IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,553

CHARLES BURDO,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FLORIDA, THIRD DISTRICT
(CERTIFIED CONFLICT)

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

This is a petition for discretionary review following a certified question posed by the Third District Court of Appeal. The symbol "T" will be used to refer to the trial transcript.

STATEMENT OF THE CASE AND FACTS

The state charged the defendant, by information, with driving under the influence, (count I), and driving while license suspended, (count II), in violation of sections 316.193 and 322.34, Florida Statutes. Following jury convictions of guilt, the trial court adjudicated Mr. Burdo accordingly.[1] At the sentencing hearing on Sepatember 29, 1994, the trial court sentenced the defendant to twenty-four months of community control followed by three years of probation for driving under the influence. The special conditions orally added to the orders of community control and probation were: a $2,500 fine, prosecution and investigation costs in the amounts of $200.00 and $50.00 respectively, permanent driver's license revocation, successful completion of the multi-offender DUI school, 200 hours of community service, 364 days of incarceration, continued treatment at the Guidance Clinic of the Middle Keys or its equivalent subsequent to prison release. (T. 191-192). The written order of community control contained the following special conditions which were not pronounced during the sentencing hearing:

> (6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.
>
> (13) You will maintain an hourly accounting of all your activities on a daily log which you will submit to your Community Control Officer upon request.

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[1]As to count two, driving with suspended license, the court sentenced the defendant to 364 days imprisonment concurrent with the jail time for the first charge

(R. 13).

The written order of probation contained the following condition which was not pronounced during the sentencing hearing:

> (6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.

(R. 14).

The Third District Court of Appeal held that the trial court failed to orally pronounced the special conditions in question. With respect to conditions six and thirteen, the district court reversed and remanded for further proceedings consistent with *Justice v. State*, 658 So. 2d 1028 (Fla. 5th DCA), *review granted,* No. 86,264 (Fla. Dec. 6, 1995). The court certified the same question that was certified in *Justice:*

> 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?

Burdo v. State, 667 So. 2d 874 (Fla. 3d DCA 1996).

SUMMARY OF ARGUMENT

The trial court erred in imposing special conditions of probation and community control where it failed to give the defendant proper notice of the special conditions where it failed to orally pronounce the special conditions of community control prohibiting excessive use of alcohol and maintenance of a daily log. The court also imposed the condition proscribing excessive use of alcohol as a special condition of the defendant's probation without orally pronouncing that condition at the sentencing hearing. This error requires that this Court strike the improperly imposed special conditions.

ARGUMENT

THE SPECIAL CONDITIONS OF COMMUNITY CONTROL AND PROBATION IMPOSED BY THE TRIAL COURT WITHOUT ORAL PRONOUNCEMENT MUST BE STRICKEN.

On September 29, 1994, the trial court entered an order placing Mr. Burdo on twenty-four months of community control followed by three years of probation. The court subsequently entered a written community control order containing two conditions which were not orall pronounced during the sentencing hearing. The court also entered a written order of probation containing one condition which was not orally pronounced during the sentencing hearing. The imposition of these conditions, which were not orally pronounced, must be stricken.[2]

A trial court may not impose special conditions to probation or community control orders without announcing the special conditions to the defendant in open court and affording the defendant with an opportunity to object to its imposition. *Curry v. State,* 656 So. 2d 521 (Fla. 2d DCA 1995)(special condition prohibiting use of alcohol to excess struck where no oral pronouncement at sentencing); *Tomlinson v. State,* 645 So. 2d 1 (Fla. 2d DCA 1994) (same); *Vinyard v. State,* 586 So. 2d 1301 (Fla. 2d DCA 1991) (special condition requiring maintenance of daily log struck in absence of oral pronouncement). The trial court erred in the instant case by imposing the following special conditions of community control

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[2]This issue has been breifed before this Court in *Justice v. State,* Case No. 86,264.

without announcing them to the defendant orally:

> (6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.
>
> (13) You will maintain an hourly accounting of all your activities on a daily log which you will submit to your Community Control Officer upon request.

(R. 12-13).

The court also imposed the condition prohibiting the excessive use of alcohol as a special condition to its order of probation. (R. 14).

The trial court's imposition of special conditions six and thirteen to the order of community control and the imposition of special condition six to the order of probation without orally informing the defendant of these conditions at the sentencing hearing constituted error and must be stricken from the defendant's sentence. Furthermore, an oral pronouncement differs from a written order, the oral pronouncement governs. *Johnson v. State*, 627 So. 2d 114 (Fla. 1st DCA 1993); *Lester v. State*, 563 So. 2d 178, 179 (Fla. 5th DCA 1990). Any written conditions which conflict with the oral pronouncements, or which were not orally announced, must be stricken. *Cumbie v. State*, 597 So. 2d 946, 947 (Fla. 1st DCA 1992); *Tillman v. State*, 592 So. 2d 767, 768 (Fla. 2d DCA 1992).

Hence, Petitioner urges this Court to follow the standard enunciated by the First, Second and Fourth District Courts of Appeal and declare that any unannounced conditions subsequently imposed by a written order must be stricken.

Vasquez v. State, 665 So. 2d 339 (Fla. 4th DCA 1995); *Bartlett v. State*, 638 So. 2d 631 (Fla. 4th DCA 1994); *Truchario v. State*, 616 So. 2d 539 (Fla. 2d DCA 1993); *Cristobal v. State*, 598 So. 2d 325 (Fla. 1st DCA 1992).

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CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner urges this Court to respond to the certified question by declaring that a court must strike unannounced probation and community control conditions which later appear in a written sentence.

Respectfully submitted,

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By: Suzanne M. Froix
SUZANNE M. FROIX
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 16th day of April, 1996.

Suzanne M. Froix
SUZANNE M. FROIX
Assistant Public Defender

Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1996

CHARLES BURDO,	**	
Appellant,	**	
vs.	**	CASE NO. 94-2553
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL NO. 94-30063
Appellee.	**	

Opinion filed January 31, 1996.

An Appeal from the Circuit Court of Monroe County, Ruth Becker, Judge.

Bennett H. Brummer, Public Defender and Suzanne M. Froix, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Paul M. Gayle-Smith, Assistant Attorney General, for appellee.

Before GERSTEN, GODERICH and GREEN, JJ.

PER CURIAM.

The defendant, Charles Burdo, appeals from his orders of

community control and probation. We affirm, in part, and reverse, in part.

The defendant challenges the following two conditions contained in the orders of community control and probation: "(6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed or used," and "(13) You will maintain an hourly accounting on a daily log which you will submit to your Community Control Officer upon request." The defendant contends that these are "special conditions," and therefore, since the trial court improperly failed to orally pronounce them at the sentencing hearing, they must be stricken. We agree, in part.

In Hart v. State, 651 So. 2d 112, 113 (Fla. 2d DCA), review granted, 659 So. 2d 1089 (Fla. 1995), the Second District held that "the only 'general conditions' are those contained within the statutes." The Hart court further explained that although the trial courts have apparently mistakenly assumed that "general conditions" include all those contained in the approved probation order in rule 3.986, Florida Rules of Criminal Procedure, it has repeatedly held that those, not contained in the statutes, are still considered "special conditions" that must be orally pronounced. Hart, 659 So. 2d at 113. Like the Fourth and Fifth Districts, we adopt the Hart court's rationale, while we await the Supreme Court's answer to the question of great public importance that was certified in Hart:

DOES THE SUPREME COURT'S PROMULGATION OF THE FORM "ORDER OF PROBATION" IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.986 CONSTITUTE SUFFICIENT NOTICE TO PROBATIONERS OF CONDITIONS 1-11 SUCH THAT ORAL PRONOUNCEMENT OF THESE CONDITIONS BY THE TRIAL COURT IS UNNECESSARY?

Hart, 659 So. 2d at 113. See also, Vasquez v. State, 20 Fla. L. Weekly D2384, 2385 (Fla. 4th DCA Oct. 25, 1995); McClendon v. State, 659 So. 2d 718, 720 (Fla. 5th DCA 1995).

That portion of Condition (6) that prohibits the defendant from visiting places where certain substances are unlawfully sold, dispensed, or used "is valid as a more precise defining of conduct prohibited under section 948.03(1)(i), Florida Statutes (1991), which states as an accepted condition of probation that an offender may 'not associate with persons engaged in criminal activities.'" Tomlinson v. State, 645 So. 2d 1 (Fla. 2d DCA 1994). Because this is a general condition that is valid, it need not have been pronounced in open court. Tomlinson v. State, 645 So. 2d at 1. However, the remaining portion of the condition prohibiting the defendant from using intoxicants to excess is a special condition that is invalid if not announced in open court. Tomlinson v. State, 645 So. 2d at 1-2. With regard to Condition (13) that the defendant must maintain an hourly accounting of all activities on a daily log, this is a special condition that must also be orally announced in open court. Curry v. State, 656 So. 2d 521, 522 (Fla. 2d DCA 1995); Vinyard v. State, 586 So. 2d 1301, 1303 (Fla. 2d DCA 1991).

In the instant case, it is evident from the sentencing transcript that the trial court failed to orally pronounce the two special conditions in question. Therefore, as to Condition (6), we affirm that portion of the condition that prohibits the defendant from visiting places where certain substances are unlawfully sold, dispensed, or used. As to that portion of Condition (6), that prohibits the defendant from using intoxicants to excess and as to Condition (13), we reverse and remand for further proceedings consistent with Justice v. State, 658 So. 2d 1028 (Fla. 5th DCA), review granted, No. 86,264 (Fla. Dec. 6, 1995).

On remand, we adopt the rationale of Justice and "permit the trial court, if it so desires, to conduct a new sentencing hearing so that it may properly announce and impose any conditions that it feels appropriate." Justice, 658 So. 2d at 1030. Because we have adopted the rationale of Justice, we find ourselves in conflict with the First, Second, and Fourth Districts, that have consistently held that a written order containing unannounced conditions of probation must be amended to conform to the oral pronouncement of judgment and sentence by striking the unannounced conditions. Therefore, we certify the same question that was certified in Justice:

> 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?

Justice v. State, 658 So. 2d at 1034; contra, Vasquez v. State, 20 Fla. L. Weekly D2384 (Fla. 4th DCA Oct. 25, 1995); Bartlett v. State, 638 So. 2d 631 (Fla. 4th DCA 1994); Truchario v. State, 616 So. 2d 539 (Fla. 2d DCA 1993); Cristobal v. State, 598 So. 2d 325 (Fla. 1st DCA 1992).

Lastly, we strike the imposition of prosecution and investigative costs as a special condition of probation where the State failed to provide written documentation supporting those costs, where the trial court failed to recite the statutory authority for the imposition of those costs, and where the trial court failed to inquire into the defendant's ability to pay. § 939.01, Fla. Stat. (1993); Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995); Sutton v. State, 635 So. 2d 1032 (Fla. 2d DCA 1994); Blanco-Diaz v. State, 618 So. 2d 370 (Fla. 3d DCA 1993). On remand, this reversal is without prejudice to the reimposition of the costs orally pronounced by the trial court upon compliance with the proper procedures. Reyes v. State, 655 So. 2d at 114; Blanco-Diaz v. State, 618 So. 2d at 371.

Affirmed, in part; reversed and remanded, in part; and conflict certified.