ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 5 1996
CLERK, SUPREME COURT
By Chief Deputy Clerk

JOHN F. CURRY

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

______________________________/

Second DCA
Case No.: 93-01827

FSC
Case No.: 85,910

REPLY BRIEF OF PETITIONER

On Appeal From the Second District
Court of Appeal and
the Sixth Judicial Circuit
In and For Pinellas County

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Preliminary Statement 1

Argument 2

I. **THIS COURT HAS JURISDICTION TO HEAR THE ISSUE REGARDING WHETHER THE TRIAL COURT ERRED IN PERMITTING DEFENDANT'S FORMER TRIAL COUNSEL TO TESTIFY AGAINST THE DEFENDANT AT HIS SENTENCING HEARING PURSUANT ARTICLE V, SECTION 3(b)(4) OF THE FLORIDA CONSTITUTION** 2

II. **THE TRIAL COURT ERRED IN IMPOSING SPECIAL CONDITIONS OF PROBATION AND COMMUNITY CONTROL WHICH WERE NOT PRONOUNCED IN OPEN COURT AND THOSE CONDITIONS SHOULD BE STRUCK FROM THE SENTENCE** 5

III. **THE COURT HAS JURISDICTION TO HEAR THE ISSUE REGARDING WHETHER THE TRIAL COURT ERRED IN IMPOSING A LIEN FOR AN UNSPECIFIED AMOUNT OF ATTORNEY'S FEES AND COSTS WITHOUT NOTICE TO THE DEFENDANT PURSUANT TO ARTICLE V, SECTION 3(b)(4) OF THE FLORIDA CONSTITUTION** 6

Conclusion 6

Certificate of Service 8

TABLE OF AUTHORITIES

Cases **Page(s)**

Curry v. State, ... 2
656 So.2d 521 (Fla. 2nd DCA 1995)

Justice v. State, ... 6
634 So.2d 123 (Fla. 1996)

Lake v. Lake,
103 So.2d 639 (Fla. 1958) 2, 3

Nank v. State
646 So.2d 762 (Fla. 2nd DCA 1994) 5

Navarre v. State,
608 So.2d 525 (Fla. 1st DCA 1992) 5

Smith v. State, ... 6
622 So.2d 638 (Fla. 5th DCA 1993)

State v. Hart, ... 5
668 So.2d 589 (Fla. 1996)

OTHER AUTHORITIES:

Art. V, §3(b)(4), Fla. Const. 2, 3, 6

Fla. R. Crim. Pro. 3.986(e) 5

PRELIMINARY STATEMENT

In this reply brief, Petitioner, JOHN CURRY, will be referred to as "Curry." Respondent, STATE OF FLORIDA, will be referred to as "the State." Reference to the record will be by the use of the symbol "R," followed by the appropriate page number(s) in the record. References to the State's answer brief shall be designated by the symbol "AB," followed by the appropriate page number(s) in the brief. All emphasis is supplied unless otherwise noted.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THE ISSUE REGARDING WHETHER THE TRIAL COURT ERRED IN PERMITTING DEFENDANT'S FORMER TRIAL COUNSEL TO TESTIFY AGAINST THE DEFENDANT AT HIS SENTENCING HEARING PURSUANT TO THE ARTICLE V, SECTION 3(b)(4), OF THE FLORIDA CONSTITUTION.

This Court granted discretionary jurisdiction in this case pursuant to Article V, section 3(b)(4) of the Florida Constitution. This section provides that:

> [This Court m]ay review any **decision** of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

The State has cited this Court's prior decision in Lake v. Lake for the proposition that such jurisdiction is limited solely to the conflict **issue**. (AB, p.7); Lake v. Lake, 103 So.2d 639 (Fla. 1958). Through this tactic, the State hopes to escape review of the trial court's critical errors at this level of appeal. However, the Lake case is clearly distinguishable from the case at bar. In Lake the district court disposed of a case with the single word, "Affirmed." The issue presented therein was whether district courts were final courts of appeal. The case at bar was not disposed with the same succinctness. The second district issued a written opinion significantly longer that the opinion referenced in the Lake case. See Curry v. State, 656 So.2d 521 (Fla. 2nd DCA 1995). Moreover, each issue raised before this Court has been addressed by the district court beyond the solitary pronouncement "Affirmed."[1] Thus, it is Petitioner's position

[1] Admittedly, the DCA disposed of two issues presented herein because it found "no merit" in Petitioner's argument. However, this statement is not the same as "affirmed," without comment. The DCA found no merit, however, Petitioner asserts

that each issue is properly before this Court pursuant to Article V, Section 3(b)(4) of the Florida Constitution.

Further, the logic of Lake indicates that judicial economy was the reason why the district courts were made courts of final appellate jurisdiction. Lake, at 640. If a record has been prepared and briefs are to be filed on a conflict issue, Petitioner contends that it cannot be logically said that there are reasons of judicial economy why justice should be limited to a review of the certified conflict issue. Indeed, the Lake court conceived that there would be exceptions to the rule announced in that decision. Id. at 643. Surely, the case at bar would qualify as such an exception, where substantial justice requires a review of all of the issues briefed in the case at bar.

Moreover, Article V, Section 3(b)(4) is a grant of jurisdiction from the citizens of Florida to this Court to review entire **decisions** of the district courts. This review is not limited to certified conflict issues. By the plain language of the Constitution the entire **decision** may be reviewed, not merely the conflict issue. There is no limit, as the State contends, regarding what issues within a case may be argued before this Court once jurisdiction is granted pursuant to conflict jurisdiction. If there were such a limiting decision, certainly the State would have made it center-stage in its brief. There simply is no such precedent.

Therefore, Petitioner reiterates his prior arguments raised in his initial brief regarding the trial court's error in allowing Petitioner's former counsel to testify

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there was merit in the issues which are presented herein pursuant to this Court's grant of discretionary jurisdiction.

against him at his sentencing hearing. Petitioner adds herein only that the State has completely failed to address how his former counsel's "name-clearing" testimony was **relevant** to Petitioner's sentencing hearing. Petitioner submits that this vindictive testimony was not relevant and that it severely prejudiced his right to a fair sentencing hearing. This position is reinforced by the fact that Claimant's former counsel, Levine testified first, then subsequent witnesses parroted Levine's testimony (See, e.g. R 175, 177, 215-216, 218). Finally, in its answer brief, the State asserts that:

> Given the Petitioner's criminal background and numerous failed rehabilitation attempts, the trial court would have imposed the same sentence . . .

(AB, p.12). The State contends, therefore, that to allow Levine's testimony was harmless error. However, this contention is based on the above blatant mischaracterization of the evidence, which is wholly unsupported by record citations. Petitioner's criminal background is minimal and involves no convictions for serious or similar prior offenses. (R 54). Moreover, the statement that Petitioner was subject to numerous failed rehabilitation attempts is simply wrong. Indeed, the evidence presented at sentencing reflected that Petitioner was successfully rehabilitating himself. (R 13-14, 16-17, 19-21). Accordingly, Levine's testimony was undeniably the most damaging and prejudicial "evidence" presented at the sentencing hearing. To allow this testimony was error and a substantial injustice to Petitioner, which warrants reversal and remand to the trial court for resentencing.

II. THE TRIAL COURT ERRED IN IMPOSING SPECIAL CONDITIONS OF PROBATION AND COMMUNITY CONTROL WHICH WERE NOT PRONOUNCED IN OPEN COURT AND THOSE CONDITIONS SHOULD BE STRUCK FROM THE SENTENCE.

In its Order of Community Control Followed by Probation the trial court imposed certain conditions of community control and probation on Curry which were not pronounced in open court. (R 50-53). In fact, the trial court announced only one condition of community control and probation at sentencing: that Curry obtain treatment. (R 239). The trial court failed to inform Curry of any other condition.

In its brief, the State has argued that Condition 18 of Petitioner's community control is merely a more definitive statement of a general condition of community control contained in Florida Statutes. The State contends that the logic of Navarre v. State controls, wherein the First District Court of Appeal reasoned that the requirements of Condition 18 were standard conditions of probation. However, more recently, the Second District Court of Appeal has held that this condition is a special condition that must be pronounced in open court. See Nank v. State 646 So.2d 762 (Fla. 2d DCA 1994). In a recent case on a similar issue, this Court cited Nank with approval. State v. Hart 668 So.2d 589 (Fla. 1996). In Hart, this Court confirmed that the general conditions of probation listed in the first part of the Order of Probation form found in Rule 3.986(e) may be validly imposed without oral pronouncement because of constructive notice through publication. This Court further held that "special" conditions of probation, - i.e., those that are not set out in the general conditions portions of the rules need to be specifically pronounced at sentencing. Id at

592. Petitioner contends, as stated in his initial brief, that Conditions 4, 6, 8, 11, 18, and 19 were "special" conditions and that they should have been stricken from the Order of Community Control Followed by Probation. The District Court agreed and held that Conditions 4, 11, and 15 be stricken. The District Court held that Conditions 6, 8, and 19 could be rectified by modification; however, this approach is not consistent with the procedure dictated by Justice v. State and, therefore, these conditions should likewise be stricken. Justice v. State 634 So.2d 123 (Fla. 1996). Petitioner respectfully requests that this Court enter such an order.

III. THE COURT HAS JURISDICTION TO HEAR THE ISSUE REGARDING WHETHER THE TRIAL COURT ERRED IN IMPOSING A LIEN FOR AN UNSPECIFIED AMOUNT OF ATTORNEY'S FEES AND COSTS WITHOUT NOTICE TO THE DEFENDANT PURSUANT TO ARTICLE V, SECTION 3(b)(4) OF THE FLORIDA CONSTITUTION

Petitioner reasserts the argument contained in Issue I regarding whether issues I and III are properly before this court. Further, Petitioner relies on his argument as stated in his initial brief and requests that this Court strike the lien for attorney's fees pursuant to Smith v. State, 622 So.2d 638 (Fla. 5th DCA 1993).

CONCLUSION

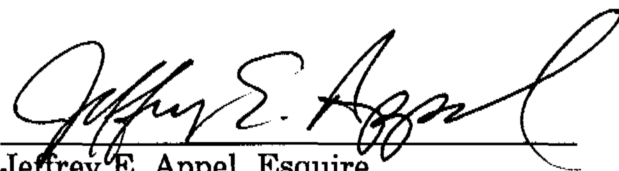
The trial court erred in permitting Levine to testify against Petitioner Curry at his sentencing hearing. This issue was not addressed by the Second District Court of Appeal. Nevertheless, this Court can properly hear arguments on this issue and should reverse the sentence and remand for a new sentencing hearing. Alteratively, if this

court determines that an issue exists regarding the potential waiver in the proceeding which was not made part of the record below, the court should remand to the trial court for an in camera determination of the existence of the privilege.

Additionally, the trial court erred with regard to imposition of "special" conditions, which must now be stricken.

Finally, the lien entered by the trial court for attorney's fees and costs should be stricken.

Respectfully Submitted,



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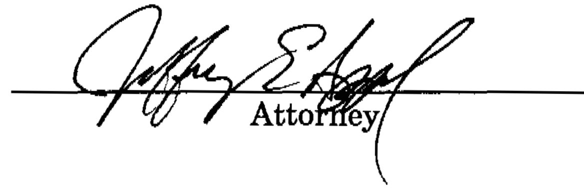
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail this 3rd day of September, 1996, to Robert J. Krauss and Stephen D. Ake, Westwood Center, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607.



Attorney

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