IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 85,419

RAFE EMOND,

Respondent.
_____/

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

# BRIEF OF PETITIONER ON THE MERITS

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## OTHER AUTHORITIES

## INTRODUCTION

Petitioner, the State of Florida, was the prosecution in the trial court and appellee in the District Court of Appeal of Florida, Second District. Respondent, Rafe Emond, 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 September 8, 1993, defendant was charged by information with possession of cocaine, in violation of §893.13, Fla. Stat. (1993).

Defendant filed a motion to suppress pursuant to Fla.R.Crim.P. Rule 3.190(h) and (i), whereupon, on October 26, 1993, defendant proceeded to a suppression hearing before the Honorable James S. Parker, Circuit Court Judge. (R. 12, 36).

Following the court's denial of the motion, defendant entered a plea of no contest to the charge, reserving his right to appeal the court's ruling in the motion to suppress. (R. 17-22, 45-47). After receiving defendant's free and voluntary plea,

the court placed the defendant on two years probation. (R. 21, 42-43, 45, 46).

No special conditions of probation were announced in open court. However, written special conditions of probation were in the written probation order. The accompanying order of probation provided in pertinent part that defendant would have to abide by the following conditions:

> (4) You will neither possess, carry, or own any weapon or firearm without first securing the consent of your Probation Officer.
>
> * * *
>
> (6) You will not associate with any persons engaged in any criminal activity.
>
> (7) 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.

(R. 45).

On direct appeal, defendant challenged the propriety of the imposition of the preceding conditions, contending that they were not orally pronounced during the sentencing and did not reasonably relate to the offense committed or his rehabilitation. The District Court of Appeal of Florida, Second District, entered an opinion affirming in part, but striking certain portions of conditions (4), and (7) of defendant's probation because they were not orally pronounced at sentencing. (See appendix, "App." at p. 13), Emond v. State, 20 Fla. L. Weekly D675 (Fla. 2d DCA March 15, 1995).

In its decision, the court noted a "continuing concern" relating to the probation conditions discussed herein, as it has "frequently reverse[d] trial courts for failure to orally pronounce special conditions of probation...because maybe [the court has] defined 'general conditions' too strictly." Furthermore, the court noted that 'these conditions [(4) and (7)] are included in the probation order form approved by the Florida Supreme Court and found in Florida Rule of Criminal Procedure 3.986." As such, the court certified the following question to be one of great public importance:

> DOES THE SUPREME COURT'S PROMULGATION OF THE FORM 'ORDER OF PROBATION' IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.896 CONSTITUTE SUFFICIENT NOTICE TO PROBATIONERS OF CONDITIONS 1-11 SUCH THAT ORAL PRONOUNCEMENT OF THESE CONDITIONS BY THE TRIAL COURT IS UNNECESSARY?

Id. Accordingly, petitioner filed a notice to invoke discretionary jurisdiction March 21, 1995. On March 27, this Court entered an order postponing its decision on jurisdiction and ordering the petitioner to file a brief on the merits. This brief follows.

## 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" as set forth in Fla.R.Crim.P. 3.986(a) 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, through counsel, are presumed to have notice. As such, the 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

### ISSUE

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.

Several of 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 Cr. Proc., 603 So. 2d 1144, 1145 (Fla. 1992).

In its decision vacating the portions of the conditions of defendant's probation which are under review, the Second District reiterated its prior holding that defendants have notice of all probation conditions contained in the statutes and therefore that a trial court has no obligation to orally pronounce these conditions. State v. Emond, 20 Fla. L. Weekly D675 (Fla. 2d DCA March 15, 1995); Hart v. State, 20 Fla. L. Weekly D329, 330 (Fla.

2d DCA Feb. 1, 1995). The court acknowledged that the rules require that the trial courts use the form order of probation set forth in Fla.R.Crim.P. 3.986(e). However, the court determined that portions of conditions (4) and (7) of defendant's probation were invalid because the trial court failed to orally pronounce them at sentencing.

> We reiterate our concern that we frequently reverse trial courts for failure to orally pronounce special conditions of probation. As we stated in Hart, this may be because we have defined "general conditions" too strictly. In our prior opinions we have not considered conditions four and seven to be "general conditions" because they are not included in the list of terms and conditions set forth in section 948.03(1)(i).

(App., p. 13). Emond v. State, 20 Fla. L. Weekly D675 (Fla. 2d DCA March 15, 1995); see also Sheffield v. State, 20 Fla. L. Weekly D450 (Fla. 2d DCA 1995) (Altenbrand, J. Concurring) ("We are frequently forced to strike [a condition] because the legislature has not chosen to include such a regulation . . . among the statutory conditions of probation in section 948.03").

However, 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]." §948.03(1), Fla. Stat. (1991) (emphasis added). This list is neither mandatory nor exclusive, as subsection (5) or 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.

§948.03(5), Fla. State. (1991). The legislature's 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 trial courts have complied with the requirement that they utilize this form order of probation, or slight variants thereon, and have repeatedly relied on the form by assuming that it provides defendants with notice of the eleven primary conditions listed therein. 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 form of Fla.R.Crim.P. 3.986(e) 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.

When 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 constructive 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 (Fla. 1st DCA), rev. den., 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 equally 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.

The rationale for the universal imposition of the condition that a defendant refrain from consuming intoxicants to excess (in addition to the statutory prohibition against involvement where intoxicants or drugs are unlawfully sold), is clearly supported by the facts in the record in the instant case. Furthermore, the escalation in the use of firearms and other weapons to facilitate the commission of crimes similarly justifies the universal prohibition against a probationer's possession of any weapon without first obtaining the consent of their probation officer.

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. §948.03(5), Fla. Stat. (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

WHEREFORE petitioner asks the court to answer the certified question in the negative, disapprove the decision of the court of appeal, and reinstate the judgment and sentence of the circuit court on the basis of the above and foregoing reasons, arguments and authorities.

Respectfully submitted,

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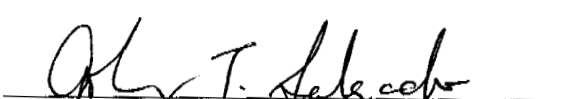

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Appellee has been furnished to, William B. Fredericks, Assistant Public Defender, Public Defenders Office, Polk County Courthouse, P.O. Drawer 9000--Drawer PD, Bartow, Florida 33830, Attorney for Appellant, by United States Mail, postage prepaid, this 24th day of April, 1995.

COUNSEL FOR PETITIONER

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APPENDIX

A.....Second District Court of Appeal Opinion, filed March 15, 1995, Case No. 93-04060