IN THE SUPREME COURT OF FLORIDA

THOMAS W. FREY, :

Petitioner, :

vs. : Case No. 88,924

STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN C. FISHER
Assistant Public Defender
FLORIDA BAR NUMBER 999865

Public Defender's Office
Polk County Courthouse
P. 0. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

The record is not numbered sequentially. The portion of the record containing documents relevant to the appeal will be designated by the letter "R." The portion of the record on appeal which contains excerpts of the trial transcript will be designated by the letter "T." The supplemental record on appeal, containing portions of the trial transcript which were not originally ordered, will be designated by the letters "Tr." The transcript of the sentencing proceeding will be designated by the letter "S."

STATEMENT OF THE CASE AND FACTS

On August 16, 1996, the Second District Court of Appeal affirmed Mr. Frey's convictions for resisting arrest with violence and aggravated battery on a law enforcement officer. Frey v. State, 21 Fla. L. Weekly D1883 (Fla. 2d DCA August 16, 1996). The decision certified a question of great public importance:

> IS THE OFFENSE OF RESISTING ARREST WITH VIOLENCE A SPECIFIC INTENT CRIME TO WHICH THE DEFENSE OF VOLUNTARY INTOXICATION APPLIES?

Id. at 1883. The court also acknowledged conflict with Gonzales v. State, 488 So. 2d 610 (Fla. 4th DCA 1986), in which the court specifically held that resisting arrest with violence is a specific intent crime and failure to give the requested instruction to the jury was reversible error. Id. at 1883. The court held it would have followed Gonzales and Colson v. State, 73 So. 2d 862 (Fla. 1954) (whether defendant was so drunk as to be incapable of forming requisite intent for resisting arrest with violence presented question for jury), but felt compelled to affirm the conviction based on language of Linehan v. State, 476 So. 2d 1262 (Fla. 1985). Id. at 1883.

On May 16, 1994, the State Attorney for the Twelfth Judicial Circuit in Manatee County filed an information charging Thomas Frey with resisting arrest with violence in violation of section 843.01, Florida Statutes (1993), and aggravated battery on a law enforcement officer in violation of sections 784.045 and 784.07, Florida Statutes (1993), occurring on April 20, 1994 (R6-7).

On September 29 and 30, 1994, a jury trial was held before the Honorable Paul E. Logan (Tl-250; Trl-77). The prosecutor asserted in opening statements that Mr. Frey was under the influence of alcohol when stopped by Deputy Britt (T18-19). Defense counsel asserted in opening statements that Mr. Frey was extremely intoxicated (T26).

Deputy Britt testified that on April 20, 1994, he was on uniformed patrol duty on the 7:00 P.M. to 7:00 A.M. shift (Tr6, 29). Britt had completed four months training at the department academy, four months field training, and had worked on his own as a deputy for one month (Tr4-5, 29, 68-69). He was six feet tall and weighed about 170 pounds (Tr29). At 11:30 P.M., as he drove past Earl's Trailer Park, he saw a man run into the trailer park upon seeing the patrol car (Tr7-8, 29-30).

Britt made a U-turn and drove into the trailer park (Tr8-9, 30). Britt saw the running man behind some trees (Tr10, 31). In court, Britt identified Mr. Frey as the man he saw (Tr16). Britt stepped out of the car and asked Mr. Frey what he was doing (Tr10, 31). Mr. Frey said he was doing nothing wrong and began to run (Tr10, 31; T48, 56). Britt followed Mr. Frey in his car for 20 or 30 yards, and told him to stop (Tr11, 31-32; T48, 56). Mr. Frey stopped in a well-lit area (Trll, 32-33, 71; T49, 54-56).

Britt got out of his car, asked Mr. Frey for his identification, and asked where he lived, where he had been, and where he was going (Trll-12, 33-35). Mr. Frey was 5'2" tall and weighed 160 pounds (Tr64). Britt kept his car door between them (Tr13, 33).

Mr. Frey did not answer Britt's questions; he babbled and slurred his speech; and he was unable to stand still (Tr34-36, 39; T57). Mr. Frey had been drinking and Britt could smell alcohol on him (Tr12, 31, 39). Britt could see Mr. Frey was unarmed and did not search him (Tr36-37). Mr. Frey handed Britt some identification which indicated he lived near the trailer park (Tr12, 33; T50-51, 57, 62). Britt ran a radio check, using his lapel microphone (Tr13, 35-36). Britt was advised by radio of a warrant for Mr. Frey's arrest, which Mr. Frey said had been taken care of (Tr14, 37-40, 72).

Britt told Mr. Frey he was under arrest and was going to jail, then ordered him to place his hands on the car (Tr14-15, 38). Mr. Frey did not comply and said "I'm not going to jail." (Tr15, 38). Britt stepped around the car door, took out his handcuffs, and grabbed Mr. Frey's hand (Tr15, 40). Mr. Frey grabbed the Britt's throat with one hand (Tr16, 40-41, 43; T51-52, 57). Britt dropped the handcuffs (Tr17, 41-42, 72). Britt called for backup on the lapel microphone while fending off Mr. Frey (Tr17, 41-42).

Mr. Frey grabbed Britt's neck with both hands (Tr17, 42-43; T151-152). Mr. Frey repeatedly said "you ain't bad enough" or said Britt was not big enough (Tr18; T151-152). Britt kicked Mr. Frey in the chest and groin and punched him in the face in an unsuccessful attempt to break free (Tr18, 43-44, 47). Mr. Frey continued to choke him (Tr19). Britt was unable to reach his baton (Tr19-20, 45-46). Britt pulled his Baretta .9 millimeter (Tr20, 44, 46). He was unable to strike Mr. Frey with the gun (Tr20, 44-45, 47).

Britt was losing consciousness and was starting to fall (Tr21, 48-[illegible]. Britt shot Mr. Frey's legs three times (Tr21, 48; T51-52, 57-58, 62). Mr. Frey did not let go until the third shot (Tr21, 48). Mr. Frey fell to the ground (Tr21, 48; T52, 57-58, 61). The struggle lasted about 30 seconds (Tr27, 49, 61; T143-145). Britt did not warn Mr. Frey that he would shoot him (Tr53; T45).

Britt leaned on the rear of the car for a moment to recover, then tried to secure Mr. Frey (Tr22, 49; T58). Britt then called for assistance on his lapel microphone (Tr22, 49-50 65-66; T58). Mr. Frey was laying on his stomach and was trying to get up (Tr23, 50). Britt held one of Mr. Frey's arms behind his back and held his head down by his hair while he continued to struggle (Tr23-24, 50; T53, 59). Britt called for E.M.S. (Tr53, 67). A woman approached the scene and handed the handcuffs to Britt (Tr23, 51; T53-54, 60, 84).

Other officers arrived on the scene (Tr24, 51; T34-35, 37-39, 61). Britt held Mr. Frey face down on the ground (T35, 39). There was blood on Mr. Frey's legs and on the ground (T39). Mr. Frey continued to struggle (Tr52; T35, 39). Britt complied with orders to handcuff Mr. Frey (Tr23, 51; T36-37, 39). Britt told a sergeant that he kicked and punched Mr. Frey to no avail, then shot him (T39-41). E.M.S. arrived and treated Mr. Frey (T43-44). Other officers, including Britt's father and brother arrived (Tr42, 51, 53-54; T66-67, 69-70, 78-79, 82-83). Britt's father and brother took Britt to a hospital for treatment (Tr24, 26, 28, 54-56).

An emergency room physician testified that he treated Mr. Frey for two gun shot wounds to his left leg and a gun shot wound to his right leg (T121-124). Mr. Frey had a blood alcohol level of 0.388, four to four and one-half times the legal limit for driving (T125-126). When persons have a high level of alcohol, they may suffer a blackout, which means they can do something and not remember it later (T127). No drugs were found in a drug screen of Mr. Frey (T125-127). A detective, who was assigned to go to the hospital to take down any statement of Mr. Frey, tried unsuccessfully to talk with Mr. Frey, who was visibly upset and smelled of alcohol (T85-87).

The defense moved for judgment of acquittal at the close of the State's case (T93-119). The motion was granted to the extent that the charge of aggravated battery on a law enforcement officer became a charge of aggravated battery (T119). The renewed motion for judgment of acquittal was denied (T154-156).

In the charge conference, the trial judge stated that he had never before dealt with the voluntary intoxication defense, but he understood the defense applied to specific intent crimes (T157). The trial judge noted that use of alcohol was in evidence (T161). Defense counsel stated that aggravated battery and resisting arrest with violence were specific intent crimes, but resisting arrest without violence and battery were general intent crimes (T162-164). The prosecutor initially agreed that resisting arrest with violence was a specific intent crime (T163-164). After a recess, the prosecutor stated that he agreed that voluntary intoxication was a

defense to aggravated battery, but the defense did not apply to resisting arrest with violence, resisting arrest without violence, or battery (T168-174). The trial judge, relying on dicta from Linehan v. State, 476 So. 2d 1262 (Fla. 1985), held that the voluntary intoxication instruction did not apply to the charge of resisting arrest with violence, but did apply to aggravated battery and battery (T171-172). The defense took exception to denying the defense to the charge of resisting arrest with violence (T171).

Defense counsel argued in closing that the deputy acted inappropriately and used excessive force, there was no evidence that Mr. Frey threatened the deputy, and there was insufficient evidence of great bodily harm (T191-209). Defense counsel argued the following concerning Mr. Frey's intoxication:

> And the deputy said that Tom was pretty much babbling at this point. He's having to, about having to go to court, and he was asking him some very basic questions, such as where have you been, what are you doing, where do you live.
>
> But Tom, nothing was registering on him. He either wasn't listening or wasn't able to answer his questions.
>
> And Deputy Britt says at this point he had his guard up because Tom was acting real funny, squirming around, and he described it as froggy. But he didn't do a weapons pat down at this point. And I believe in his testimony and in his deposition he said he could tell that Tom didn't have any kind of gun or weapon, and that's why he didn't do a weapons pat down.
>
> And he indicated that Tom was thick tongued and had slurred speech, and in Deputy Britt's own words he said he was just everywhere, just out of control.

(T195). Defense counsel also argued that Mr. Frey was so drunk that he could not form any specific intent (T206-207).

The prosecutor stated in closing that although Mr. Frey had a .388 blood alcohol level, his actions showed he had the requisite intent (T211-215, 227-228). The prosecutor also told the jury that voluntary intoxication is a defense to aggravated battery, but not a defense to resisting arrest with violence (T225-226).

The trial judge initially instructed the jury that the voluntary intoxication defense applied to both aggravated battery and resisting arrest with violence, then told the jury that he misread the instructions (T232-233). He then specifically instructed the jury that the voluntary intoxication defense applied to aggravated battery and battery, but voluntary intoxication is not a defense to resisting arrest with violence (R42; T233-234). Defense counsel renewed all motions and renewed the objection to denying the voluntary intoxication defense to the charge of resisting arrest with violence (T241).

The jury found Mr. Frey guilty as charged of resisting arrest with violence and guilty of the lesser included offense of battery (R37; T242). Mr. Frey was adjudicated guilty of both offenses (R55). He was sentenced to thirty months imprisonment to be followed by two years probation on the resisting arrest with violence count. He was sentenced to time served for battery (R54, 57-60; S20-21).

The court commented on Mr. Frey's extreme intoxication at the time of the offense. The trial court noted that it had seen one person in three or four years with a higher blood alcohol content than Mr. Frey and "the doctors were amazed she was not dead at that

point." (S19). The trial court also told Mr. Frey, "And as drunk as you were that night, a blood alcohol like that -- what is it law enforcement usually tells me? That it was .34 or higher. They usually take them directly to the hospital because law enforcement's training and E.M.S.'s training is, apparently for that rate, you're going to die on them. And I'm worried about that." (S22). The court imposed conditions of probation which included entering and successfully completing a residential alcohol program at Bay Pines, "completion of aftercare counselling or therapy after that as directed by his probation officer," and other conditions relating to the use of intoxicants and random testing (S21; R67-68).

SUMMARY OF THE ARGUMENT

The trial court erred in denying the defense request for a jury instruction on voluntary intoxication as to the charge of resisting arrest with violence. The voluntary intoxication defense was an issue in the case. Evidence produced by both the State and the defense established that Petitioner was extremely intoxicated. The voluntary intoxication instruction should be given on the charge of resisting arrest, a specific intent crime, where there was an evidentiary basis. The trial court not only denied the requested instruction, but specifically and erroneously instructed the jury that voluntary intoxication is not a defense to resisting arrest with violence. Petitioner's conviction for resisting arrest with violence should be reversed.

ARGUMENT

ISSUE

REVERSAL FOR A NEW TRIAL IS REQUIRED BY THE TRIAL COURT INSTRUCTING THE JURY THAT VOLUNTARY INTOXICATION IS NOT A DEFENSE TO THE CHARGE OF RESISTING ARREST WITH VIOLENCE.

Mr. Frey was extremely intoxicated at the time of the incident. Deputy Britt testified that Mr. Frey did not answer Britt's questions, he was babbling, his speech was slurred, and he could not stand still (Tr34-35, 39). Deputy Britt stated that Mr. Frey did not act right, that he had been drinking and Britt could smell alcohol on him (Tr12, 31, 36, 39). A resident of the trailer park who witnessed the onset of the encounter between Mr. Frey and Deputy Britt testified he believed Mr. Frey was drunk because he swayed and spoke in a loud, slurred and unintelligible voice (T49-51, 56-57, 62). A detective testified that at the hospital he tried unsuccessfully to talk with Mr. Frey who was visibly upset and smelled of alcohol (T87). An emergency physician testified that Mr. Frey had a blood alcohol level of 0.388, four to four and one half times the legal limit for driving (T125-126). The doctor testified that when persons have a high level of alcohol, they may suffer a blackout, which means they can do something and not remember it later (T127).

At the sentencing proceeding, the trial judge expressed concern about the extreme intoxication of Mr. Frey at the time of the incident. The trial court noted that it had seen one person in

three or four years with a higher blood alcohol content than Mr. Frey and "the doctors were amazed she was not dead at that point," (S19). The trial court also told Mr. Frey, "And as drunk as you were that night, a blood alcohol like that -- what is it law enforcement usually tells me? That it was .34 or higher. They usually take them directly to the hospital because law enforcement's training and E.M.S.'s training is, apparently for that rate, you're going to die on them. And I'm worried about that." (S22).

Voluntary intoxication is a defense to specific intent crimes. Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985); Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Gardner, 480 So. 2d at 92 (evidence that defendant drank three or four beers and smoked one or two high potency marijuana cigarettes in the morning, then shared two or three quarts of beer and more high potency marijuana cigarettes with his accomplices before committing the crimes required the jury to be instructed on voluntary intoxication).

Resisting arrest with violence is a specific intent crime. Colson v. State, 73 So. 2d 862 (Fla. 1954) (Appellant asserted "he was so drunk at the time he did not know what he was doing and, being so, the necessary element of 'knowingly and willfully' resisting the sheriff in the performance of his duty was not present."); Gonzales v. State, 488 So. 2d 610 (Fla. 4th DCA 1986) ("resisting arrest with violence is a specific intent crime."); Miller v. State, 636 So. 2d 144, 151 (Fla. 1st DCA 1994) ("Like

battery on a law enforcement officer, resisting arrest with violence is a specific intent crime."). Voluntary intoxication is a defense to resisting arrest with violence. Gonzales, 488 So. 2d at 611; Colson, 73 So. 2d at 862 ("Whether or not defendant had enough left to know what he was doing was a question for the jury'").

During the charge conference, the trial judge stated that he had never dealt with the voluntary intoxication defense, but he understood the defense applied to specific intent crimes (T157). The trial judge noted that use of alcohol was in evidence (T161). Defense counsel stated that resisting arrest with violence was a specific intent crime (T162-164). The trial judge held that the voluntary intoxication instruction did not apply to the charge of resisting arrest with violence (T171-172). The defense took exception to denying the defense to the charge of resisting arrest with violence (T171). After the jury instructions were read, the defense renewed the objection to the denial of the voluntary intoxication defense to the charge of resisting arrest with violence (T241).

In Gonzales, the defendant had been charged with resisting arrest with violence and other offenses. The court held that "[t]he trial court committed reversible error by failing to give the requested instruction to the jury regarding the effect of voluntary intoxication on the defendant's ability to form a specific intent." Gonzales, 488 So. 2d at 611. See also Brown v. State, 614 So. 2d 12 (Fla. 1st DCA 1993) ("We reverse appellant's

convictions and sentences for battery on a law enforcement officer and resisting arrest with violence, because the trial court improperly limited voir dire of jury venire relating to the defendant's anticipated voluntary intoxication defense.").

The prosecutor initially agreed that resisting arrest with violence was a specific intent crime, but later asserted that the defense did not apply to resisting arrest with violence because of Williams v. State, 250 So. 2d 11 (Fla. 3d DCA 1971), as cited by Linehan, 476 So. 2d at 1264 (T163-164, 168-174). The trial judge, relying on this language from Linehan, 476 So. 2d at 1264, held that the voluntary intoxication instruction did not apply to the charge of resisting arrest with violence (T171-172).

In Linehan, 476 So. 2d at 1264-1265, the Court held that the voluntary intoxication defense applied to specific intent crimes, but not to the general intent crime of arson. The Court listed among examples of general intent crimes in which Florida courts had rejected the voluntary intoxication defense -- "Williams v. State, 250 So. 2d 11 (Fla. 3d DCA 1971) (violence while resisting arrest)." Linehan, 476 So. 2d at 1264.

In Williams v. State, 250 So. 2d 11 (Fla. 3d DCA 1971), the court did not state that violence while resisting arrest was a general intent crime. The court also did not reject the voluntary intoxication defense as a matter for the jury. What the court did say about the resisting arrest charge follows:

> The appellant was found guilty in a non-jury trial of (1) larceny of an automobile, and (2) resisting arrest with violence.

> Appellant's argument that because he was intoxicated he ought not be held to account for his violence in resisting arrest is without basis in the law. See Colson v. State, Fla.1954, 73 So. 2d 862.

Williams, 250 So. 2d at 12. The Court in Colson v. State, 73 So. 2d 862 (Fla. 1954), held that whether the defendant was so drunk as to be unable to form the requisite intent on the charge of "knowing and willfully" resisting a sheriff in the performance of his duty was a question for the jury and that the jury resolved it against him.

In the present case, the Second District Court of Appeal held it would have followed Gonzales and Colson, but felt compelled to affirm the conviction based on language of Linehan. Frey v. State, 21 Fla. L. Weekly D1883 (Fla. 2d DCA August 16, 1996). The Second District Court of Appeal noted that "[t]he supreme court has never receded from" Colson. Id. at D1883. The Second District Court of Appeal noted that the Linehan Court stated that Williams held voluntary intoxication was not a defense to resisting arrest without violence, but additionally noted that Williams is "equivocal on the issue." Id. at D1883.

The dicta of Linehan, 476 So. 2d at 1264, concerning Williams, must have been a slip of the pen. Resisting arrest with violence is a specific intent crime and a voluntary intoxication instruction should be given in this case where it was the theory of defense and there was an evidentiary basis for the instruction. The prejudice from the trial court's ruling was increased by the prosecutor's argument to the jury that voluntary intoxication is not a defense

to resisting arrest with violence (T225-226). The trial judge's difficulties with reading the jury instructions also stressed that the jury was not to apply the voluntary intoxication defense to the charge of resisting arrest with violence (R42; T232-234). Mr. Frey's conviction for resisting arrest with violence should be reversed.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

APPENDIX

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and C.J., natural mother, Appellees. 2nd District. Case No. 94-03361. Opinion filed August 16, 1996. Appeal from the Circuit Court for Pinellas County; George W. Greer, Judge. counsel: Ron Smith, Safety Harbor, for Appellant. C. Bette Wirnbish, St. Petersburg, for Appellee Department of Health & Rehabilitative Services. John E. Dubrule, St. Petersburg, for Appellee C.J.

(DANAHY, Acting Chief Judge.) The father of a seven-year-old child has filed a notice of appeal seeking reversal of an order returning the child to the custody of her mother.

The child was declared to be a dependent child on March 23, 1993. Thus the trial court retains jurisdiction until the child reaches eighteen years of age, unless jurisdiction is relinquished by order of the trial court. § 39.40(2), Fla. Stat. (1993). The trial court has not relinquished jurisdiction in this case.

The nonfinal order is not an appealable nonfinal order under Florida Rule of Civil Procedure 9.130(3). However, we believe that such an order may be reviewed by writ of certiorari. We treat Father's notice of appeal as a petition for writ of certiorari. Fla. R. App. P. 9.040(c). Finding no departure from the essential requirements of law, we deny the petition.

Petition denied. (PATTERSON and ALTENBERND, JJ., Concur.)

* * *

Criminal law--Trial court jurisdiction to entertain second motion for post conviction relief while appeal from prior motion pending

DAVID HUFFMAN, Appellant(s), v. STATE OF FLORIDA, Appellee(s). 2nd District. Case No. 96-01595. August 15, 1996.

[Original Oninion at 2 1 Fla. L. Weekly D 1664c]

BY ORDER OF THE COURT:

Upon the court's own motion, the opinion in this case dated July 19, 1996, is withdrawn pending further review.

* * *

Criminal law—Trial court jurisdiction to rule on motion to correct sentence while direct appeal pending

BRIAN ANTHONY CARTER, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District, Case No. 96-01035. July 9, 1996.

[Original Opinion at 21 Fla. L. Weekly D1459a]

BY ORDER OF THE COURT:

Upon the court's own motion, the opinion in this case dated June 19, 1996, is withdrawn pending further review.

* * *

Criminal bw-Resisting arrest with violcncc-No error to deny request that jury bc instructed on defense of voluntary intoxication—Question certified as to whether offense of resisting arrest with violence is a specific intent crime to which the defense of voluntary intoxication applies-Probation--Conditions of probation listed in order of probation form not required to be orally pronounced—General conditions of probation not required to be orally pronounced

THOMAS W. FREY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 94-04405. Opinion filed August 16, 1996. Appeal from the Circuit Court for Manatee County: Paul E. Logan, Judge. Counsel: James Marion Moorman, Public Defender. and John C. Fisher, Assistant Public Defender, Barrow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ann P. Corcoran, Assistant Attorney General, Tampa, for Appellee.

(DANAHY, Acting Chief Judge.) The state charged the appellant with aggravated battery on a law enforcement officer (Count I) and resisting arrest with violence (Count II). The offenses were alleged to have occurred on April 20, 1994.

A jury found the appellant guilty of the lesser included offense of battery on Count I and guilty as charged of resisting arrest with violence on Count II. The trial court sentenced the appellant to time served on Count I and to thirty months' imprisonment to be followed by two years' probation on Count II.

The appellant asserts two issues on appeal. First, he argues that the trial court erred in denying his request that the jury be instructed on the application of the voluntary intoxication defense to the charge of resisting arrest with violence. We affirm on this issue but certify the question. Second, the appellant argues that the trial court erred in imposing certain probation conditions. We find no error and affirm on the second issue.

The answer to the first issue raised by the appellant depends on whether resisting arrest with violence is considered a specific intent crime or a general intent crime. *The* voluntary intoxication defense applies only to specific intent crimes. *Linehan* v. *State*, 476 So. 2d 1262 (Fla. 1985).

In the early case of *Colson v. State*, *73 So.* 2d 862 (Fla. 1954), the defendant was charged with knowingly and willfully resisting the sheriff. The supreme court held that evidence as to whether the defendant was so drunk as to bc incapable of forming the requisite intent presented a question for the jury, The supreme court has never receded from that opinion.

However, in *Linehan*, the court noted that Florida courts have rejected the voluntary Intoxication defense "in the following cases" involving general intent crimes. One of the cases listed in this category was *Williams* v. *State*, 250 So. 2d 11 (Fla. 3d DCA 1971), which the court described as a case involving violence while resisting arrest. ***Williams*** actually is equivocal on the issue. The court said in that case:

> Appellant's argument that because he was intoxicated he ought not be held to account for his violence in resisting arrest is without basis in the law. *See Colson v. State*, Fla. 1954, 73 So. 2d **862.**

***Id.* at 12.**

In 1986 the Fourth District Court of Appeal specifically held that resisting an arrest with violence is a speci ficintent crime, citing *Colson*. The court further held that the trial court committed rcvcrsiblc error by failing to give the requested instruction to the jury regarding the effect of voluntary intoxication on the defendant's ability to form a specific intent. Gonzales *v.* Safe, 488 So. 2d 610 (Fla. 4th DCA 1986).

Wcrc it not for the supreme court's remarks in *Linehan* concerning the *Williams* case, WC would rely on ***Colson*** and Gonzales and reverse. Howcvcr, WC must give due consideration to *Linehan*. Thercforc, we affirm the trial court's decision denying the defense request that the jury be instructed on the application of the voluntary intoxication defense to the charge of resisting arrest with violence.

Bccausc our holding is in conflict with ***Gonzales*** and addresses a question of great public importance, we certify the following question to the supreme court:

> IS THE OFFENSE OF RESISTING ARREST WITH VIOLENCE A SPECIFIC INTENT CRIME TO WHICH THE DEFENSE OF VOLUNTARY INTOXICATION APPLIES?

The appellant's second issue on appeal concerns four conditions of his probation which were not orally pronounced. The appellant argues that because the conditions were npt orally pronounced they must be stricken. The state appropriately responds by pointing out that the conditions listed as (4), (7), and (8) arc among the eleven standard or general conditions of probation listed in the order of probation form added to Florida Rule of Criminal Procedure 3.986. The supreme court in *State* V. *Hart* 668 So. 2d 589 (Fla. 1996), ruled that the listing of those conditions in the order form provides constructive notice to a defendant so as to permit an opportunity to object if probation is imposed; therefore, oral pronouncement is not required.

The condition of probation numbered (10) is also a general condition of probation and need not bc orally pronounced. See § 948.03(1)(k)(1), Fla. Stat. (Supp. ***1994); Gilchrisr v. Stare. 674* So. 2d 847** (Fla. 2d DCA 1996).

Affirmed; question certified. (PATTERSON and ALTENBERND, JJ., Concur.)

* * *

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ann P. Corcoran, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of October, 1996.

Respectfully submitted,

JOHN C. FISHER
Assistant Public Defender
Florida Bar Number 999865
P. 0. Box 9000 - Drawer PD
Bartow, FL 33831

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

/jcf