IN THE SUPREME COURT OF FLORIDA

LAURIE G. JUSTICE,

Petitioner,

v. CASE NO. 86,264

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary Review Of
Decision Of Florida Fifth District Court Of Appeal

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the parties and the record on appeal will be referred to as in Ms. Justice's initial brief. Ms. Justice's initial brief will be referred to as "IB." The state's answer brief will be referred to by "AB." Since those two briefs have been filed, the Fifth District's opinion has been printed in the Southern Reporter. It is found at Justice v. State, 658 So.2d 1028 (Fla. 5th DCA 1995).

ARGUMENTS

I.

NON-STANDARD CONDITIONS OF PROBATION WHICH WERE NOT ORALLY PRONOUNCED MUST BE STRICKEN

The state asserts certain things as facts which are not evident from this record. For instance, the state asserts that the order placing Ms. Justice on probation was done and ordered on February 14, 1994 (AB 2). It is correct that the order states it was done and ordered on February 14 (III/502), but there is absolutely no discussion of this order in the transcript of the sentencing hearing (VIII/695-715). This order was not mentioned on the record. There is no indication at all in the record that it was served on Ms. Justice on February 14, or any date prior to it being filed on February 28. The original in the court file does not bear Ms. Justice's signature. While the state recognizes that Ms. Justice did not sign the acknowledgment (AB 3), it is clear there is simply no evidence that Ms. Justice was ever asked to sign the acknowledgment.

The state 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" (AB 3). What is indisputable is that the conditions were not discussed at the February 14th sentencing, and that the order setting forth these conditions was not discussed at that sentencing. The record contains a complete transcript of the sentencing hearing, and the state does not contend otherwise. The order was not filed until February 28, 1994. In contrast, the record contains several documents (III/437-40, 496-97) and a judgment (III/498-99) which were marked "filed in open court" at the sentencing on February 14. One can therefore see that the order placing Ms. Justice on probation was not filed in open court on February 14.

The state discusses the fact that a statement of judicial acts to be reviewed, and an amended statement of judicial acts to be reviewed, were filed without any mention that Ms. Justice was attacking the probation order (AB 3). There is no requirement that the statement of judicial acts to be reviewed contain each and every point to be raised on appeal. The notice of appeal (III/506) stated that Ms. Justice was appealing the judgment and sentence. Her designation to the court reporter (III/521-22) requested transcription of the sentencing proceeding. The state was thus on notice that the sentence was also being appealed.

The state asserts "... 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" (AB 3). Apparently the state

concedes these conditions were not orally announced at sentencing on February 14 in the presence of Ms. Justice and her counsel. What is clear is that at some point after the sentencing hearing on February 14 and prior to the filing of the motion to stay the order of probation pending appeal on March 4, 1994 (III/514-15), Ms. Justice became aware of the additional conditions of probation. At that time the notice of appeal (III/506) had already been filed, and the trial court lacked jurisdiction to amend its sentence. Ms. Justice's proper remedy was appealing the illegal conditions of probation to the Fifth District, which she did.

The issue before this Court is not whether the purpose of probation to rehabilitate Ms. Justice would be furthered by some or all of the unannounced conditions (AB 4). If some or all of those conditions would have aided in Ms. Justice's rehabilitation, then the trial court was legally required to orally announce them at Ms. Justice's sentencing. Since they were not announced at sentencing, the law requires they be stricken (IB 10-13).

As did the Fifth District, 658 So.2d at 1033, the state argues that the oral pronouncement can be corrected by calling the defendant back into court on another occasion (AB 4-5). First, again this Court must recognize that Ms. Justice was not called back into court at any time to be advised of the additional special conditions of probation. Second, the state's argument completely ignores this Court's prior decision in Troupe v. Rowe, 283 So.2d 857 (Fla. 1973). In Troupe, this Court recognized that once the sentencing hearing had concluded, and the defendant had begun

serving a sentence, that sentence could not be increased. Although Troupe was discussed several times in Ms. Justice's initial brief (IB 12-13), and directly addresses the issue at hand, the state has chosen not to address it in its answer brief. That demonstrates a serious weakness in the state's argument. Third, the calling back of a defendant for a second sentencing hearing and the addition of more conditions of probation would clearly violate the dictates of Lippman v. State, 633 So.2d 1061 (Fla. 1994), and Clark v. State, 579 So.2d 109 (Fla. 1991). See also, Zepeda v. State, 658 So.2d 1201 (Fla. 5th DCA 1995); C. M. v. State, 658 So.2d 1178 (Fla. 2d DCA 1995); Johnson v. State, 657 So.2d 971 (Fla. 3d DCA 1995).

The state makes reference to Hart v. State, 651 So.2d 112 (Fla. 2d DCA 1995), rev. granted, Fla. S.Ct. Case No. 85,168 (AB 6). In Hart, this Court will consider the issue of whether the conditions provided in Fla.R.Crim.P. 3.986 are standard, not special, conditions and therefore need not be orally announced at sentencing. It must be recognized that Rule 3.986 is a form promulgated in 1992. It is not a statute passed by the legislature with the intent to set forth conditions of either probation or community control. The cases talking about standard conditions of probation which do not need to be orally announced at sentencing (IB 10-18) refer to the conditions set forth in Chapter 948, not conditions in a form provided for a clerk or a court's benefit in the criminal rules. Therefore, in Hart, this Court must rule that the conditions provided in Rule 3.986 are not necessarily standard conditions. Unless they are set forth in Chapter 948, any

conditions found in Rule 3.986 must be considered special conditions and orally announced at sentencing.

Ms. Justice agrees with the state and Judge Harris that sentencing is not a game. A defendant's liberty is at stake. Therefore, there are strict rules to be followed. One of those rules is that the trial court, if it wishes to impose special conditions of probation, must orally announce them at sentencing so as to give the defendant and counsel an opportunity to object to the special conditions. It is the state, and the Fifth District, which seek to have this Court rewrite the rules to allow for such things as a second sentencing hearing, and imposition of written orders adding additional conditions of probation well after the sentencing hearing, which would have the effect of changing a defendant's initial sentence. This Court must reject those efforts. The special conditions of probation noted in Ms. Justice's initial brief on the merits (IB 14-17) must be stricken from the order of probation.

II.

DENIAL OF PROPOSED DEFENSE INSTRUCTION ON AUTHORITY TO SIGN CHECKS DENIED MS. JUSTICE A FAIR TRIAL

A. JURISDICTION.

In its answer brief, the state does not discuss the issue of jurisdiction. Therefore, there is no need for a reply on this part of issue II.

B. MERITS.

Relying upon Perkins v. State, 463 So.2d 481 (Fla. 2d DCA 1985), the state asserts that the trial court properly denied Ms. Justice's proposed theory of defense instruction on authority (AB 8-9). It is interesting to note that the state does not address this Court's prior decision in Barker v. State, 83 So. 287 (Fla. 1919), although it was relied heavily upon in Ms. Justice's initial brief (IB 22-24), directly addresses the issue at hand, and has not been overruled by this Court.

Perkins, and the trial court in Justice, were wrong because the standard jury instruction now given in forgery cases does not adequately advise the jury on the defense of authority. The forgery offense can be closely analogized to the theft defense. Forgery requires a defendant's specific intent to defraud. Theft requires a defendant's specific intent to take the property of someone else. Kilbee v. State, 53 So.2d 533 (Fla. 1951). Just as the standard forgery instruction does not contain any language concerning the defense of a good faith belief as to authority, the standard theft instructions does not contain any language concerning the defense of good faith belief that one is entitled to take the property at issue. Yet appellate courts in this state have time and time again held it to be reversible error in theft cases to deny a theory of the defense instruction which sought to put the good faith belief of one's right to take the property before the jury. See e.g., Thomas v. State, 526 So.2d 183 (Fla. 3d DCA), rev. denied, 536 So.2d 245 (Fla. 1988); Rodriguez v. State, 396 So.2d 798, 799 (Fla. 3d DCA 1981). See also, United States v.

Regan, 937 F.2d 823, 825-27 (2d Cir. 1991) (reversible error to fail to give good faith instruction in tax fraud case).

The state's argument that there was no evidence to support the authority defense must be rejected. It is important to note that the state does not argue that there was minimal, or scant evidence. Instead, recognizing that even scant evidence would require a theory of the defense instruction, the state has seen fit to argue that there was no evidence to support such a defense (AB 9-10). A review of the facts in the record, summarized in Ms. Justice's initial brief (IB 20-22), demonstrates that there was evidence to support this authority defense.

Two of the factual matters set forth in Ms. Justice's initial brief as bases for the theory of defense instruction are rejected by the state as "a self-serving statement of a subjective belief" and "a subjective belief" that Ms. Justice could sign Ms. Reynold's name to the checks (AB 9). It is clear that a defendant's own, uncorroborated, testimony is sufficient to provide evidence for a theory of defense instruction. Indeed, in a theft case, if a defendant states "I believed I was entitled to take the property at issue," that defendant would be entitled to a good faith instruction. In a battery case, if a defendant states "I hit him because I feared he would hurt me," the defendant is certainly going to be entitled to a self-defense instruction, even if he has no other evidence to support that "subjective" belief. All denials or explanations by a defendant are necessarily "self-serving." A defendant's "subjective" belief is as valid a basis for many

theories of defense as other evidence. The law does not impose objective corroboration as a prerequisite to entitlement to a theory of defense instruction. The weight to be given to such "self-serving" and "subjective" testimony is to be decided by the jury based upon complete instructions.

Contrary to the state's claim (AB 8-9), the fact that this defense was argued to the jury does not render the trial court's failure to instruct the jury on this defense harmless. A request of counsel is no substitute for a proper instruction by the court. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). In a case where Ms. Justice's intent was the overriding issue, the failure to provide this authority instruction cannot be held to be harmless error. The state, although it makes this superficial claim (AB 8-9), does not actually present an argument or analysis demonstrating that this error was harmless beyond a reasonable doubt.

Because Ms. Justice's jury was not provided with the requested theory of defense instruction, Ms. Justice is entitled to a new trial.

CONCLUSION

Based on the arguments and authorities set forth in this brief and in Ms. Justice's initial brief on the merits, this Court should accept this case for review, vacate the Fifth District's decision, and remand this case for a new trial. In the alternative, this Court should vacate the Fifth District's opinion and order that all

special conditions of probation not orally announced at the original sentencing be stricken from the probation order.

RESPECTFULLY SUBMITTED this 25th day of October, 1995, at Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished on this 25th day of October, 1995, by U.S. Mail, to Kellie A. Nielan, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

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