FILED
SID J. WHITE
JUL 17 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC NO. 85,331

RICHARD GELLER,

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, Richard Geller, 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

On February 12, 1993 the State Attorney for Pinellas County, Florida filed an information charging the appellant, Richard Dennis Geller, with driving under the influence of alcoholic beverages (having been convicted of the same offense on at least three prior occasions), a third degree felony. An amended information for the same offense was filed on June 17, 1993. (R. 4, 9) On June 17, 1993 the appellant was found guilty after a jury trial of the offense charged in the amended information. (R. 95) Thereafter, the appellant was sentenced to two years probation with certain conditions including one year incarceration in the Pinellas County Jail. (R. 20-25)

On appeal, following briefing by the parties, the Second District appropriately struck the portion of probation condition four (4), which implied that a probation officer may consent to

the defendant's possession of a firearm. However, the Second District also struck the portion of condition four (4) prohibiting the possession or ownership of any weapon because it was not orally pronounced at sentencing.

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 Brent D. Armstrong, Esquire, 5560 Roosevelt Blvd., Suite 3, Clearwater, Florida 34620 on this 13th day of July, 1995.

Pat Tanfey
OF COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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RICHARD GELLER,

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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

RICHARD GELLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93-02670

RECEIVED
FEB 24 1995

Opinion filed February 24, 1995.

Appeal from the Circuit Court for Pinellas County; Karl B. Grube, Acting Circuit Judge.

Brent D. Armstrong, Clearwater, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Robert J. Krauss, Senior Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Richard Geller's appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), stating he found no meritorious issue in the judgment and sentence entered in this case. We find no

reversible error affecting Geller's conviction for driving under the influence of alcoholic beverages, a third-degree felony, and affirm.

Our independent review of the record reveals that the trial court imposed a "special condition" of probation without orally pronouncing it at sentencing. This was error. See Zachary v. State, 559 So. 2d 105 (Fla. 2d DCA 1990). Condition 4 prohibits the possession or ownership of firearms or weapons without the probation officer's consent. We affirm condition 4 insofar as it prohibits Geller, a convicted felon, from owning or possessing a firearm. See § 790.23, Fla. Stat. (1991). We strike the portion of condition 4 implying that a probation officer may consent to Geller'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 affirm the judgment and sentence. We affirm in part and strike in part condition 4. For the reasons stated in Hart v. State, No. 92-04257 (Fla. 2d DCA Feb. 1, 1995), we again 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 PROBATIONS OF CONDITIONS 1-11 SUCH THAT ORAL PRONOUNCEMENT OF THESE CONDITIONS BY THE TRIAL COURT IS UNNECESSARY?

PATTERSON, A.C.J., BLUE and LAZZARA, JJ., Concur.