IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC NO. 85,490

JAMES L. HALL,

Respondent.
_____/

# PETITIONER'S BRIEF 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, Second District. Respondent, James L. Hall, 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 August 3, 1992, an information was filed in the Circuit Court of the Twentieth Judicial Circuit in Charlotte County against the defendant, James Larry Hall. (R. 60-61) This information alleged that on July 15, 1992, Mr. Hall shot his wife, Deborah Marie Hall, in an attempt to kill her, constituting attempted first-degree murder with a firearm in violation of § 782.04, Fla. Stat. (1991)(murder), and §777.04, Fla. Stat. (1991)(attempts). (R. 60-61)

On August 20, 1993, Mr. Hall entered a plea of no contest to the lesser offense of attempted second-degree murder with a firearm. (R. 188-190) On September 21, 1993, the Honorable Donald E. Pellecchia, Circuit Judge, adjudged Mr. Hall guilty of attempted second-degree murder with a firearm, which is a first-degree felony.

The sentencing guidelines scoresheet showed a recommended sentencing range of 12 to 17 years. (R. 195) The court sentenced Mr. Hall to 15 years incarceration, with a three-year mandatory minimum (as required by §775.087(2)(a), Fla. Stat. (1991)), where a firearm is used in a felony (R. 24, 200), plus 10 years probation, plus payment to the Charlotte County Public Defender's Office of costs and attorney's fees totalling $2,731.30, plus $24,371.92 in restitution to either Deborah Hall or the Crimes Compensation Trust Fund. (R. 21, 23-26, 194, 195, 199-203, 206-207) The restitution was made an express condition of probation. (R. 25, 207)

As further probation conditions, the court also ordered Mr. Hall to pay $280 in court costs and to have no contact with Deborah Smith (formerly Deborah Hall) or any members of her family. (R. 25, 207) No other probation conditions were orally pronounced. Mr. Hall was allowed credit for the 434 days he had spent incarcerated prior to sentencing. (R. 21, 200) Mr. Hall filed his notice of appeal to this court on October 14, 1993. (R. 211, 215)

The essential facts of this case were not placed in evidence; but Assistant State Attorney Paul Allesandroni presented the following summary to the trial court in a hearing on August 20, 1993 (R. 29-48): On July 14, 1992, Mr. Hall was asked by his wife, Deborah Hall (now Deborah Smith) to leave the

marital residence at 225 West McKenzie Street in Punta Gorda, Florida. Mr. Hall complied with his wife's wishes, but was angered by these events and began drinking. In the early morning hours of the following day, July 15, 1992, the appellant returned to his home and fired six shots from a .22 caliber rifle into the bedroom window. Three of these shots struck Deborah Hall in the left back area, inflicting severe injury. (R. 42-43)

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 Joseph F. Bohren, II., Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33831 on this 13th 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

JAMES L. HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93-03519

Opinion filed March 29, 1995.



Appeal from the Circuit Court for Charlotte County; Donald E. Pellecchia, Judge.

James Marion Moorman, Public Defender, and Joseph F. Bohren II, Assistant Public Defender, Bartow, for Appellant.

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

CAMPBELL, Judge.

Appellant, having pled nolo to attempted first degree murder with a firearm, challenges the restitution he was ordered to pay, the public defender fees he was ordered to pay, and several conditions of his probation. We find error only in the imposition of certain of the probation conditions.

Appellant argues that conditions four and six should be stricken. Condition four provides: "You will neither possess,

carry or own any weapons or firearms." Condition six provides: "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."

Appellant contends that these conditions must be stricken because they were not orally pronounced at sentencing. We will consider them singly.

In conformance with other pronouncements of this court, we affirm that portion of condition four that prohibits appellant from possessing, carrying or owning any firearms. See Stark v. State, No. 93-04175 (Fla. 2d DCA Feb. 22, 1995); Hart v. State, 20 Fla. Law Weekly D329 (Fla. 2d DCA Feb. 1, 1995); Fitts v. State, 20 Fla. Law Weekly D238 (Fla. 2d DCA Jan. 20, 1995). Also following the dictates of those cases, we strike the reference to weapons contained in condition four. We further certify the following question of great public importance that was certified in Hart:

> 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?

Turning to condition six, in accord with Hart and Tomlinson v. State, 645 So. 2d 1 (Fla. 2d DCA 1994), we strike that portion of condition six that prohibits the excessive use of intoxicants because it was not orally pronounced at sentencing.

We affirm the remainder of condition six as a more precise definition of a general condition that need not be orally pronounced. Tomlinson.

Affirmed in part, portions of probation conditions stricken, and question certified.

DANAHY, A.C.J., and WHATLEY, J., Concur.