposing the probationary terms, stated that the appellant was to be placed in a long-term drug treatment program as a condition of probation, was to successfully complete the program, that all drug-related conditions of probation would apply, and that he was subject to warrantless searches by his probation officer and to random drug testing. The written order of probation includes the conditions orally pronounced. However, the written order additionally includes a proscription against using intoxicants to excess and visiting places where intoxicants are dispensed or used.

Because these additional conditions in the written probation order are not statutorily authorized, they must be orally pronounced at sentencing to be valid. Turchario v. State, 616 So. 2d 539 (Fla. 2d DCA 1993), Olvey v. State, 609 So. 2d 640 (Fla. 2d DCA 1992); see generally Nank v. State, No. 93-02215 (Fla. 2d DCA Nov. 4, 1994). Since these conditions were not orally pronounced at the appellant's sentencing hearing they must be stricken. We note, in accord with Turchario, that had the trial court imposed "the same conditions as before," and had the appellant's probation conditions in his earlier cases contained alcohol-related conditions, he would be on notice of those previously imposed conditions and, if they were related to his rehabilitation, they would have been valid conditions to this probation. Id. at 540.

Turning to the third issue, the restitution imposed, we cannot reconcile the amounts announced at the sentencing hearing with the amounts shown in the written order. Since we must remand for resentencing, the trial court should clarify the restitution amounts related to the two cases appealed.

We reverse the sentencing order and remand for further proceedings in accord with this opinion.

FULMER, J., Concurs.
ALTENBERND, J., Concurs specially.

ALTENBERND, Judge, Concurring.

The legislature and the trial bench should understand that most appellate judges would prefer to enforce the typical condition of probation prohibiting the use of alcohol. We are frequently forced to strike this condition because the legislature has chosen not to include such a regulation of the use of alcohol among the statutory conditions of probation in section 948.03, Florida Statutes (1993). That section should be substantially revised to include a uniform set of simple rules governing the conduct of persons on probation.

Because section 948.03 is inadequate and written in legal jargon, the courts have created a standard probation order with many "special" conditions of probation, including a

condition regulating the use of alcohol. See Fla. R. Crim. P. 3.986(e). Thus, these "special" conditions of probation are imposed in most cases--not in special cases. The form is difficult to use because the trial judge must remember to orally announce each condition on the form that is not a statutory condition. Moreover, portions of a condition may be statutory, while other portions are not. See Tomlinson v. State, 19 Fla. L. Weekly D1179 (Fla. 2d DCA May 27, 1994). This difficulty is compounded by the fact that, although the form contains a "special conditions" section, it places some special conditions, including the alcohol condition, within the list that would seem to be statutory.

For example, in this case, Mr. Sheffield has an extensive criminal record and a related substance abuse problem. In a complex sentencing hearing, the trial court sentenced Mr. Sheffield to fifteen years' imprisonment as a habitual offender, followed by probation. In explaining the conditions of probation--which should become relevant only after many years of imprisonment--the trial judge described "all of the drug related conditions," but did not expressly announce the special alcohol restriction in the standard probation form. Even though the drug and alcohol conditions are interwoven in the standard probation form and the alcohol condition could be properly imposed in this case, I reluctantly agree that the trial court must specially announce the alcohol condition in light of the existing case law and statutes. See Olvey, 609 So. 2d 640.

Trial courts could impose reasonable conditions of probation without oral announcement if the legislature, after consulting with the trial bench, enacted an adequate list of basic do's and don'ts for persons on probation.[2] In the rare case when a standard condition was inappropriate, the trial court could orally override the statute. This procedure would be more efficient and informative than the litany of rote special conditions now imposed in virtually every circuit court.

I would suggest to the legislature that, "you will not drink any alcoholic beverage while on probation," might be an appropriate, simple instruction that should reasonably govern the conduct of all convicted felons who have the good fortune to be on probation, rather than in prison.

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[2] I am not suggesting that the legislature simply codify the standard probation order. The order created by the judiciary is also complex and difficult to understand. The typical probationer does not read at the high school level. The standard form contains the following language: "Nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used." There are few public "places" in Florida, including our jails, that a probationer is permitted to visit under the literal requirements of this rule. Maybe a probationer would understand: "You will not go into a bar, tavern, or lounge while on probation. You will not go into any building where you know that you can get cocaine, heroin, or other illegal drugs."