IN THE SUPREME COURT OF FLORIDA

LAURIE G. JUSTICE,

Petitioner,

v.

STATE OF FLORIDA

Respondent.
_____/

CASE NO. 86,264

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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POINT 2: The jury was properly instructed, since pursuant to the standard instructions the jury would not have been able to find Justice guilty if it found she had authority to sign another person's name on the checks. Error, if any, is harmless. Justice did not present evidence to support the authority defense so the trial court was correct in not instructing the jury on it.

POINT 1

ON REMAND, THE TRIAL COURT SHOULD BE ALLOWED TO REIMPOSE SPECIAL CONDITIONS OF JUSTICE'S PROBATION CONTAINED IN ITS WRITTEN PROBATION ORDER BUT NOT ORALLY PRONOUNCED DURING THE SENTENCING HEARING.

Justice contends that the non-standard conditions of probation which were not orally announced at sentencing must be stricken because the oral pronouncement conflicts with the written order, and it was error to add conditions in the subsequent written order. The record in the instant case contains an order placing Justice on probation, which lists the standard and special conditions of probation (R 502-05). The order states that this was done and ordered on February 14, 1994, and is signed by the trial judge (R 502). That order, entitled "judgment of guilt", contains the following language:

> It is further ordered that when you have reported to the probation officer and have been instructed as to the conditions of probation you shall be released from custody if you are in custody and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

(R 502). The order further states:

> It is further ordered that the Clerk of this Court file this order in his office, record the same in the Minutes of the Court, and forthwith provide certified copies of same to the Probation Officer for his use in compliance with the requirements of law.

(R 502). At the bottom of this form it states:

> I acknowledge receipt of a certified copy of this order and that the conditions have been explained to me.

(R 502). Justice did not sign this acknowledgement. Following that order are three pages listing conditions of probation, and the second and third pages contain the special conditions that were orally announced at the hearing (R 503-05). The order was filed on February 28, 1994, the same day that the notice of appeal was filed (R 502, 506).

A statement of judicial acts to be reviewed was filed March 9, 1994, and mentions nothing about the now contested conditions of probation (R 518-19). On March 11, 1994, Justice filed an amended motion to stay order of probation pending appeal, wherein she stated that she would have to submit to drug testing twice a week to obtain a travel permit, and the interference of probationary requirements would more than likely cause her difficulty in getting a job (R 525). An amended statement of judicial acts to be reviewed was filed on March 22, 1994, and again there was no mention of the now contested conditions of probation (R 532-33).

Respondent first contends that the record does not indicate for a fact that the conditions were added after the sentencing hearing and at the time the order was filed. In fact, it would appear that any delay in the filing of the order would have been due to the clerk of the court, which was directed to file the order. Based on the documents filed in the trial court concerning the appeal of the judgment and sentence, it would appear that Justice was aware of the conditions of probation, and at no time prior to the filing of her initial brief contested them. Thus, respondent contends that the only issue before this court is that contained in the certified question, specifically, whether the failure to orally

announce special conditions of probation should result in their being stricken or, as the district court found, whether the trial court can reimpose the conditions on remand.

Justice first contends that any of the written conditions that conflict with the oral pronouncements must be stricken. The general rule that oral prevails over written was based upon the rationale that the written sentence is merely a record of the actual sentence pronounced in open court, and as even the cases cited by Justice recognize, was intended to rectify uncontested inconsistencies between the actual sentence imposed and the later memorialization thereof in the written order. *See, e.g., Johnson v. State,* 627 So. 2d 114 (Fla. 1st DCA 1993) (state conceded written sentence incorrectly reflected amount of credit for time served). *Compare, Lester v. State,* 563 So. 2d 178 (Fla. 5th DCA 1990) (absent concession by state, conflict between written order and oral pronouncement requires factual resolution by trial court). This simplistic rule designed for correction of uncontested errors should not be expanded to permit the defendant to "successfully run the gauntlet at oral sentencing" and enjoy "immunity from corrective action". *Justice, supra.* In the instant case, there is no question that the sentence imposed orally and subsequently by written order was three years of probation. Assuming that the purpose of probation is the rehabilitation of the probationer, it would seem odd to delete conditions that may be of value in that effort in blind obedience to the rule that "oral prevails over written".

Justice next contends that it was illegal to impose additional conditions two weeks after the sentencing hearing. As the district court majority reasoned, there is no reason why the oral pronouncement cannot be timely corrected by calling the defendant back into

court to correct the previously announced sentence before the judgment is made final by the rendition of a final order. Because the sentence is not final until reduced to writing and filed with the clerk, remanding the case to allow the trial court to orally announce the special conditions and to give the defendant an opportunity to object does not constitute an enhancement of an existing final order of probation under this court's decisions in *Lippman v. State,* 633 So. 2d 1061 (Fla. 1994) and *Clark v. State,* 579 So. 2d 109 (Fla. 1991). *Justice v. State,* 20 Fla. L. Weekly D 1697 (Fla. 5th DCA July 21, 1995). Both *Lippman* and *Clark* refer to "previously entered orders of probation or community control". The order in question was not "entered" or "rendered" until it was filed by the clerk, so the terms of Justice's probation were not enhanced after rendition.

Respondent contends that this is becomes even more significant when reviewing the language of the order placing Justice on probation. As stated, it would appear from the record that all of the documents were prepared at the same time. In fact, the special conditions announced at sentencing are contained in the same documents as the unannounced conditions. Further, the order that was signed in open court indicates that the probation officer would instruct on the conditions of probation, at which point Justice would be released from custody or bail. Thus, it would appear that none of the conditions were enforceable until Justice reported to the probation officer and was instructed on all of the conditions imposed by the trial court, and officially on probation as opposed to in custody or on bond. As stated, although there was mention of at least one of the conditions in a later filed document, there was never any objection to any of the conditions until the initial brief on direct appeal. Respondent would point out that if only

the order signed in open court on the 14th were enforceable, without reference to the three additional pages listing conditions, then there would be no conditions of probation at all. As this court noted in *Harris v. State,* 645 So. 2d 386, 388 (Fla. 1994), "[t]he Constitution does not require that sentencing should be a game in which one wrong move by the judge means immunity for the prisoner."

Respondent would further point out that in *Hart v. State,* 651 So. 2d 112 (Fla. 2d DCA 1995), *review pending*, Case No. 85,168, the court noted that perhaps the probation order contained in Florida Rule of Criminal Procedure 3.986 provides sufficient notice to make oral pronouncement unnecessary, and certified a question on this issue to this court. Of the eight contested conditions, five are contained in essentially the same language in that form (possession of weapons, use of intoxicants, employment, inquiries/visits by probation officer, and consumption of alcohol). Thus, even if this court determines that unannounced special conditions must be stricken with no chance for reimposition, this court's answer to the certified question in *Hart* could well resolve the issue of notice as to at least five of the contested conditions.

Respondent urges this court to adopt the logic of Judge Harris' district court opinion in the instant case and allow for reimposition of the contested conditions of probation on remand. A sentencing judge's oversight in failing to mention a special condition (or as the *Hart, supra,* court noted, failure to announce conditions he assumes to be "general"), should not create a "gotcha'" situation in which the trial court is precluded from imposing conditions it deems necessary. This court's decisions in *Lippman* and *Clark* do not dictate such result, nor does the rule that oral pronouncements

prevail over written orders.

POINT 2

THE JURY WAS PROPERLY INSTRUCTED;
ERROR, IF ANY, IS HARMLESS.

Justice claims that the trial court erred in not giving her requested instruction on the defense of authority. This same issue was decided adversely to Justice's claim in *Perkins v. State*, 463 So. 2d 481 (Fla. 2d DCA 1985). In *Perkins*, as in the instant case, the defendant requested the trial court to instruct the jury the if it found the defendant had authority to sign another person's name, it should find the defendant not guilty. The district court found that the trial court's instructions to the jury, that in order to convict the defendant it would have to find that the defendant knew the check was false or forged and intended to defraud some person or firm, covered the proposed defense, since these elements of the offense negated any defense of authority. *Id.* at 482. The court further found that the proposed instruction required a comment on the evidence. *Id.* at 483.

Likewise, in the instant case, the jury was instructed that in order to find Justice guilty, it would have to find that she falsely made the checks and intended to defraud some person or firm (R 678-79). As in *Perkins*, the instruction on these elements negated any defense of authority, i.e., if the jury believed Justice had authority to write the check, it could not find the state had proven a crime. *See, Perkins* at 482. For the same reason, respondent asserts that error, if any, in failing to give the proposed instruction was harmless, since the verdict could not have been affected. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). As stated, the jury's finding that Justice falsely made the checks and intended to defraud some person or firm negates any defense of authority. The defense argued the authority defense to the jury, so the jury was well

aware of the fact that if Justice had authority it would negate the essential elements of the crime. Thus, even if the trial court erred in not giving the requested instruction, it does not amount to reversible error. *DiGuilio, supra.*

Respondent further asserts that the instruction was properly denied since there was no evidence to support such defense. None of the record cites referred to by Justice contain evidence that she had authority to sign Janice Reynolds' name on the check. On page 333, there was testimony that other authorized signatories on the account would leave signed blank checks for Justice to utilize, but this does not amount to evidence that Justice had authority to sign their names on the checks. On page 446, Justice testified that she believed Reynolds would have signed the check, and that if the situation had been the same, Reynolds could have signed Justice's name, but again, this is not evidence that Justice had authority to sign Reynolds' name. On page 475, Justice testified that she thought it would be "okay" to sign Reynolds name, and that she did not see anything wrong with it under the circumstances. This is simply a self serving statement of a subjective belief that under the circumstances, Justice could sign Reynolds name because she found herself in a dire emergency, and is not evidence of authority (R 475-77). On page 526, Justice was asked if she believed she had implied authority to sign Reynolds' name on the check, and she replied that she "did believe it was okay". Again, this is not evidence of authority, but rather a subjective belief that it would be "okay" to sign Reynolds name under the circumstances. There is a clear distinction between the fact that Justice may well have received the assistance if she had followed proper procedures, and the fact that she, on two occasions, ignored those procedures

and signed somebody else's name without ever notifying anyone that she had done so. The testimony on page 566 simply demonstrates that Justice had authority to make disbursements from the account in amounts less than $65.00; it does not show that she had authority to sign another person's name on the check in making that disbursement. Respondent would also point out that both checks in the instant case exceed this $65.00 limit. The testimony on page 573 simply demonstrates that the board forgave Justice. Since there was no evidence that Justice had authority to sign Reynolds' name on the two checks at issue, the instruction on such defense was properly denied.

CONCLUSION

Based on the foregoing arguments and authorities, respondent requests this court affirm the judgment of the trial court and remand to the trial court for resolution of any discrepancy between the oral and written conditions of probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to Terrence E. Kehoe, Law Offices of Terrence Kehoe, Tinker Building, 18 West Pine Street, Orlando, FL 32801, this 2ND day of October, 1995.

Kellie A. Nielan
Of Counsel

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LAURIE G. JUSTICE,

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STATE OF FLORIDA

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APPENDIX

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evidence is required to establish the allocation between pension and disability benefits. This cannot be established by an overall description, as contained in the brochure, about the benefit generally. The determination by the trial judge that seventy-five percent of the husband's income from this source represented retirement is not based on evidence which considers the variables involved in a determination of this party's specific benefit.

We therefore must reverse that portion of the final judgment and remand to the trial court with directions to give the husband[3] sufficient time to obtain an official statement from the New York City Pension Fund which denotes an allocation between the retirement and disability portions of the benefit. If the husband fails to obtain this information within a reasonable period of time, the trial judge may revisit the entire property distribution since the $990 monthly benefit awarded to the wife was an integral part of the scheme fashioned by the court. *Schiller v. Schiller*, 625 So. 2d 856, 861 (Fla. 5th DCA 1993); *Collinsworth v. Collinsworth*, 624 So. 2d 287 (Fla. 1st DCA 1993). This may include a change in the alimony award, if the trial court deems it to be necessary.[4]

REVERSED AND REMANDED. (DAUKSCH, J., concurs in conclusion only, without opinion. GRIFFIN, J., concurs and concurs specially, with opinion.)

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[1]Benefits paid for noneconomic damages such as pain and suffering, loss of future wages and future medical expenses are the separate property of the party receiving the benefit. *Weisfeld v. Weisfeld*, 545 So. 2d 1341 (Fla. 1989); *Stern v. Stern*, 636 So. 2d 735 (Fla. 4th DCA 1993).

[2]*Diffenderfer v. Diffenderfer*, 491 So. 2d 265 (Fla. 1986).

[3]Since the husband is the legal owner of this benefit we presume that only he has access to this information.

[4]Disability income may be viewed as a source for alimony. *Freeman v. Freeman*, 468 So. 2d 326 (Fla. 5th DCA 1985); *Baker v. Baker*, 419 So. 2d 735 (Fla. 1st DCA), *pet. denied*, 422 So. 2d 842 (Fla. 1982).

(GRIFFIN, J., concurring and concurring specially.) Reluctantly, I agree that the value of the pension as a marital asset needs to be reconsidered by the lower court. I am reluctant because the trial court did the best it could with what it was given. As appellee notes, there is normally a presumption that an asset acquired during the marriage is marital and the burden of establishing the nonmarital status of any part of the asset is on the proponent—in this case, Mr. Pilny. Here, Mr. Pilny offered no evidence of the nonmarital asset status of a portion of his pension, as the New York case law cited by Judge Sharp clearly indicates can and must be done. Mr. Pilny preferred an all-or-nothing approach that failed. It was Mrs. Pilny who offered the brochure containing the formula used by the judge. Because, however, the New York case law plainly describes a disability pension like the one at issue here as consisting of both marital and nonmarital components, I do not think Mrs. Pilny can rely on the presumption that the asset is marital or on Mr. Pilny's failure of proof to the contrary. Mrs. Pilny concedes in her brief that all the evidence that would have permitted an accurate calculation under the formula was not a part of the record. The court below needs more evidence to do its job correctly.

* * *

Criminal law—Probation—Where sentence is reversed because trial court failed to orally pronounce certain special conditions of probation which later appeared in written sentence, trial court is not required to strike the unannounced conditions, but may elect to "reimpose" those conditions at resentencing after affording defendant an opportunity to object—Question certified

LAURIE G. JUSTICE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-501. Opinion Filed July 21, 1995. Appeal from the Circuit Court for Lake County, Mark J. Hill, Judge. Counsel: Terrence E. Kehoe, Law Offices of Terrence E. Kehoe, Orlando, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING *EN BANC* AND CERTIFICATION

[Original Opinion at 20 Fla. L. Weekly D546c]

(HARRIS, C. J.) We grant appellant's Motion for *En banc* Rehearing and Certification.

Even though the original panel reversed her sentence, Laurie Justice, takes issue with that portion of the original opinion that remanded the matter back to the trial court for resentencing rather than merely directing that the previously unannounced conditions of probation be stricken. Because our practice is different from that of the other district courts, we agree that the issue should be certified to the supreme court.[1]

The issue, quite simply, is whether the trial court, after conducting the sentencing hearing, may thereafter add previously unannounced conditions of probation in its written judgment if it calls the defendant back into court to be advised of the new conditions before such written judgment is entered. We hold that the trial court has that authority.

Due to extremely heavy criminal case loads and constant pressure of time standards, trial judges often schedule several sentencing hearings during the same block of time. Appellate issues rarely occur because of this procedure. However, on occasion and after additional reflection afforded by the delay between the sentencing hearing and the preparation of the written judgment, a trial court may conclude that, in order for probation to have a reasonable chance to succeed, conditions other than those previously orally announced must be imposed. Such was the case here.[2]

It is appellant's position that, having successfully run the gauntlet at oral sentencing, she now enjoys immunity from corrective action even though the "sentence" has not been rendered and thus has not yet begun to run. This position is based on a principle of law which this court and all of the other appellate courts in this state recognize: that the "oral pronouncement of sentence prevails over the written order" when there is a conflict.[3] This principle is based on due process concerns. As the court explained in *Olvey v. State*, 609 So. 2d 640 (Fla. 2d DCA 1992), special conditions of probation must be pronounced in open court so that the defendant will know the conditions and have an opportunity to object to them.

But *Olvey* does not explain why the oral pronouncement itself cannot be timely corrected. We know of no reason—be it based on a constitutional provision, a statute, a rule or precedent—that would prohibit a trial court from calling the defendant back into court to correct a previous sentence before the judgment of sentence is made final by the rendition of a valid written order and thus before the "sentence" is commenced. Due process concerns are satisfied because the defendant will then "know" of the added conditions and will have the same opportunity to object that he would have had if the conditions had been announced at his original sentencing. Further, his appeal period will not begin to run until the "corrected" sentence is reduced to writing and filed.

We start from the proposition that sentencing has traditionally been the exclusive province of the trial court and its sentence will not be disturbed so long as it is within the statutory maximums and otherwise comports with the requirements of law. This also should be true of resentencing after remand. Certainly the resentencing may not be used to "punish" one for taking an appeal;[4] nor may it be used (or abused) to avoid the consequences of statutory sentencing guidelines.[5] Neither is the case here. A sentence is not final until rendered—reduced to writing and filed with the clerk. Before that time, there is no legal sentence to add to or modify. The fact that this sentence had not been rendered at the time the new conditions were added distinguishes this case from *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994), and *Clark v. State*, 579 So. 2d 109, 110 n.3 (Fla. 1991).

Nor does the imposition of previously unannounced conditions punish the defendant for exercising any constitutional right. The only "right" affected is the defendant's "due process" right to have the special conditions of probation announced in open court so that objections can be made. *Olvey*, *supra*. As the supreme court stated in *Harris v. State*, 645 So. 2d 386, 388 (Fla. 1994): "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Failing to pronounce conditions should not create a "gotcha" situation in which a trial court is precluded

from imposing conditions it later, upon reflection, deems necessary merely because they were not previously pronounced at the sentencing hearing. It simply means that the defendant must be given an opportunity to make his or her objections of record before such conditions can be validly imposed. Therefore, if the court intends to impose previously unannounced conditions, it must call the defendant back into court for a new sentencing hearing prior to signing the judgment. If the court fails to do so, we have no alternative but to reverse for resentencing. But even after reversal, sentencing remains the trial court's function, and the determination of what conditions are necessary for probation, if properly pronounced, should be left to it.

Appellant urges us to follow the path taken by the supreme court in *Pope v. State*, 561 So. 2d 554, 556 (Fla. 1990), in which the court imposed a prophylactic rule to prevent "multiple appeals, multiple resentencings and unwarranted efforts to justify an original departure." We believe that such prophylactic rules which limit the authority of the trial court should be used only in the most extreme situations. We do not see the imposition of unannounced conditions of probation as a major source of appeals.[6] And the requirement of resentencing itself, because of the trial court's heavy docket, encourages the court to get it right the first time. Further, we do not perceive the trial bench as resisting the requirement to orally pronounce special conditions. Rather, this appears to be a problem of oversight created by the volume of criminal sentencings. It might be, because of large dockets, the trial court will sometimes prefer merely to strike the unannounced condition rather than resentence. But the trial court should have the authority, if it so desires, to impose such conditions as it deems appropriate after conducting a new sentencing hearing which provides the defendant with his or her due process right to object to the special conditions.

We therefore reject appellant's contention that she has a "right" to expect that her sentence, once *orally* pronounced, will be final and unchangeable. We are unaware of any such right and unwilling to establish one in this case.

The defendant's only "right" at resentencing is to be sentenced within the statutory maximum and in accordance with the law. If these added conditions are contrary to the law (as they may well be), the defendant can object to them and appeal on that basis. If they are merely unacceptable to her, she may wish to reject probation. In any event, by requiring that the special conditions be announced in open court, the defendant will have the opportunity due process requires.

We agree that the cause must be reversed because these options were not given the defendant in this case. We hold, however, that on remand the trial court is free to impose such conditions as are appropriate so long as it pronounces such conditions at a new sentencing hearing.

We certify the following question:

WHERE A SENTENCE IS REVERSED BECAUSE THE TRIAL COURT FAILED TO ORALLY PRONOUNCE CERTAIN SPECIAL CONDITIONS OF PROBATION WHICH LATER APPEARED IN THE WRITTEN SENTENCE, MUST THE COURT SIMPLY STRIKE THE UNANNOUNCED CONDITIONS, OR MAY THE COURT ELECT TO "REIMPOSE" THOSE CONDITIONS AT RESENTENCING?

(PETERSON, C.J., DAUKSCH, COBB, SHARP, W., GOSHORN, and THOMPSON, JJ., concur. GRIFFIN, J., dissents, with opinion.)

[1]We recognize that the other appellate courts, apparently without considering whether the trial court should have the option to resentence and properly add previously unannounced conditions, have merely remanded with directions that the sentencing court delete the unannounced conditions from the judgment. We think it is preferable to give the trial court the option to conduct a new sentencing hearing so that it may properly announce and impose any conditions that it deems appropriate.

It may well be that the new conditions added in this case are invalid as not being sufficiently related to the crimes for which Justice was convicted. But suppose this was a case involving sexual abuse of a child in which the court forgot at the sentencing hearing to condition a probationary portion of the sentence on the defendant's undergoing counseling or avoiding contact with the victim or other children. Should it be precluded thereafter from adding these conditions? If the judge imposes previously unannounced conditions upon resentencing, then such conditions may be attacked the same as had they been pronounced at the original sentencing hearing.

[3]Here there is no conflict in the sense that the later conditions alter or conflict with earlier announced conditions. The only "conflict" is that the new conditions simply were not mentioned at the sentencing hearing.

[4]*North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

[5]*Pope v. State*, 561 So. 2d 554 (Fla. 1990).

[6]When we consider that there were 15,858 appeals filed in our intermediate appellate courts during the year 1994, the very few cases involving this issue show that this problem does not greatly impact the courts.

(GRIFFIN, J., dissenting.) Our court's approach to a lower court's error in imposing written conditions of probation not orally announced is unique. The First, Second and Fourth Districts all have consistently held that where a defendant appeals a written order containing unannounced special conditions of probation, the order must be amended to conform to the oral pronouncement of judgment and sentence by striking the unannounced conditions. *See, e.g., Bartlett v. State*, 638 So. 2d 631 (Fla. 4th DCA 1994); *Christobal v. State*, 598 So. 2d 325 (Fla. 1st DCA 1992); *Turchario v. State*, 616 So. 2d 539 (Fla. 2d DCA 1993).[1] The lower court is not free at a sentencing to add the previously unannounced conditions.

Alone among the districts, under our prior decision in *Cleveland v. State*, 617 So. 2d 1166 (Fla. 5th DCA 1993), this court would vacate the sentence but would remand for the trial court to resolve the discrepancy between the oral pronouncement and the written order. If the lower court had "intended" to impose the written conditions that it had never orally announced, the court, on remand, could simply add these missing conditions.

As is reflected in prior case law of this court on which *Cleveland v. State* was grounded, this court contemplated the possibility that where there was a discrepancy between the record of the oral pronouncement and the judgment and sentence as written down, the error might have, in fact, resided in the record of the oral pronouncement. *Harden v. State*, 557 So. 2d 926, 927 (Fla. 5th DCA 1990) (Cobb, J., concurring). Rather than mechanically apply the "oral prevails over the written" rule, by ordering the written to conform to the oral, this court has preferred to send the matter back to the trial court to verify what was, in fact, orally pronounced. This notion was quickly expanded, however, to provide that where there existed some unexplained conflict between the written sentence and the oral pronouncement, the lower court would be permitted to impose what it "intended" to pronounce even if it were not what was, in fact, pronounced.[2] *See, e.g., Whitfield v. State*, 569 So. 2d 528 (Fla. 5th DCA 1990).

Even at its most expansive, however, the underlying rationale of this prior case law has no application to the situation presented here. Here, there is no reasonable possibility either that the sentencing proceeding record erroneously failed to report the oral pronouncement of multiple special conditions of probation or that there is a "conflict" between the oral pronouncement and the written sentence. The special conditions simply were not pronounced at sentencing.[3]

The majority seems to suggest that a lower court has the unfettered power to alter sentences up until the moment the judgment and sentence are "rendered," *i.e.* signed and filed, by the simple expedient of calling the defendant back in and changing the sentence. Dubious as that proposition is, it is not what happened here. Here the trial court never called the defendant back to pronounce the originally omitted conditions of probation before the judgment and sentence were rendered, before appellant began to serve the sentence or before the appeal was filed. The issue here is whether unannounced conditions that were properly struck on appeal because they had not been orally pronounced can be added, on remand, by invoking our "discrepancy" case law.

The definition of "sentence" in Florida found in Florida Rule of Criminal Procedure 3.700(a)(b) is:

> (a) Sentence Defined. The term sentence means the *pronouncement* by the court of the penalty imposed on a defendant

for the offense of which the defendant has been adjudged guilty [emphasis supplied].

The written sentence is merely a record of the actual sentence pronounced in open court. *Kelly v. State*, 414 So. 2d 1117 (Fla. 4th DCA 1982).

The Florida Supreme Court has not considered a case such as this where the sentencing court has attempted to include in the *original* written sentence conditions of probation that were not announced, but the court has held that probation conditions cannot be added to an existing sentence, absent a finding of violation of probation. *Lippman v. State*, 633 So. 2d 1061, 1063 (Fla. 1994). The addition of conditions of probation is as impermissible as any other augmentation of a previously announced sentence. *Id.* It seems to follow that, just as the lower court could not later add probation to an announced sentence of a term of years, or increase the number of years of probation, it cannot later add a condition of probation. The court has explained that the sentencing court is authorized only to modify "theretofore imposed" terms. *Clark v. State*, 579 So. 2d 109, 110 n.3 (Fla. 1991). Consistent with these pronouncements of the high court, our sister district courts of appeal have correctly ordered stricken on appeal any special condition of probation not orally pronounced.

An order of probation, like any other aspect of sentencing, ought not be a work in progress that the trial court can add to or subtract from at will so long as he or she brings the defendant back in and informs the defendant of the changes. To permit this would mean a lack of finality for no good reason and multiple appeals. *See Pope v. State*, 561 So. 2d 554 (Fla. 1990). It is not too much to ask of a sentencing judge to decide on and recite the special conditions of probation at the sentencing hearing, just as is done with the balance of the sentence. If the court has omitted a condition it wishes it had imposed, its chance has passed unless the defendant violates probation. Even if the majority is correct that the sentencing judge can keep resentencing the defendant by bringing him back in and changing the sentence until he actually renders it by signing and filing it, surely the failure to do so by the time of rendition brings this opportunity to an end.

The majority posits that this case illustrates why the trial court ought to have the ability to add additional conditions of probation after the sentencing hearing—that during the time of "additional reflection afforded by the delay between the sentencing hearing and the preparation of the written judgment, a trial court may conclude that, in order for probation to have a reasonable chance to succeed, conditions other than those previously orally announced must be imposed." Whatever may be the justification for a delay in rendering the sentence, in fact, this case illustrates the opposite. Here, the initially imposed conditions were valid and relevant; it is the non-standard conditions contained in the written order that are almost entirely invalid. *See Biller v. State*, 618 So. 2d 734 (Fla. 1993).

Laurie Justice was the founder of God's Love Center, a mission established to help needy people in Lake County by providing emergency aid, called "outreach," consisting primarily of food and clothing. It was a small operation, partly financed by Justice, through an inheritance she had received, and by her husband. The by-laws of the Center, however, required two signatures for any expenditure over $65. Laurie Justice wrote two checks from the Center bank account to the City of Mount Dora to pay her home electric bill because the City was threatening to turn off her power. When she was unable to contact another authorized signatory to obtain the second signature, she forged the signature of another board member. Forgery of the signatures on those two checks is the crime for which she was prosecuted and convicted.

Initially, the trial court orally imposed only two probation conditions—that Justice pay certain costs and that she not have a checking account. Also contained in the written order, however, are special conditions such as a prohibition against the possession of "any weapon" and a prohibition against using "intoxicants to excess." Far from illustrating the beneficial effect of allowing the trial court time for reflection to improve on their probationary scheme, this case appears, instead, to illustrate that it can, and in this case did, have the opposite effect.[4] If these later conditions[5] were not subject to being stricken for the reason we have already held, they should have been stricken anyway. *Biller*. I would simply strike any unannounced special conditions of probation.

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[1]*See also Williams v. State*, 653 So. 2d 407 (Fla. 2d DCA 1995); *Nank v. State*, 646 So. 2d 762 (Fla. 2d DCA 1994); *Peterson v. State*, 645 So. 2d 84 (Fla. 2d DCA 1994); *Chicone v. State*, 644 So. 2d 532 (Fla. 5th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995); *Sweet v. State*, 644 So. 2d 176 (Fla. 5th DCA 1994); *Willis v. State*, 640 So. 2d 1188 (Fla. 5th DCA 1994); *Jamail v. State*, 637 So. 2d 362 (Fla. 1st DCA 1994); *Skiff v. State*, 627 So. 2d 614 (Fla. 4th DCA 1993). By now, these cases appear so frequently in Florida Law Weekly that no effort has been made to catalogue them all.

[2]Also, this court's treatment of such cases has not been entirely consistent. *See Lowell v. State*, 649 So. 2d 364 (Fla. 5th DCA 1995); *Macon v. State*, 639 So. 2d 206 (Fla. 5th DCA 1994).

[3]The State implicitly concedes in its brief that the conditions at issue are "special" conditions that were not orally announced.

[4]Truth to tell, what almost certainly happened in this case is that the trial judge simply entered the local form order without considering whether its "standard" conditions were, in fact, non-standard. To some extent, this case presents a problem like the one discussed in *Hart v. State*, 651 So. 2d 112 (Fla. 2d DCA), *review granted*, No. 85,168 (Fla. June 22, 1995).

[5]Other special conditions include a requirement to submit to a warrantless search of her person, residence or property; a requirement that she undergo drug testing at her expense and participate in a drug treatment program as directed by the probation officer; and payment of $1 for each month of supervision to First Step, Inc.

* * *

Wrongful death—Medical malpractice—Jury instructions—Concurring cause and intervening cause instructions given by trial court adequately covered circumstances involving action against hospitals and physicians who provided treatment for severe injuries received by decedent in automobile accident and who allegedly failed to detect and treat cardiac tamponade which caused decedent's heart to arrest—No reversible error resulted from trial court's failure to give requested instruction concerning aggravation of preexisting condition

MICHAEL RYEKA, etc., et al., Appellants, v. HALIFAX HOSPITAL DISTRICT, etc., et al., Appellees. 5th District. Case No. 94-303. Opinion filed July 21, 1995. Appeal from the Circuit Court for Volusia County, John V. Doyle, Judge. Counsel: Sheldon J. Schlesinger, P.A., Fort Lauderdale, and Joel S. Perwin of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, for Appellant. William A. Parsons, of Woerner & Parsons, South Daytona, for Appellee Halifax Hospital District. James W. Smith and Robert K. Rouse, Jr., of Smith, Schoder, Rouse & Bouck, P.A., Daytona Beach for Appellees James T. Sutton, M.D., James T. Sutton, M.D., P.A., Stuart J. Doliner, M.D., James Henson, M.D., Robert Blannett, CRNA, Daytona Anesthesiology Associates, P.A., and Halifax Emergency Physicians.

(SHARP, W., J.) Michael Reyka, personal representative of the estate of Cynthia Reyka, his deceased wife, appeals from a final judgment following a jury trial in favor of the various defendant health care providers.[1] Reyka argues the trial court erred in failing to give his requested jury instruction concerning aggravation of a pre-existing condition. It was based on Florida Standard Jury Instruction 6.2(b):

> Any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of CYNTHIA REYKA's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

We affirm because we find that the failure to give this instruction in this case did not create reversible error.

This was a wrongful death case. The plaintiff sought to prove that the health care providers failed to properly detect and treat Cynthia's cardiac tamponade she suffered after being severely injured in an automobile accident.[2] Early in the morning on February 6, 1989, Cynthia (then nineteen years old) suffered extensive injuries in a collision with another vehicle. She was airlifted to the emergency room at Halifax Hospital, one and one-half hours after the accident. There she was treated by members of the trauma team and hospital staff. She suffered a cardiac arrest about one and one-half hours after her arrival at the hospital. This