IN THE SUPREME COURT OF FLORIDA

TAURANCE YOUNG,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,099

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

Pet's ~~RESPONDENT~~'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On February 10, 1994, an information was filed in case number 94-30589-CFAES in the circuit court in and for Volusia County, charging Petitioner with aggravated battery. (R 37) On March 8, 1994, an information was filed in case number 94-31038-CFAES charging Petitioner with armed robbery with a firearm or deadly weapon. (R 57) On May 3, 1994, an information was filed in case number 94-31931-CFAES charging Petitioner with principal to armed robbery with a weapon and conspiracy to commit armed robbery with a firearm. (R 85-86) On June 29, 1994, an information on case number 94-32941-CFAES charging Petitioner with unlawful sale or delivery of a counterfeit controlled substance under section 817.563(2) Florida Statutes. (R 113) On July 13, 1994, an amended information was filed on case number 94-31038-CFAES charging Petitioner with grand theft of the first degree. (R 60) Also on July 13, 1994, an amended information was filed on case number 94-31931-CFAES charging Petitioner with count one, grand theft of the first degree and, count two, conspiracy to commit grand theft of the first degree. (R 89-90) An amended information was subsequently filed in case number 94-32941-CFAES on an unknown date charging Petitioner with unlawful sale or delivery of a counterfeit controlled substance as a third degree felony under section 817.563(1) Florida Statutes. (R 124)

On July 13, 1994, Petitioner entered into a plea agreement and pleaded guilty in case number 94-31931-CFAES to, count one, grand theft of the first degree, a first degree felony, and,

count two, conspiracy to commit grand theft of the first degree, a second degree felony. (R 6, 10-11, 91-92) In case number 94-31038-CFAES, Petitioner pleaded guilty to grand theft of the second degree, a lesser included offense of the offense charged in the amended information. (R 6, 10-11, 61-62) In case number 94-32941-CFAES, Petitioner pleaded guilty to unlawful sale or delivery of a counterfeit controlled substance, a third degree felony.[1] (R 7, 10-11, 119-120) In case number 94-30589-CFAES, Petitioner pleaded guilty to the lesser included offense of battery. (R 7, 10-11, 42-43)

On September 14, 1994, the circuit judge filed a Notice And Order For Separate Proceeding To Determine If Defendant Is Habitual Felony Offender Or Habitual Violent Felony Offender Pursuant To Florida Statute 775.084 And For Sentencing Hearing. (R 44-45) Petitioner subsequently filed a motion to strike the circuit court's notice of habitual offender proceedings. (R 121-122) The circuit court denied Petitioner's motion to strike on September 16, 1994. (R 46)

At the sentencing hearing held on January 25, 1995, Petitioner was declared to be a habitual felony offender pursuant to section 775.084 Florida Statutes. (R 18, 47, 72, 106, 123) In case number 94-31038-CFAES, the circuit court adjudicated

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[1] The written plea agreement incorrectly listed the offense in case number 94-32941-CFAES as unlawful sale or delivery of a controlled substance, a second degree felony. The circuit judge made a similar error at the plea hearing. The correct offense as charged in the amended information and to which Appellant was sentenced was unlawful sale or delivery of a counterfeit controlled substance, a third degree felony. (R 27, 124)

Petitioner guilty of grand theft of the first degree and sentenced him to fifteen years in the Department of Corrections with credit for 296 days time served to be followed by five years probation. (R 26, 63-67, 68-71)

In case number 94-30589-CFAES, the circuit court adjudicated Petitioner guilty of battery and sentenced him to 364 days in jail with credit for 281 days time served. (R 26, 47-48) The court ordered Petitioner's sentence to run concurrently with the sentence imposed in case number 94-31038-CFAES. (R 26, 47-48)

In case number 94-31931-CFAES, the circuit court adjudicated Petitioner guilty of, count one, grand theft of the first degree, and, count two, conspiracy to commit grand theft of the first degree. (R 26, 93-94) The court sentenced Petitioner to five years probation on each count, with each term of probation to run concurrently with each other and both terms to run consecutive to the fifteen year prison sentence in case number 94-31038-CFAES. (R 26, 27, 98-105)

In case number 94-32941-CFAES, the circuit court adjudicated Petitioner guilty of the unlawful sale or delivery of a counterfeit controlled substance and sentenced Petitioner to five years probation to run concurrently with the terms of probation imposed on the other cases. (R 27)

Petitioner filed separate notices of appeal for each case on January 30, 1995. (R 49, 73, 107, 127) The circuit court appointed the Office of the Public Defender to represent Appellant on appeal on January 31, 1995. (R 55, 79, 113, 133)

After considering briefs by the parties, the District Court of Appeal, Fifth District, affirmed Petitioner's convictions in part and remanded two of Petitioner's cases for resentencing. Young v. State, 20 Fla. L. Weekly D2636 (Fla. 5th D.C.A. Dec. 1, 1995) The district court certified the following question to this Court:

> 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?

Id. D2636-D2637. This appeal follows.

SUMMARY OF ARGUMENT

POINT ONE: The trial court included in Petitioner's written orders of probation special conditions that the trial court had not orally pronounced at Petitioner's sentencing hearing. On appeal, the district court ruled the unannounced special conditions invalid but ordered Petitioner's case remanded to the trial court with permission for the trial court to impose the same previously unannounced conditions subject to giving Petitioner the opportunity to object to the conditions. The district court's ruling should be reversed because upon pronouncing sentence and rendering the written sentence, Petitioner's sentence became final. Allowing the trial court to impose additional special conditions on remand would violate Petitioner's right to be free from double jeopardy.

POINT TWO: The district court ruled that a trial court has the power to initiate habitual offender proceedings on its own motion. The district court's ruling should be reversed because section 775.08401, Florida Statutes makes clear the Legislature's intent that only State Attorney's offices may initiate habitual offender proceedings.

ARGUMENT

POINT ONE

THE DECISION OF THE DISTRICT COURT TO PERMIT THE TRIAL COURT TO ENHANCE PETITIONER'S SENTENCE BY ADDING SPECIAL CONDITIONS OF PROBATION AFTER REMAND IS INCORRECT BECAUSE THE SENTENCE WAS FINAL AND ENHANCING THE SENTENCE EXPOSES PETITIONER TO DOUBLE JEOPARDY

The trial court included in Petitioner's written orders of probation special conditions that the trial court had not orally pronounced at Petitioner's sentencing hearing. On appeal, the district court ruled the unannounced special conditions invalid but ordered Petitioner's case remanded to the trial court with permission for the trial court to impose the same previously unannounced conditions subject to giving Petitioner the opportunity to object to the conditions. The district court's ruling should be reversed because upon pronouncing sentence and rendering the written sentence, Petitioner's sentence became final. Allowing the trial court to impose additional special conditions on remand would violate Petitioner's right to be free from double jeopardy.

At Petitioner's sentencing hearing on January 25, 1995, the trial court sentenced Petitioner to prison followed by probation. (R 13-34) The trial court pronounced several special conditions of probation, including the special conditions that Petitioner receive substance abuse testing and mental health counseling and treatment, if needed. (R 28-29) In the trial court's written orders of probation signed on February 9, 1995, the court

included the special conditions that Petitioner to pay the costs of any required substance abuse testing or mental health counseling or treatment. (R 68-71,98-101,102-105) The requirements that Petitioner pay the costs associated with substance abuse testing and mental health counseling were not orally pronounced by the court at the sentencing hearing.

On appeal to the district court, Petitioner argued that the trial court erred in imposing special conditions of probation without orally pronouncing those conditions at Petitioner's sentencing hearing. Youns v. State, 20 Fla. L. Weekly D2636 (Fla 5th D.C.A. Dec. 1, 1995) The district court agreed that the trial court improperly imposed the unannounced special conditions of probation that Appellant pay the costs of substance abuse testing and mental health counseling. Id. However, instead of remanding the case with orders for the trial court to strike the unlawfully imposed conditions, the court ordered the case remanded to the trial court with permission for the trial court impose the previously unannounced special conditions if it so chose. Id. The court ruled that the trial court on remand could impose the special conditions not orally pronounced if the court informs Petitioner of its intentions and affords Petitioner the opportunity to object. Id. In so ruling, the district court cited its previous opinion in Justice v. State, 658 So. 2d 1028 (Fla. 5th D.C.A. 1995) and certified to this Court 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?

Id. at D2636-D2637.

Petitioner contends that when a defendant appeals a written order of probation 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. This is the position taken by three of the district courts. See, e.g., Bartlett v. State, 638 So. 2d 631 (Fla. 4th D.C.A. 1994); Christobal v. State, 598 So. 2d 325 (Fla. 1st D.C.A. 1992); Turchario v. State, 616 So. 2d 539 (Fla. 2d D.C.A. 1993)

The majority opinion in Justice takes the position that a trial court can impose new special conditions of probation not orally pronounced at the sentencing hearing anytime before the court signs the written judgment of sentence as long as the court brings the defendant back before the court to inform the defendant of the new conditions and provides an opportunity for the defendant to object to the new conditions. Justice at 1033. The majority bases this proposition on the argument that a sentence is not final until reduced to writing and filed with the clerk. Id. The majority then expands this position by holding that if the trial court imposes new special conditions in the written judgment of sentence without bringing the defendant back

before the court, and the defendant appeals on the basis that the new conditions were not orally pronounced, on remand, the trial court can resentence the defendant and **"reimpose"** the new conditions. Id. at 1034.

The majority in Justice raises two separate issues. First, may a trial court impose new special conditions of probation not orally pronounced at the sentencing hearing anytime before the court signs the written judgment of sentence as long as the court brings the defendant back before the court to inform the defendant of the new conditions and provide an opportunity for the defendant to object to the new conditions. Secondly, when a defendant appeals unannounced special conditions and the appellate court reverses, may the trial court, on remand, resentence the defendant and **"reimpose"** the added conditions.

While not conceding the point, even if the trial court properly may add new special conditions of probation not orally pronounced by calling a defendant back before the court prior to the court's signing of the written judgment of sentence, that scenario did not occur in Petitioner's case. In Petitioner's case, the trial court imposed the additional special conditions of probation without bringing Petitioner back before the court to inform him of the new conditions the court planned to impose. Clearly once the trial court signs the written judgment of sentence, the sentence becomes final. As the dissent pointed out in Justice:

> An order of probation, like any other aspect of sentencing, ought not to 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 sentencing 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.

Id. at 1035-1036, (Griffen, J., dissenting).

The majority's justification for its position in Justice is that "after additional reflection afforded by the delay between the sentencing hearing and the preparation of the written judgement, 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." Id. at 1032. While this may or may not be a reason to allow a trial court to impose previously unannounced conditions before the rendering of the written judgment, to allow the trial court to impose additional special conditions after the rendition of the written judgment in affect means the order of probation would never be final.

Not only would the majority's position in Justice eliminate

any semblance of finality to an order of probation, this Court has previously held that absent proof that a probationer violated his or her conditions of probation, a court cannot change an order of probation by enhancing its terms. Clark v. State, 579 so. 2d 109, 110-111 (Fla. 1991) In Clark, this Court held section 948.06, Florida Statutes "provides the sole means by which the court may place additional terms on a previously entered order of probation or community control." Id. at 110. When a trial court fails to orally pronounce special conditions of probation, the appellate court has "no alternative but to reverse for resentencing." Justice at 1033. Once the conditions are held invalid, however, the remaining portion of the sentence becomes the totality of the defendant's sentence. Allowing the trial court to add the previously unannounced conditions to the sentence on remand amounts to enhancing the order of probation without a finding that the probationer violated probation.

Furthermore, the written sentence is merely a record of the actual sentence pronounced in open court. Kelly v. State, 414 SO" 2d 1117 (Fla. 4th D.C.A. 1982); See also Vasca-uez v. State, 20 Fla. L. Weekly D2384 (Fla. 4th D.C.A. Oct. 25, 1995) This rule stems from the definition of "sentence" in rule 3.700(a) of the Florida Rules of Criminal Procedure:

> (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.

Rule 3.700(a) Fla.R.Crim.P.(emph. added): See Justice at 1035, (Griffin, J., dissenting).

Allowing the trial court to add unannounced conditions to the defendant's sentence upon remand violates the defendant's guarantee against double jeopardy. See U.S. Const. amend V.; Art. I, § 9, Fla. Const. In Lippman v. State, 633 So. 2d 1063, 1064 (Fla. 1994), this Court held that probation is a sentence and "the double jeopardy protection against multiple punishments includes the protection against enhancements or extensions of the conditions of probation." In Petitioner's case, the added conditions that Petitioner pay the cost and fees of substance abuse testing and mental health counseling and treatment is more restrictive than the orally pronounced special conditions that did not include the burden that Petitioner pay such costs. Thus, adding special conditions on remand would enhance the terms of Petitioner's probation in violation of Petitioner's right to double jeopardy protection. See Vasquez at D2386-D2387.

POINT TWO

THE DECISION OF THE DISTRICT COURT WAS INCORRECT BECAUSE THE HABITUAL OFFENDER PROCEEDINGS WERE INITIATED BY THE TRIAL COURT ON ITS OWN MOTION, CONTRARY TO THE INTENT OF THE LEGISLATURE

After Petitioner pleaded guilty pursuant to his plea agreement on July 13, 1994, the trial judge sua sponte filed a notice pursuant to section 775.084(3)(b) to hold a hearing to determine if Petitioner qualified as a habitual felony offender or a habitual violent felony offender. (R 44-45) See § 775.084(3)(b) Fla. Stat. (1995) Petitioner argued on appeal that the trial court erred in sentencing Petitioner as a habitual felony offender because the trial court on its own notice initiated habitual offender treatment. The district court ruled that section 775.08401 does not preclude the trial judge initiating a proceeding to sentence a person as a habitual felony offender. The district court's ruling should be reversed because the Legislature's intent as expressed in section 775.08401, Florida Statutes is that notice of habitual offender treatment may only be filed by State Attorney's offices.

In Toliver v. State 605 So. 2d 477 (Fla. 5th D.C.A. 1992), rev. denied 618 So. 2d 212 (Fla. 1993), the district court held that "either the state or the court could 'suggest' classification as a habitual offender, We noterl there is nothing in the statute to show the legislature intended otherwise," Toliver at 480. (emphasis added) The district

court's position was reiterated in Turcotte v. State 617 So. 2d 1164 (Fla. 5th D.C.A. 1993), where the district court held "we read Toliver to hold that there is nothing in the habitual offender statute which indicates that the legislature did not intend to give both the trial court and the state attorney authority to initiate the procedure for classification of a defendant as an habitual offender." Turcotte at 1165.

Following district court's decisions in Toliver and Turcotte, however, the Legislature enacted Section 775.08401, Florida Statutes, which became effective on June 17, 1993. The statute reads:

> The state attorney in each judicial circuit shall adopt uniform criteria to be used in determining if an offender is eligible to be sentenced as a habitual offender or a habitual violent felony offender. The criteria shall be designed to ensure fair and impartial application of the habitual offender statute. A deviation from this criteria must be explained in writing, signed by the state attorney, and placed in the case file maintained by the state attorney. A deviation from the adopted criteria is not subject to appellate review.

§ 775.08401 Fla. Stat. (1995)

The statute makes clear the Legislature's intent that only the state attorney may seek habitual offender treatment of a defendant. The district court initially recognized this statement of legislative intent in Santoro v. State, 644 So. 2d 585, 586 n.4 (Fla. 5th D.C.A. 1994) rev'd on other srounds State v. Santoro, 657 So. 2d 1161 (Fla. 1995) when the court noted that:

> The judge's ability to initiate habitual offender treatment has been placed in doubt by the enactment of section 775.08401, Florida Statutes (1993).... It appears that this statute . ..may very well have "repealed" Toliver (cites omitted), which permitted the sentencing judge to initiate habitual offender consideration. It now appears that the legislature has determined that it is only the state attorney, in order to ensure "fair and impartial application," who can seek habitual offender treatment of a defendant-and then only if the defendant meets a circuit-wide uniform criteria.

Santoro at 586, n.4. However, in Petitioner's case, the district court chose not to adopt the position that habitual offender proceedings may only be invoked by the State Attorney. See also Kirk v. State, 20 Fla. L. Weekly D2621 (Fla. 5th D.C.A. Dec. 1, 1995)

Legislative intent is the polestar by which the courts must be guided in construing statutes. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). The intent of a statute is the law, and that intent should be duly ascertained and effectuated. American Bakeries Company v. Haines City, 180 So. 524, 532 (Fla. 1938). Petitioner submits that the Legislature intended habitual offender proceedings may only be invoked by the State Attorney,

Petitioner urges this Court to adopt the reasoning of Judge Harris' concurring opinion. Judge Harris wrote:

> By enactment of [section 775.084011, the legislature recognized that since every felon who has a record that would otherwise qualify for habitual offender treatment will not, and should not, be habitualized, there must be some standard (at least within any particular circuit) on which to base a sentencing decision. By placing the obligation on the state attorney to develop and maintain the

> appropriate criteria, in my view, the legislature has now expressed an intent that the separate proceedings required by section 775.084(3) must be invoked by, and only by, the office of the state attorney. Otherwise the purpose of such section can be avoided by merely deferring to the sentencing philosophy of each individual judge. Did the legislature intend that a judge could sentence one as an habitual offender who would not be so qualified under the criteria established by the state attorney?

Young v. State, 637 So. 2d 1 (Fla. 1st D.C.A. 1994)(footnote omitted), as noted in Steiner v. State, 591 So. 2d 1070, 1072 and n.2 (Fla. 2d D.C.A. 1991)(Lehan, J., concurring), "the wisdom and propriety of the notice issuing from the trial court is...questionable....[T]he appearance of impartiality of a sentencing judge may be compromised when he or she has already filed a notice to invoke a sentencing enhancement procedure, the imposition of which is discretionary in the first place."

The procedure used in Petitioner's case creates the appearance that the court has become an arm of the prosecution. Proceedings involving criminal charges must both be fundamentally fair and appear to be fundamentally fair. Steinhorst v. State, 636 So. 2d 498, 501 (Fla. 1994)(emph. added). Section 775.08401 clearly establishes the Legislature's intent that invocation of habitual offender procedures is solely a prosecutorial function.

The legislature has given responsibility of initiating the habitual offender process to the state attorney. The legislature has attempted to ensure fair and impartial application of the habitual offender statute by requiring the state attorney to establish circuit-wide criteria to determine habitual offender

status, and then by having only the state attorney initiate the process based on the criteria. Therefore, in order to ensure and maintain that the required criteria are met and to ensure the fundamental fairness of habitual offender proceedings, the trial court cannot, on its own, initiate the habitual offender treatment of a defendant.

CONCLUSION

For the reasons stated above, Petitioner requests this Honorable Court to reverse the decision of the District Court of Appeal and to remand this case to the trial court for resentencing under the sentencing guidelines and with orders to strike the unannounced special conditions 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 hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Taurence Young, DOC #589567, Central Florida Reception Center, P.O. Box 6288040, Orlando, FL 32862-8040, on this 2nd day of February, 1996.

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