IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC NO. 85,760

THOMAS FARRINGTON a/k/a
THOMAS JACKSON,

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, Thomas Farrington, a/k/a Thomas Jackson, 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 or about September 10, 1992 the defendant came before the court for resentencing in Cases 88-9963 and 89-582 following numerous revocations and reimpositions of probation or community control. In Case 88-9963, the defendant was sentenced to a five year term of imprisonment with credit for time served. (R. 48-50) In Case 89-582, the defendant was again placed on probation for two years, consecutive to the five year term of imprisonment imposed in Case 88-9963. (R. 83)

On appeal, counsel for defendant filed a brief pursuant to Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967) asserting an inability to find meritorious argument to the effect that the trial court committed any significant error in the case. On October 13, 1994 the Second District Court

of Appeal entered its order allowing the defendant thirty (30) days to file an additional brief to direct the court's attention to any matters which he believed should be considered in connection with the appeal. It does not appear as if the defendant availed himself of the opportunity. On November 14, 1994 the state submitted its brief expressing agreement with the initial Anders brief that no meritorious grounds supported the appeal.

On March 3, 1995 the Second District filed its opinion finding an absence of reversible error in Case No. 88-9963. The court did, however, note a problem with the number of special conditions of probation imposed at resentencing in Case No. 89-582. Accordingly, the Second District struck the general prohibition against possessing, carrying or owning any weapons, as opposed to firearms, in probation condition 4, since this provision was not orally pronounced at sentencing. The Second District also struck the portion of condition 6 which prohibited the appellant from using alcohol to excess and the entirety of condition 12 prohibiting the appellant from consuming any alcoholic beverages or visiting a business where the main source of income is the sale of alcoholic beverages. (App.)

In response, the state petitioned for rehearing and directed the court's attention to the fact that the probation conditions stricken, numbers 4 and 6, appear in the form order of probation

promulgated in Florida Rule of Criminal Procedure 3.986. The state requested the Second District to certify the question certified in other Second District opinions as being of great public importance:

> 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?

See Emond v. State, Case No. 93-04060 (Fla. 2d DCA, Mar. 15, 1995); Geller v. State, 20 Fla. L. Weekly D522 (Fla. 2d DCA, Feb. 24, 1995); Sheffield v. State, 20 Fla. L. Weekly D450 (Fla. 2d DCA, Feb. 17, 1995); Hart v. State, 20 Fla. L. Weekly D329 (Fla. 2d DCA, Feb. 1, 1995).

On May 3, 1995 the Second District granted the state's motion for rehearing and amended its previous opinion to certify the question previously certified in the aforementioned cases as being of great public importance. 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 Thomas E. Cunningham, Jr., 3802 Bay to Bay Blvd., Suite 11, Tampa, Florida 33629 on this 13th day of July, 1995.

OF COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v. FSC NO. 85,760

THOMAS FARRINGTON a/k/a
THOMAS JACKSON,

Respondent.

_____/

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

THOMAS FARRINGTON, a/k/a THOMAS JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 92-03998

Opinion filed March 3, 1995.

Appeal from the Circuit Court for Hillsborough County; Donald C. Evans, Judge.

Thomas E. Cunningham, Jr., of Thomas E. Cunningham, Jr., P.A., Tampa, for Appellant.

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

PER CURIAM.

The appellant's counsel has filed a brief in this appeal pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and the appellant has not filed any pro se supplemental brief. In accordance with our duty under In re Anders Briefs, 581 So. 2d 149 (Fla. 1991), we have carefully reviewed the record and find that the appellant's

community control was properly revoked and the sentence imposed for Circuit Court Case No. 88-9963 was within the statutory and guidelines parameters. Williams v. State, 594 So. 2d 273 (Fla. 1992).

However, we note a problem with several of the special conditions of probation imposed in Circuit Court Case No. 89-582. Accordingly, we strike that portion of condition number 4 which improperly implies that a convicted felon may possess a firearm with his probation officer's permission. Fitts v. State, 20 Fla. L. Weekly D238 (Fla. 2d DCA Jan. 20, 1995); Beckner v. State, 604 So. 2d 842 (Fla. 2d DCA 1992). As a convicted felon the appellant may not possess a firearm regardless of whether his probation officer has so consented. § 790.23, Fla. Stat. (1991); Fitts. We strike the general prohibition of possessing, carrying or owning any weapons, as opposed to firearms, in condition number 4 since this provision was not orally pronounced at sentencing. Id. We also strike that portion of condition number 6 which prohibits the appellant from using alcohol to excess and the entirety of condition number 12 which prohibits the appellant from consuming any alcoholic beverages, or visiting business where the main source of income is the sale of alcoholic beverages because these special conditions were also not pronounced at sentencing. See Tomlinson v. State, 645 So. 2d 1 (Fla. 2d DCA 1994); see generally, Nank v. State, 19 Fla. L. Weekly D2324 (Fla. 2d DCA Nov. 4, 1994).

Affirmed as modified.

DANAHY, A.C.J., and SCHOONOVER and FULMER, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

THOMAS FARRINGTON, a/k/a THOMAS JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 92-03998

Opinion filed May 3, 1995.

Appeal from the Circuit Court for Hillsborough County; Donald C. Evans, Judge.

Thomas E. Cunningham, Jr., of Thomas E. Cunningham, Jr., P.A., Tampa, for Appellant.

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

ON MOTION FOR REHEARING

PER CURIAM.

Upon consideration of the appellee's motion for rehearing filed on March 21, 1995, we grant the motion for rehearing and we amend the prior opinion in this case, filed March 3, 1995, to add

the following language at the end of the penultimate paragraph of the opinion:

> As in Hart v. State, 20 Fla. L. Weekly D329 (Fla. 2d DCA Feb. 1, 1995), we certify the following question as one of great importance:
>
> > 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?

DANAHY, A.C.J., and FULMER, J., Concur.
SCHOONOVER, J., Dissents.