IN THE SUPREME COURT OF FLORIDA

CASE NO. **87, 553**

CHARLES BURDO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FLORIDA, THIRD DISTRICT

(CERTIFIED CONFLICT)

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, CHARLES BURDO, was the defendant in the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida. The Respondent, the STATE OF FLORIDA, was the prosecution in the lower court.

In this brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the defendant. The symbols "R" and "T" will be used to refer to the portions of the record and trial transcript respectively. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The defendant was charged by information with driving under the influence (Count I), driving while license suspended (Count II), in violation of Florida Statutes 316.193 and 322.34. (R. 2-3).

On September 28, 1994, prior to sentencing, the defendant acknowledged, in writing his receipt of written notice of all conditions of probation including the special conditions of probation. (S.R. 1,2). The jury found the defendant guilty on both counts. (T. 173).

The sentencing hearing commenced on September 29, 1994. (T. 178-195). At the hearing, the trial judge specifically noted that the defendant indicated that he understood and agreed to comply with the conditions noted in the community control order. (T. 191). The conditions of community control which the State supplemented the record on appeal with (S.R. 1,2) specifically included the special conditions of probation.

At the sentencing hearing the trial court sentenced the defendant to twenty-four (24) months of community control followed by three years of probation for driving under the influence. (T. 191).

The court imposed a $2,500 fine, and prosecution and investigation costs in the amounts of $200.00 and $50.00. (T. 193). The court permanently revoked the defendant's driver's license. The defendant was ordered to successfully complete the multi-offender DUI school and 200 hours of community service. Additionally, the defendant was sentenced to 364 days of incarceration and was ordered to undergo

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 all of those conditions that the defendant had agreed to prior to sentencing (S.R. 1,2) and acknowledged at sentencing (T. 191) and those conditions noted at the sentencing hearing. (R. 12-13).

The defendant raised the following argument on appeal.

> THE TRIAL COURT ERRED IN IMPOSING SPECIAL CONDITIONS OF COMMUNITY CONTROL AND PROBATION WITHOUT ORAL PRONOUNCEMENT AND IN IMPOSING COSTS OF PROSECUTION, AND INVESTIGATION WITHOUT ABIDING BY THE REQUIREMENTS ENUNCIATED IN §939.01, FLORIDA STATUTES.

The Third District Court of Appeal issued a per curiam opinion on January 31, 1996. The court noted that part of condition (6) listed in the orders of community control and probation stated that the defendant was prohibited from visiting places where certain substance were unlawfully sold, dispensed or use. The court contended that that portion of condition (6) was a valid general condition that did not have to be pronounced in open court. The court found the remaining portion of the condition prohibiting the defendant from using intoxicants to excess to be a special condition which was invalid as it was not announced in open court. The court further found that condition (13) that the defendant must maintain an hourly accounting of all activities on a daily log, was also a special condition that should have been orally announced in open court.

The court held that the sentencing transcript made it clear that the trial court

failed to orally pronounce the two special conditions in question. The court, as to condition (6) affirmed that portion of the condition that prohibited the defendant from visiting places where certain substances were unlawfully sold, dispensed or used. As to that portion of condition (6) that prohibited the defendant from using intoxicants to excess and as to condition (13) the court reversed and remanded for further proceedings consistent with Justice v. State, 658 So. 2d 1028 (Fla. 5th DCA), rev. 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 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 THE ARGUMENT

The Third District Court of Appeal erred in finding that portion of condition (6) prohibiting the defendant from using intoxicants to excess to be a special condition which had to be articulated in court. Such provision is found in the order of probation form, Florida Rule of Criminal Procedure 3.986(e). This Court has specifically held that defendants facing the imposition of probation are on constructive notice of conditions one through eleven set forth in the form for order of probation which is contained in the rules of criminal procedure.

The defendant indicated that he understood and agreed to comply with the special conditions noted in the community control order (T. 191), which included condition number (13). The defendant and his attorney had actual notice of the special conditions of probation and had ample opportunity to object to the conditions. The defendant, instead fully accepted the special conditions of probation.

ARGUMENT

THE SPECIAL CONDITIONS OF COMMUNITY CONTROL AND PROBATION IMPOSED BY THE TRIAL COURT WITHOUT ORAL PRONOUNCEMENT NEED NOT BE STRICKEN WHERE THE DEFENDANT AGREED TO THE SPECIAL CONDITION (13), AND INFORMED THE COURT OF HIS ACKNOWLEDGMENT AND ACCEPTANCE OF THE SPECIAL CONDITION. CONDITION (6) DID NOT HAVE TO BE ORALLY PRONOUNCED AS IT IS A CONDITION LISTED AS CONDITION NUMBER 7 OF THE FORM FOR ORDER OF PROBATION. FLORIDA RULE OF CRIMINAL PROCEDURE 3.986(e).

The record is clear that the trial court provided the defendant, prior to sentencing, the conditions of community control. (S.R. 1,2). The defendant signed and dated receipt of the conditions which included the special conditions. At the sentencing hearing, itself, the defendant informed the court of his acknowledgment and acceptance of the special conditions. (T. 191). At sentencing, the defendant failed to make a contemporaneous objection to the special conditions. Therefore, the defendant actually waived any objection he may have had to said conditions. Larson v. State, 572 So. 2d 1368, 1371 (Fla. 1991). Olvey v. State, 609 So. 2d 640 (Fla. 2d DCA 1992)(on rehearing en banc).

The State would respectfully submit that it doesn't matter that the trial judge did not specifically state special condition number thirteen where the trial judge instead noted that the defendant indicated that he understood and agreed to comply with the special conditions noted in the community control order. (T. 191). In Turchario v. State, 616 So. 2d 539 (Fla. 2d DCA 1993) the Second District Court of Appeal reversed a written order of probation as the trial court imposed special conditions of

probation in the written order which were not orally pronounced at sentencing. The court, however, noted as follows:

> We note, however, that in this case had the trial court stated at sentencing it was imposing the same conditions as before, the defendant and his attorney would be deemed to be on notice of the previously imposed special conditions, which would then be incorporated by reference with the burden on the defendant to object to those conditions.

616 So. 2d at 540.

In the instant case the defendant and his attorney had actual written notice of the special condition of probation prior to sentencing. (S.R. 1,2). The defendant signed an acknowledgment of his receipt of said notice. (S.R. 1,2). He, acknowledged to the court his acceptance of the special condition of probation. (T. 191). Clearly, as in Turchario, the defendant should be deemed to have been on notice of the special condition. The defendant had the burden to object to the conditions. The defendant admitted to the trial court that he understood and agreed to comply with the conditions noted on the community control order. (T. 191). The defendant should be presumed to have read and understood the conditions because he signed an acknowledgment stating so and because he was represented by counsel who is presumed effective. The State would submit that the defendant had the opportunity to object to the imposition of the special condition of probation but failed to do so. As such, the conditions were not "unannounced," they were fully contemplated and agreed to and as such need not be stricken. Due process concerns are satisfied because the defendant knew of the special condition and had the

opportunity to object at sentencing. See Justice v. State, 658 So. 2d 1028, 1030 (Fla. 5th DCA) rev. granted, No. 86,264 (Fla. Dec. 6, 1995)(The imposition of unannounced conditions in the written judgment does not 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).

It has been well-settled that conditions of probation which are authorized by statute, specifically including conditions of probation enumerated in Section 948.03 Florida Statutes (1993), may be included in a written order without being orally pronounced at sentencing. Vasquez v. State, 663 So. 2d 1343 (Fla. 4th DCA 1995). The legal rationale for this exception to the general rule has been stated to be that statutes provide constructive notice of their subject matter and that such notice, together with the opportunity to be heard and raise any objections at a sentencing hearing, is sufficient to satisfy the requirements of procedural due process. State v. Beasley, 580 So. 2d 139 (Fla. 1991). Clearly, the rationale for oral pronouncement of special conditions of probation is not applicable here. Here, the defendant and his attorney had notice of the special conditions of probation. The defendant had that opportunity to be heard and raise any objections at the sentencing hearing. The requirements of procedural due process were therefore, satisfied. See also State v. Hall, 21 F.L.W. S77, 78 (Fla. February 22, 1996). citing to Olvey v. State, 609 So. 2d 640, 643 (Fla. 2d DCA 1992), "when a trial court sufficiently apprises the defendant of the 'substance of each special condition' so that the defendant has the

opportunity to object 'to any condition which the defendant believes is inappropriate'. The minimum requirements of due process are satisfied). In State v. Hall, this Court agreed with the Second District's statement on the substance of an "open court pronouncement." in Olvey, as follows:

> When special conditions of probation are imposed for the first time, these conditions can be orally explained using language which is different from the language in the order of probation. So long as the oral pronouncement is sufficient to place the defendant on notice of the general substance of each special condition and gives the defendant the opportunity to object, the minimum requirements of due process are satisfied.

State v. Hall, 21 F.L.W. at 578 note 4.

The State would again submit that the defendant here had sufficient notice to permit an opportunity to object. Interestingly, in State v. Hall, this Court considered that same portion of condition (6) that prohibits the defendant from using intoxicants to excess. This Court referred to Florida Rule of Criminal Procedure 3.986(e) as the section which delineates conditions of probation. A review of that rule reveals that the aforementioned portion of condition (6) herein appears in condition 7. In State v. Hall, this Court answered the following certified question in the affirmative:

> 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?

As such, it is clear that the trial court did not have to orally pronounce condition (6) herein as it is part of a general probation condition found in the order of probation

form, Florida Rule of Criminal Procedure 3.986(e). This Court specifically held as follows:

> Once defendants are charged and subject to the controlling terms of the rules of criminal procedure, we think the publication of general terms of probation in the rules provides all defendant's with sufficient notice to permit an opportunity to object if probation is imposed. The rules provide the same type of notice as the probation conditions set forth in the Florida Statutes. See, e.g., § § 948.03-.034, Fla. Stat. (1993). Consistent with the purpose and policy of Beasley, we hold that all defendant's facing the imposition of probation are on constructive notice of conditions one through eleven set forth in the form for order of probation, which is contained in the rules of criminal procedures.

21 F.L.W. at 578 (citation omitted).

The State asks this Honorable Court to answer the certified question herein in the negative. This Court should not strike special condition (13) as the defendant had proper notice of the special condition and ample opportunity to object. As to condition number (6) it is clear that such condition is enumerated in the form for order of probation. As such, the defendant was on constructive notice of such condition besides actual notice having agreed to such condition and acknowledged such in court. (T. 191).

CONCLUSION

Based on the foregoing facts, authorities and arguments, the State would respectfully submit that this Court should respond to the certified question by declaring that a court need not strike a probation and community control condition which the defendant had notice of such condition and ample opportunity to object to its imposition but failed to do so. This Court should further reiterate that a condition enumerated in the form for order of probation need not be orally pronounced.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** was mailed to **SUZANNE M. FROIX,** Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 2nd day of May, 1996.

ROBERTA G. MANDEL
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