IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RICHARD GELLER,

Respondent.

Case No. 85,331
District Court Appeal
Second District No. - 93-02670

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent adopts the Statement of Case and Facts as set forth by Petitioner in the Brief of Petitioner on the Merits.

SUMMARY OF THE ARGUMENT

The question at bar is if the sentencing court is required to orally pronounce the standard conditions of probation when placing a defendant on probation. Due process requires that a defendant be provided notice and opportunity to object. The list of suggested conditions in §948.03(1), Fla. Stat. (1993), which the court "may include" in the conditions of probation is not sufficient notice of those conditions to relieve the need for oral pronouncement at the sentencing hearing if they are actually imposed.

The promulgated "Order of Probation" form with a list of standard conditions in Fla. R. Crim. P. 3.986(e) are also not sufficient notice of the conditions that will be actually be imposed. The sentencing court's orders of probation frequently do not and are not required to specifically follow the promulgated list as evidenced by the leniency provided in Fla. R. Crim. P. 3.986(a), the rule providing that failure to follow the form does not void the order.

The court is required to orally pronounce the condition(s) at sentencing or to assure due process notice and opportunity to object by some procedure. The statute and procedural rule alone are not sufficient notice to satisfy the due process requirement.

ARGUMENT

ISSUE

DOES THE 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? (CERTIFIED QUESTION)

The question certified to this court is if the sentencing court is required to orally pronounce the imposition of probation conditions 1-11 as set forth in the form "Order of Probation" in Florida Rules of Criminal Procedure 3.986 when sentencing a defendant to probation. Emond v. State, 20 Fla. L. Weekly D675 (Fla. 2d DCA March 15, 1995); In Re Amend. to the Fla. Rules Cr. Proc., 603 So. 2d 1144 (Fla. 1992); Fla. R. Crim. P. 3.986(e).

In Petitioner's Brief on the Merits, the State of Florida contends that oral pronouncement of those conditions is not required. Petitioner asserts that publication of the statute gives constructive notice of general conditions listed by the legislature in §948.03(1), Fla. Stat. (1993), and the promulgation of the "Order of Probation" by this Court also gives constructive notice of this Court's version of the 1-11 general conditions via counsel. Petitioner contends that such constructive notice relieves any obligation to orally pronounce "Order of Probation" conditions 1-11 at sentencing.

In the argument herein, Respondent establishes that neither the publication of the statute nor the promulgation of the "Order of Probation" promulgated by this Court provides sufficient notice to relieve the due process requirement that the conditions of probation be orally pronounced at sentencing to provide the defendant with notice and opportunity to object to the

conditions.[1]

Chapter 948 establishes probation and provides that the determination of the conditions of probation are to be a mixture of those determined by the legislature and those to be determined by the court.[2] The legislature placed limitations on the terms and conditions which can be placed on probation by the court such as a maximum of 364 days incarceration; restrictions on required work; and restriction from revocation for inability to achieve education or training or make payments. §948.03(5-8), 948.031, and 948.032 Fla. Stat. (1993).

The legislature required the imposition specific statutory drug treatment program conditions on probation following convictions of a violation of Chapter 893, Florida Statutes (1993). §948.034, Fla. Stat. (1993) sets forth conditions regarding determination of the need of counseling and/or treatment for specified sex offenders is also required. §948.03, Fla. Stat. (1993).

The legislature left the determination of other conditions to the discretion of the court. "The court shall determine the terms and conditions of probation or community control and may include among them the following, that the probationer or community control shall: [A specific list of suggested conditions (a)-(j)]." §948.03, Fla. Stat. (1993) (emphasis added). "The

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[1] Amend. V and XIV, U.S. Counts.; Art. I, Statute 9, Fla. Const.

[2] The certified question at bar addresses only the need for oral pronouncement. Potential issue regarding the simultaneous legislative and judicial determination of the applicable conditions of probation are not addressed herein. See, Art. II, Statute 3, Fla. Const.; Smith v. State, 537 So.2d 982, 985 (Fla. 1989) (Judicial promulgation the grid schedules and recommended ranges for sentencing); Booker v. State, 514 So.2d 1079, (Fla. 1987) (Legislative power to determine extent of departure from the sentencing guidelines.)

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, Fla. Stat. (1993).

Oral pronouncement of a sentence is generally required. "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 guilty...Every sentence or other final disposition of the case shall be pronounced in open court." Fla. R. Crim. P. 3.700.

The district courts of appeal have determined that there are two types of conditions: "standard conditions" (those listed in statute by the legislature) which do not require oral pronouncement and "special conditions" (added by the courts) which due process requires oral pronouncement at sentencing.[3] When the sentencing court's "standard conditions" differ from the legislative suggested conditions, the appellate courts have renamed them "special conditions" and found them to warrant oral pronouncement. That is the situation in the cases which have certified the instant question to this Court.[4]

Respondent does not dispute the legal principle that publication of statutes gives all citizens constructive notice of the consequences of their actions. In State v. Beasley, 580 So.2d 139 (Fla. 1991), this Court found that, when costs and a surcharge are "statutorily mandated," the defendant is on constructive notice that the charges were a consequence of his criminal acts.

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[3] Cumbie v. State, 597 So.2d 946 (Fla. 1st DCA 1992); Olvey v. State, 609 So.2d 640 (Fla. 2d DCA 1992); Shacraha v. State, 635 So.2d 1051 (Fla. 4th DCA 1994); Cleveland v. State, 617 So.2d 1166 (Fla. 5th DCA 1993); Tillman v. State, 592 So.2d 767 (Fla. 2d DCA 1992).

[4] Decisions filed preceding the instant case: Hart v. State, 20 Fla. L. Weekly D329 (Fla. 2d DCA February 1, 1995); Sheffield v. State, 20 Fla. L. Weekly (Fla. 2d DCA February 17, 1995); Geller v. State, 20 Fla. L. Weekly D522 (Fla. 2d February 24, 1995); Lietz v. State, 20 Fla. L. Weekly D675 (Fla. 2d DCA March 15, 1995).

In Hayes v. State, 585 So.2d 297 (Fla. 1st DCA 1991), that court found:

> Because of the requirement that the appellant submit to blood, breathalyzer, and urinalysis examinations accords with the provision of section 948.03(1)(j) for "random testing," it is a standard condition of probation, and under the rationale of Beasley it does not need to be orally pronounced. (emphasis added)

The Hayes rational is exemplary of that repeated in district court decisions. However, respondent again points out that the legislature in 948.03(1) did not require those conditions--the court specifically "may include" them. Notice of conditions which the court might impose does not meet the same standard as notice of mandated consequences.

Due process requires that the conditions of probation be orally pronounced at sentencing to provide the defendant with notice and opportunity to object to the conditions. The contemporaneous objection rule applies to conditions of probation not illegal or so egregious as to be the equivalent of fundamental error. Larson v. State, 572 So.2d 1368, 1370-1371 (Fla. 1991). The conditions of probation need to either have a relationship to the crime for which the offender is convicted, it relates to conduct that is in itself criminal, or it requires or forbids conduct that is reasonably related to future criminality. Biller v. State, 618 So.2d 734 (Fla. 1993). Any dispute the defendant may have with the imposition of a potential "standard condition" is waived by the lack of notice as to what specific provision are going to be imposed.

Further, imposition of the conditions set forth by the legislature in §948.03(1) is within the court's discretion. If discretionary sentencing provisions are not orally pronounced, any resulting inconsistent written sentence is to be stricken. See, Green v. State, 615 So.2d 823 (Fla. 4th DCA 1993) (Struck discretionary habitual minimum mandatory sentence imposed in writing, but not orally.) Therefore, all the conditions which the statute left to the discretion of the discretion of the court require oral pronouncement.

Unlike the statutes, the Florida Rules of Criminal Procedure are not notice to the public regarding prohibited acts and resulting consequences. The promulgated rules of this Court are to inform those before the bench of the procedure to be followed.

This Court found that the forms set forth in 3.986(b) were to be used by all courts, but also specifically found that "Variations from these forms do not void" the order. Fla. R. Crim. P. 3.986(a). A comparison of the Order of Probation appendixed hereto which placed Respondent on probation on June 17, 1993, to the 3.986(e) (1983) Order of Probation shows variations from the promulgated form by the sentencing court. The common occurrence of such variations is basis for the latitude permitted in 3.986(a). In the Petition at bar, the state admits "slight variants" from the standard form in the orders by the sentencing counts. Brief of Petitioner on the Merits, Page 8. The form in 3.986(e) is not sufficient notice of what conditions will actually be imposed by the sentencing court.

Neither the statute not the promulgated rules are sufficient notice of what conditions of probation will actually be imposed by the sentencing court. Due process requires that the defendant have notice and opportunity to object at the time of sentencing to conditions of probation being imposed by the court.

Petitioner's argument is that the defendant has constructive knowledge via the defendant's counsel who is presumed to have knowledge of the statutes, procedures, and specific conditions--that defendant should be bound by their counsel's knowledge. Petitioner's argument presumes all sentencing court orders will be as set forth in 3.986(e). Petitioner places the burden upon the defendant's counsel to know what conditions that court applies in all cases or to ask the court what conditions are being imposed upon his defendant. Brief of Petitioner on the Merits, Pages

9 and 10. This argument with its implicit suggestion that all represented defendants are advised by their counsel of these conditions prior to their imposition ignores the probability that counsel failed to advise his client of these conditions or that the defendant was unrepresented. Petitioner's suggestion will provide future basis for a multitude of ineffective assistance of counsel allegations.

In Cleveland v. State, 617 so.2d 1166, 1167 (Fla. 5th DCA 1993), the court addressed the requirement of pronouncement of the conditions of probation and suggest a more viable solution--that counsel be provided a copy of the order to be used, time be allowed for explanation to the defendant, and the defendant sign the order in open court. In the event these conditions of probation are imposed as a result of a change of plea, a copy of these standard conditions could be attached to or incorporated into the forms utilized in many circuits. See Appendix A for copy of plea form utilized in the Sixth Judicial Circuit Court. In either case both notice and opportunity to object would be assured.

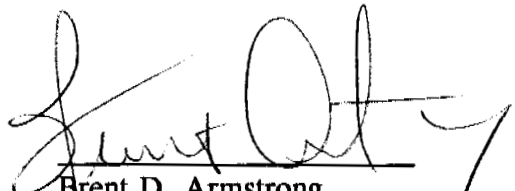
The issue at bar is if the court is required to orally pronounce the standard conditions or probation at the sentencing hearing. Respondent has shown that the due process notice and opportunity to be heard requirement have not been satisfied by §945.03(1), Fla. Stat. (1993), or by Fla. R. Crim. P. 3.986(e). Oral pronouncement or some other viable method to satisfy due process is required.

CONCLUSION

Based upon the cases cited and arguments presented herein, Respondent respectfully requests this Honorable Court answer the certified question at bar in the negative--this Court's promulgation of the form "Order of Probation" in the Florida Rule of Criminal Procedure 3.986 does not constitute sufficient notice to probationers of conditions 1-11 such that oral pronouncement of these conditions by the trial court is unnecessary. Further, Respondent requests this Court find that it is also necessary that the trial court orally pronounce the optional conditions listed in 948.03(1), Fla. Stat. (1993).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by regular U.S. Mail this 23 day of August, 1995 to Attorney General, Suite 700, 2002 N. Lois Avenue, Tampa, Fl 33607.



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