

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC Case No. 91,848  
2d DCA Case No. 97-00981

ROBERT ALLEN CASTERLINE,

Respondent.

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

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, will be referred to as "Petitioner." Respondent, Robert Allen Casterline, will be referred to as "Respondent."

The instant case is an appeal from the trial court's denial of Respondent's motion for post-conviction relief. Petitioner will cite to the relevant exhibits and transcripts in the record on appeal according to the attached exhibit list.

The opinion of the Second District Court of Appeal is reported at Casterline v. State, 22 Fla. L. Weekly D2330 (Fla. 2d DCA Oct. 3, 1997).

STATEMENT OF THE CASE AND FACTS

On September 17, 1984, Respondent pled guilty to two counts of sexual performance by a child and was placed on probation for fifteen years. (Exh. 001). On July 17, 1991, an affidavit of violation of probation was filed alleging three violations of Respondent's probation, including a violation of condition 8, failure to follow the probation officer's instructions to have no contact with minor children. (Exh. 002).

On August 8, 1991, the trial court conducted a revocation hearing and orally stated that he found Respondent not guilty of violating his probation. (Exh. 003). Respondent had other charges pending at the time of his revocation hearing, and during the hearing, defense counsel requested that Respondent be released on his own recognizance. (Exh. 003, T.140-143). The State countered that Respondent's probation should be modified so that he would have no unsupervised contact with minors. Respondent agreed to that modification and stipulated to it in exchange for the court considering his motion for release on his own recognizance. The trial court then issued an Order of Modification of Probation which indicated that Respondent had violated conditions 4 and 8 of his probation and modified his probation to include the special condition prohibiting

unsupervised contact with minors.<sup>1</sup> (Exh. 004).

On April 27, 1995, the court held a violation of probation hearing based on Respondent's alleged violation of the modified condition of probation prohibiting contact with minors. (Exh. 005). At the revocation hearing, Respondent admitted to a violation of the modified condition. The court revoked Respondent's probation and entered an Order of Modification of Probation which included a special condition prohibiting unsupervised contact with minors. (Exh. 006).

On February 6, 1996, another affidavit of violation of probation was filed alleging a violation of the Order of Modification of Probation dated April 27, 1995.<sup>2</sup> (Exh. 007). On March 29, 1996, Respondent pled guilty to this violation and the trial court sentenced Respondent to fifteen years Department of Corrections with jail time credit for time served. (Exh. 008). Respondent did not file a direct appeal, but filed a motion for post-conviction relief on January 7, 1997. (Exh. 009).

Respondent's post-conviction motion attacked the trial court's 1996 revocation of his probation based on the 1991 order which enhanced the conditions of his probation. The trial court

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<sup>1</sup>As previously stated, the court orally found that Appellant had not violated his probation.

<sup>2</sup>For a thorough discussion of the significance of this fact, see Casterline v. State, 22 Fla. L. Weekly D2330, 2331-32 (Fla. 2d DCA Oct. 3, 1997) (Schoonover, A.C.J., dissenting).

summarily denied the motion on February 18, 1997. (Exh. 010). Respondent filed a notice of appeal from the trial court's denial of his post-conviction motion on March 12, 1997. On October 3, 1997, the Second District Court of Appeal issued its decision reversing the trial court's denial of Respondent's motion. The Second District Court of Appeal denied Petitioner's Motion for Rehearing on October 29, 1997.

On November 7, 1997, Petitioner filed a notice to invoke the discretionary jurisdiction of this Court and a motion to stay the mandate. On December 5, 1997, this Court denied the State's motion to stay the mandate. The Second District Court of Appeal issued its mandate on January 13, 1998. On January 27, 1998, Respondent returned to the trial court and, in accordance with the Second District Court of Appeal's opinion, had his probation reinstated. On February 26, 1998, this Court accepted jurisdiction of the instant case.

## SUMMARY OF ARGUMENT

The Second District Court of Appeal erred in reversing the trial court's denial of Respondent's motion for post-conviction relief. In 1991, Respondent waived any double jeopardy protections he had when he stipulated to a modification of his probation in open court, with the assistance of counsel, in exchange for the court considering his motion for release on his own recognizance.

In April 1995, Respondent violated the modified condition of probation prohibiting unsupervised contact with minors and the court entered an Order of Modification of Probation. Respondent did not file an appeal from this order. Almost one year later, Respondent violated the condition of probation contained in his 1995 modified sentence. Respondent pled to this violation, and after the court revoked his probation and sentenced him to prison, Respondent filed a motion for post-conviction relief attacking the 1991 modification. The Second District Court of Appeal erroneously concluded that the trial court illegally enhanced Respondent's probation in 1991 and that the subsequent revocation hearings were a nullity.



ARGUMENT

ISSUE

RESPONDENT WAIVED HIS DOUBLE JEOPARDY PROTECTION WHEN HE NEGOTIATED FOR A MODIFICATION OF HIS PROBATION IN EXCHANGE FOR THE COURT CONSIDERING HIS MOTION FOR RELEASE ON HIS OWN RECOGNIZANCE IN ANOTHER MATTER, AND RESPONDENT'S SUBSEQUENT COLLATERAL ATTACK OF THE COURT'S 1991 MODIFIED ORDER OF PROBATION IS ERRONEOUS.

In 1984, Respondent pled guilty to two counts of sexual performance by a child and was placed on fifteen years probation. In 1991, the State filed an affidavit of violation of probation alleging three violations of Respondent's probation, including a violation of condition 8, failure to follow the probation officer's instructions to have no contact with minor children. At the revocation hearing, the trial court found that Respondent did not violate his probation. Respondent had other charges pending at the time of the revocation hearing and requested that the court consider a motion for release on his own recognizance. The State countered with a request that Respondent's probation be modified to include a condition of probation prohibiting unsupervised contact with minors. Respondent, in open court and with assistance of counsel, agreed to the modification and was subsequently released on his own recognizance.

The Second District Court of Appeal found that the trial court's 1991 order modifying Respondent's probation was void because the double jeopardy clause prohibited the enhancement of

Respondent's probation terms when there had been a finding that Respondent did not violate his probation. The Second District Court of Appeal relied on this Court's opinion in Clark v. State, 579 So. 2d 109 (Fla. 1991), and Lippman v. State, 633 So. 2d 1061 (Fla. 1994), in ruling that "[a]bsent proof of a violation, the court cannot change an order of probation by enhancing the terms." Casterline v. State, 22 Fla. L. Weekly D2330, D2331 (Fla. 2d DCA Oct. 3, 1997). Furthermore, the court held that even when a non-violating probationer agrees to the enhancement of the terms of his probation, he is not estopped from raising the double jeopardy infringement. Id. at D2331.

In his dissenting opinion, Acting Chief Judge Schoonover stated that he questioned whether this Court's Lippman and Clark decisions "intended to foreclose such a bargain which benefits both parties. . . ." Id. Judge Schoonover found that the prohibition against double jeopardy does not restrain a trial court from endorsing a negotiated agreement voluntarily entered into between parties in a criminal proceeding. Petitioner submits that the majority opinion in Casterline erroneously found that double jeopardy prevents the enhancement of probation terms when the defendant, in open court and with the assistance of counsel, negotiates for the enhancement in exchange for a benefit to him.

In Lippman v. State, 633 So. 2d 1061 (Fla. 1994), the trial

court enhanced the defendant's probation terms by adding conditions relating to the defendant's sex offender treatment program and his contact with minors. The defendant did not object to the order modifying his probation, nor did he appeal the enhanced probation order. Id. at 1063. The trial court subsequently found a violation of the enhanced condition prohibiting contact with minors and sentenced the defendant to twelve years in prison. Id. The defendant appealed the revocation on evidentiary grounds, and the Third District Court of Appeal affirmed the revocation. Id.; see Lippman v. State, 559 So. 2d 1148 (Fla. 3d DCA 1990). Lippman then moved for post-conviction relief arguing that the trial court's enhancement of his probation violated his constitutional right against double jeopardy and, thus, his subsequent incarceration for violating the additional conditions also violated double jeopardy. Lippman, 633 So. 2d at 1063.

This Court found that "the double jeopardy protection against multiple punishments includes the protection against enhancements or extensions of the conditions of probation." Id. at 1064. This Court noted that the defendant did not waive his double jeopardy protections by failing to object at the time of the enhancement, by failing to file a direct appeal of the modified order of probation, or by failing to raise his double jeopardy claim on direct appeal after his revocation hearing.

Id. at 1064-65.

In the instant case, assuming arguendo that the trial court's modification of Respondent's probation was an "enhancement,"<sup>3</sup> Petitioner submits that the Second District Court of Appeal erred in finding that Respondent did not waive his double jeopardy protection by negotiating for the modification in 1991, and by failing to attack the modification until filing his post-conviction motion in January 1997.

At his revocation hearing in 1991, Respondent negotiated to have his probation modified by adding a condition prohibiting unsupervised contact with minors in exchange for the benefit of the court considering his motion for release on his own recognizance. Respondent faced continued incarceration, and through counsel, negotiated in open court for his release in exchange for the imposition of the modified condition of probation. Respondent should not be allowed to receive the

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<sup>3</sup>Although the Second District Court of Appeal characterized this condition as an "enhancement," Petitioner would note that the 1991 affidavit of violation of probation alleged that Respondent violated condition of probation 8 by not complying with his probation officer's instructions prohibiting contact with minors. In addition, Respondent's 1984 order of probation specifically allows the trial court to "rescind or modify any of the conditions of your probation" at any time. See also Lippman v. State, 633 So. 2d 1061 (Fla. 1994) (McDonald, J., dissenting) (stating that a trial court is statutorily authorized to modify terms of probation at any time if necessary). Petitioner adopts the argument contained in Justice McDonald's dissenting opinion in Lippman, regarding the trial court's statutory authority to modify the terms and conditions of probation.

benefit of his bargain, and then be heard to complain of its illegality. See Waldron v. State, 670 So. 2d 1155, 1161 (Fla. 4th DCA 1996) (Stone, J., dissenting) ("Having negotiated for, and accepted the benefit of, the state's withdrawing the affidavit, Appellant should not now be heard to disavow her agreement. . . [T]o hold otherwise deprives a probationer facing certain revocation and incarceration of the opportunity to negotiate a reasonable modification acceptable to the court.").

In Novation v. State, 634 So. 2d 607 (Fla. 1994), this Court ruled that double jeopardy claims may be waived as part of a negotiated plea agreement with the State. This Court found that the defendant had received the benefit of his bargain, and could not be relieved of the burden of his agreement. Id. at 608-09. In Lippman, decided only one week prior to Novation, this Court also acknowledged that a defendant may knowingly waive his double jeopardy rights in limited instances. Lippman, 633 So. 2d at 1065 (citing State v. Johnson, 483 So. 2d 420 (Fla. 1986)). Petitioner submits that, similar to the plea agreement in Novation, Respondent waived his double jeopardy protection when he negotiated with the court for the addition of a special condition of probation in exchange for a benefit.

In Clark v. State, 579 So. 2d 109 (Fla. 1991), the defendant signed a "Waiver of Rights and Motion to Modify Community Control," requesting that the court modify his community control

to include a condition requiring him to enter and complete a restitution program. The court, without a hearing, modified Clark's community control. Id. at 109. Two months later, the court revoked the defendant's community control based on a violation of this condition. Id. The district court of appeal affirmed the revocation based on the voluntariness of the modification. Id. at 110. This Court quashed the district court's decision and found that "[t]he trial court erred in this case by enhancing the terms of Clark's community control without notice and hearing." Clark, 579 So. 2d at 110.

In the instant case, Respondent knowingly waived his double jeopardy rights when he bargained with the court and received the benefit of the bargain (his release on pending charges), in exchange for the imposition of a condition of probation prohibiting contact with minors. Respondent negotiated this agreement in open court with the assistance of counsel. Thus, the facts of the instant case are distinguishable from the facts in Clark. This Court in Clark "recognized the potential abuse of procedural due process inherent in such an arrangement and based its assessment of trial court error on the absence of notice and hearing to the probationer." Casterline v. State, 22 Fla. L. Weekly D2330, D2331 (Fla. 2d DCA Oct. 3, 1997) (Schoonover, A.C.J., dissenting). Accordingly, Petitioner urges this Court to find that the double jeopardy clause does not prohibit the

court's modification of Respondent's probation when Respondent voluntarily negotiated, in open court with the assistance of counsel, for the modification in exchange for a benefit.

Petitioner would further assert that the Second District Court of Appeal erred in finding that the 1995 revocation hearing was a nullity. As previously stated, an affidavit of violation of probation was filed in 1995 alleging a violation of the 1991 condition of probation prohibiting unsupervised contact with minors. On April 27, 1995, Respondent admitted to the violation and the trial court revoked Respondent's probation and entered an Order of Modification of Probation containing the following modified condition of probation: "No contact with any child under 18 unless responsible adult is present." Respondent has never appealed or sought collateral review of this 1995 order. On February 6, 1996, an affidavit of violation of probation was filed alleging a violation of the 1995 Order of Modification of Probation condition prohibiting unsupervised contact with minors. Respondent pled guilty to the violation and the trial court revoked his probation and sentenced him to fifteen years Department of Corrections. Respondent did not file a direct appeal, but filed a motion for post-conviction relief attacking the 1991 Order of Modification of Probation.<sup>4</sup>

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<sup>4</sup>Respondent's motion for post-conviction relief inaccurately states that his revocation is based on 1991 modification, when in fact, Respondent's 1996 revocation was based on the court's 1995

Even if this Court rejects the State's argument that Respondent waived his double jeopardy protection in 1991 when he negotiated for the modification, the State submits that the trial court's 1995 Order of Modification is not reviewable or subject to constitutional attack at this time. Respondent's post-conviction motion attacked on double jeopardy grounds the condition of probation imposed in 1991 when the court found no violation of probation. Respondent, however, cannot be heard to complain of the special condition contained in the 1995 Order of Modification of Probation because that condition was imposed after a finding that Respondent violated his probation. The 1996 revocation proceeding resulted from an affidavit of violation of Respondent's 1995 modified order of probation. Respondent's incarceration for his 1996 revocation is not tainted by double jeopardy concerns because the revocation stems from an order in 1995 adding the condition of probation after a finding of violation. Accordingly, the State requests that this Court quash the Second District Court of Appeal's decision and find that the trial court properly denied Respondent's motion for post-conviction relief.

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Order of Modification of Probation.



CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, Petitioner respectfully requests that this Honorable Court affirm the trial court's denial of Respondent's motion for post-conviction relief.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert Allen Casterline, 1512 ½ E. 8th Avenue, Room 8, Tampa, Florida, 33605, on this 20th day of March, 1998.

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COUNSEL FOR PETITIONER