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SID J. WHITE
FEB 22 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TAURANCE YOUNG,

Petitioner,

v. CASE NO. 87,099

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

POINT ONE.

The focus of the question before the court should be on what error was actually committed and what is the best remedy. If the sentence is final at the end of the oral pronouncement, then the additional conditions in the written order are a scrivener's error and should be struck. If the sentence is final when rendered (written and filed), then the error is remedied by allowing the defendant an opportunity to object to the conditions not orally announced. Either way, double jeopardy is never implicated.

POINT TWO.

The amendment to the habitual offender statute added a requirement for the state attorneys to encourage more, and more consistent, application of habitual offender proceedings. Nothing in the statute either explicitly or implicitly changed the acknowledged power of the trial court to independently initiate habitual offender proceedings.

ARGUMENT

POINT ONE

THE DISTRICT COURT'S DECISION TO ALLOW THE TRIAL COURT TO REIMPOSE UPON REMAND SPECIAL CONDITIONS OF PROBATION NOT ORALLY ANNOUNCED AT THE ORIGINAL SENTENCING IS CONSISTENT WITH THE LAW AND SHOULD BE AFFIRMED.

The Fifth District Court of Appeals reviewed Young's appeal from the trial court and agreed that two special conditions of probation were not orally announced at Young's sentencing hearing. *Young* ***v.*** *State*, 20 Fla. L. Weekly D2636 (Fla. 5th DCA Dec. 1, 1995). Consistent with the law, the district court reversed and remanded Young's sentence to the extent that the two conditions were **improperly** imposed. However, the district court remanded with instructions that the trial court could impose the special conditions if the trial court allows Young an opportunity to object. The district court further certified the following question to this court:

> WHERE A SENTENCE IS REVERSED BECAUSE THE **TRIAL** COURT FAILED TO @RALLY PRONOUNCE CERTAIN SPECIAL CONDITIONS OF PRCBATION 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 D2636-37. The fifth and third district courts have answered

this question in the affirmative. *Justice v. State*, 658 So. 2d 1028 (Fla. 5th DCA 1995); *Burdo v. State*, 21 Fla. L. Weekly D281 (Fla. 3rd DCA Jan. 31, 1996). This court also has had this question briefed and argued and it is now fully submitted in two cases. *Justice v. State*, case no. 86,264; *Chicone v. State*, case no. 85,136. The instant case is the third time this court has addressed this same question. The State believes that the question should be answered in the affirmative and the decision of the fifth and third district courts approved.

The proper answer to the certified question is found by focusing on the actual error committed here and then looking for the solution that best fixes the error without further violating someone's rights. The error here stems from the due process requirement that the defendant he present for sentencing arid in particular, that the defendant have the opportunity to object to or reject probation and any of its conditions. *See, e.g. Olvey v. State*, 609 So. 2d 640 (Fla. 2d DCA 1992). As long as the defendant has the opportunity to object, the record is preserved for an eventual appeal and a review of the contested conditions. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982). The sentence is rendered and final for purposes of appeal at the time the written order is filed. Fla. R. App. P. 9.140(b)(2).

This is exactly the error that occurred in this case. Young was sentenced and a special condition of probation was not orally announced while he was in court and able to object. The State admitted below that this was error. This error needs to be remedied. The divergence comes with fashioning the remedy.

Young urges this court to adopt a bright line rule that when the trial court stops speaking, the sentencing is over and the sentence is fully imposed and unchangeable, no matter what important condition of probation may have inadvertently been left out. The **proposed** remedy is total exclusion of any condition of probation that may thereafter appear in the written order, no matter what. On the other hand, the State (and %he fifth and third district courts) propose a remedy that more closely fits the **error.** If the error was the lack of opportunity tc object, then give the defendant an opportunity to object by having a re-sentencing hearing at which the defendant may be heard. The defendant may then preserve any error in the condition itself for further review. The defendant's right to due process will be satisfied, as well as the public's interest in an appropriate sentence which has the best chance of reforming the convicted criminal.

The problem with Young's assertions that sentencing is over and complete with no allowable modifications as soon as the judge is

done with the oral pronouncement *is* illustrated by the following questions. What if sentencing is interrupted for some reason? Is the portion of the sentence coming before the interruption the only allowable sentence? At what point is the oral pronouncement over? Are there "magic words" that the trial court must use? Is it when the defendant leaves the courtroom? Is it when the defendant leaves counsel table and sits back in the holding area, but still in the courtroom? Is it when the defendant leaves the courthouse or when he actually reaches the jail? Is it when the courthouse closes for the day or when the judge goes home for the evening? Is it some later time but before the written order is prepared? When exactly is it tnat the oral pronouncement is over and when does the court's ability to add to or modify that oral pronouncement end? Answers to any of these questions raise examples that would require exceptions.

If the sentence is complete and can not be modified at the time the defendant leaves the courtroom, for example, what happens in the case where the defendant leaves the courtroom before the judge is finished? It is not out of line to suggest that the defendant may be taken out of the courtroom for any number of reasons which may or may not be the defendant's fault and which would then end the sentence. Or there may be the case that the judge sentences the defendant in the morning and the deputies keep the defendant in the

courtroom throughout the day, then the judge modifies the sentence at the end of the day. The defendant never left the courtroom so the sentence would not be final under that rule.

The best rule is the one that this court uses for determining when a sentence may be appealed. An crder is final when it is written and filed. Then there is no question what the order says or when it was rendered **or** what it contains. There is no artificial cutoff point subject, to interpretation or exception based on unusual circumstances. There is simply a final order which the defendant can challenge on appeal if he so desires.

Tnie rule also is consistent with this court's holdings in *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994) and *Clark v. State*, 579 So. 2d 109 (Fla. 1991). Those cases dealt with enhancement of already rendered orders. Because the orders of probation in those cases had already been rendered, that is, reduced to writing and filed, the court correctly held that they could not be enhanced. However, that is not the case with Young. No order of **probation** had previously been entered when the written order containing the special condition was rendered. *Lippman* and *Clark* do not apply.

Young also argues that adding the special conditions of probation at a re-sentencing would violate his right to be free from double jeopardy. However, again by focusing on the actual error,

the question of double jeopardy is never reached. There can be no double jeopardy problem if the sentence is not final until it is rendered in writing. If it is final upon oral pronouncement. as Young asserts, then there *is* no double jeopardy problem, there is a clerical error.

Young's cites this court to *Lippman* for the proposition that double jeopardy protects against enhancements or extensions of the conditions of probation. *Lippman* at 1064. However, as noted above, the instant case does not involve an enhancement of a previous written order of probation, but only a difference in the oral pronouncement and the written order. If sentencing is complete at the mcment that the judge quits speaking it in open court, then any different language in the written order is no more than a scrivener's error and is easily corrected by simply striking it out. Double jeopardy is never implicated. If, on the other hand, the sentence is not final until the written sentence is filed, then the error is only that the defendant was not present and given an opportunity to object, an error which can be remedied at re-sentencing. Double jeopardy *is* again not implicated because there is no "enhancement" of the sentence. The sentence was imposed by the written order. The special conditions not orally pronounced are already in the written order. Allowing the defendant an opportunity

to object to the imposition of the special conditions does not in any way add to or enhance the written order. It does not even modify the written order. The only possible change to the written order would come only after the defendant has a chance to object to the unannounced conditions and then only if the court agrees with the basis for the objection. Then the written order would be reduced by striking or modifying the conditions. The defendant cannot be in any danger of having his sentence increased over the sentence that was rendered in writing. The court is simply fixing the error of imposing conditions without allowing objection. This is the appropriate remedy and the decision of the district court in this case should be approved.

POINT TWO

THE DISTRICT COURT CORRECTLY DECIDED THAT THE TRIAL COURT MAY INITIATE HABITUAL OFFENDER PROCEEDINGS AGAINST A DEFENDANT.

Young asserts as his second argument to this court that the district court erred in holding that the trial. court may initiate habitual offender proceedings against a defendant. Young argues that only the prosecutor may initiate habitual offender proceedings, The State counters that nothing in the legislature's amendment to §775.08401, Fla. Stat. (1993) removes the court's power to initiate said proceedings. The opinion of the district. court should be affirmed.

The fifth district has previously held that under the prior version of §775.084 both the state and the court had the power to suggest habitual offender classification. *Toliver* v. State, 605 So 2d 477 (Fla 5th DCA 1992), rev. *denied* 618 So. 2d 212 (Fla. 1993) Young now argues that the 1993 amendment to 775.084 removed the power to suggest habitual offender status from the judge. The state disagrees.

The section of the law allowing for habitual offender sentencing which is at issue in this argument was adopted in 1993 and codified as §775.08401, Fla. Stat. (1993). It reads, in pertinent part:

> 775.08401 Habitual offenders and habitual violent felony offenders; eligibility criteria.-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.

In enacting this change, the legislature began the act with this policy statement:

> This revision of the sentencing guidelines may be cited as the "Safe Streets Initiative of 1994," and is designed to emphasize incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and have demonstrated an inability to comply with less restrictive penalties previously imposed.

Ch. 93-406, §1, at 2911, Fla. Laws. The goal cf the legislature was clear. The law was intended to make sure that habitual offenders were treated as such. The changes were an expansion of the law and not a reduction, Young's interpretation is inconsistent with the stated policy of the law and should be rejected.

As the fifth district noted in another case concerning this

exact same issue:

> Section 775.08401 does not reject the established rule that a proceeding under the habitual offender statute can be initiated independently by the court. The statute does not refer to any of the rights or duties of the court.....Had the legislature intended to remove judicial discretion to initiate a proceeding for an enhanced penalty, it would have done so expressly.
>
> * * * *
>
> Section 775.08401 is a discrete provision of the habitual offender statute and it adds a regulation that pertains exclusively to the conduct of state attorneys. This section does not add any new requirement for trial judges, much less remove any authority previously vested in trial judges. Judicial discretion in selecting cases for enhanced sentencing continues to be an important part of the statutory scheme.

Kirk v. State,. 20 Fla. L. Weekly D2621 (Fla. 5th DCA Dec. 1, 1995).

Nothing in the amendment to the habitual offender statute changes the power of the court to initiate habitual offender proceedings. The statute limits the discretion of the state attorney to not bring habitual proceedings by requiring criteria and an explanation when the state attorney does not habitualize. The thrust of the statute is toward more habitual offenders, not less. The decision of the fifth district is correct and should be approved.

CONCLUSION

Based upon the foregoing facts, authorities and reasoning the State respectfully requests this Honorable Court to approve the decision of the district court and remand this case for further proceedings consistent with that opinion.

Respectfully submitted,

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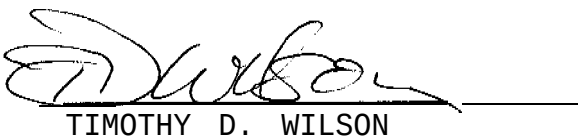
CERTIFICATE OF SERVICE

I HEREBY **CERTIFY** that a true and correct copy of the foregoing MERITS BRIEF has been furnished by hand delivery to DAN D. **HALLENBERG,** Office of the Public Defender, Counsel for the Petitioner, via the Public Defender's basket at the Fifth District Court of Appeal on February 20, 1996,



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