IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 91,848

ROBERT A. CASTERLINE,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

ROBERT S. FRIEDMAN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 500674
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 91,848

ROBERT A. CASTERLINE,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent was the appellant in the Second District Court of Appeal and the defendant in the trial court. Petitioner was the appellee and the prosecution, respectively, in the lower court.

In the brief, the parties will be referred to as they appear before this Honorable Court. Respondent will cite to the exhibits and transcripts in the record on appeal according to the enumerated exhibit list submitted by Petitioner.

The symbol "PB" will denote Petitioner's Brief on the Merits.

The opinion of the Second District Court of Appeal is reported at Casterline v. State, 703 So.2d 1071 (Fla. 2d DCA 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 against Respondent alleging three violations of his probation, including a violation of condition 8, failure to follow the probation officer's instructions to have no contact with minor children. (Exh. 2) On August 8, 1991, the trial court conducted a violation of probation hearing. At the hearing, the state conceded that the allegation of a violation of condition 8 was not a violation that the trial court could use to revoke Respondent's probation. The trial court further found that appellant was not guilty of violating conditions 4 and 5 of his probation. (Exh. 3, T 18, 21, 133)

The Second District Court of Appeal summarized the ensuing procedural history and facts in its decision on Respondent's appeal of his Rule 3.850 motion as follows:

> At the conclusion of the hearing defense counsel requested that Casterline be released on his own recognizance pending the criminal trial for the alleged aggravated assault. Although the state had no objection to Casterline's release, it requested that the terms of his probation be changed to prohibit contact with minors. Defense counsel objected and stated that the matter should be set for a hearing before the court at another time; however, he capitulated when the court indicated that it intended to schedule the hearing on the request for release at a future date.

> Counsel stated, “Judge, let me state this. Because my client needs to get out of jail, he needs to go to work, and he has previously told me that if the Court so desires to inform (sic) such a condition, that he would have no objections to it.” The Court noted, “So, it would be without objection by your client to modify the probation to require that he had no contact with minor children, that is anyone under the age of eighteen, without the presence of another responsible adult.”
>
> On August 8, 1991, an order entitled “Corrected Order of Modification of Probation” was entered which erroneously stated that Casterline had violated the terms and conditions of his probation. Further, the order required the conditions of probation to be modified to include the provision that Casterline have no unsupervised contact with children under the age of eighteen. Casterline’s probation was revoked on April 27, 1995, and on March 29, 1996, for violating the condition which prohibited contact with children. On April 27, 1995, Casterline admitted that he had contact with a teenage boy in the hallway of the county courthouse. On March 29, 1996, Casterline admitted that he had verbal contact with two boys aged ten and fourteen when he inquired if they had seen his lost cat. Casterline v. State, 703 So.2d 1071, 1072 (Fla. 2d DCA 1997). [Footnote omitted].

The trial court sentenced Respondent to fifteen years in the Department of Corrections for his violation of the 1991 order of modification of probation. (Exh. 7, 8)

Respondent did not file a direct appeal. On January 7, 1997, Respondent filed a Rule 3.850 motion for post-conviction relief. (Exh. 9) The trial court summarily denied the motion on February 18, 1997. (Exh. 10) Respondent filed a notice of

appeal from the trial court's summary denial of his Rule 3.850 motion on March 12, 1997. On October 3, 1997, the Second District Court of Appeal reversed the trial court's summary denial of Respondent's motion. In so doing, the Second District concluded that the trial court had no authority to enhance Respondent's terms of probation in 1991 in the absence of a finding of a violation. The Second District further concluded that any subsequent violation of the enhanced condition could not form the basis for a revocation of probation. Judge Schoonover dissented with an opinion. Casterline v. State, 703 So.2d 1071 (Fla. 2d DCA 1997).

Petitioner filed a notice to invoke this Court's discretionary jurisdiction. On February 26, 1998, this Court accepted jurisdiction of this case. On September 18, 1998, the Office of the Public Defender for the Second Judicial Circuit was appointed by this Court to represent Respondent and file a brief on the merits on his behalf. This brief follows.

SUMMARY OF THE ARGUMENT

This Court improvidently granted jurisdiction in the instant case. The decision does not directly and expressly conflict with this Court's decisions in Novaton v. State, 634 So.2d 607 (Fla. 1994) and Lippman v. State, 633 So.2d 1061 (Fla. 1994).

The Second District Court of Appeal correctly concluded

that the trial court's 1991 order modifying Respondent's probation was a nullity because the double jeopardy clause prohibited the enhancement of the terms and conditions of Respondent's probation in the absence of a finding that Respondent violated his probation. The double jeopardy protection against multiple punishments includes the protection against enhancements or extensions of the conditions of probation. Respondent 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 subsequent revocation hearing. Because Respondent's 1995 modification and 1996 revocation were based on the 1991 enhancement in 1995, jeopardy had already attached and Respondent could not be subjected to multiple punishments for the same offense.

ARGUMENT

ISSUE

THE SECOND DISTRICT COURT OF APPEAL WAS CORRECT WHEN IT HELD THE TRIAL COURT HAD NO AUTHORITY TO ENHANCE THE TERMS AND CONDITIONS OF RESPONDENT'S PROBATION IN 1991 IN THE ABSENCE OF A FINDING OF A VIOLATION OF PROBATION AND THAT ANY SUBSEQUENT VIOLATION OF THE ENHANCED CONDITION COULD NOT FORM THE BASIS FOR A REVOCATION OF PROBATION.

Preliminarily, Respondent would point out that this Court improvidently granted jurisdiction to review the Second District's decision in this case.[1] The decision does not directly and expressly conflict with the decisions in Novaton v. State, 634 So.2d 607 (Fla. 1994) and Lippman v. State, 633 So.2d 1061 (Fla. 1994), as Petitioner alleges. In Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) this Court defined the limited parameters of conflict review as follows:

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definition of the term "express" includes: "to represent in words;" "to give expression to." "Expressly" is defined "in an express manner." Webster's Third New International Dictionary 1961 edition unabridged.

See also, Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Withlacoochee River Electric Co-op v. Tampa Electric Company, 158 So.2d 136 (Fla. 1963), cert. denied, 377 U.S. 952 (1964).

In order for two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions must be to the same point of law, in a factual context of sufficient similarity to permit the inference that the result in each case would have

[1]Respondent was a pro se litigant in the Second District Court of Appeal and was not appointed counsel until September 18, 1998 by this Court.

been different had the deciding court employed the reasoning of the other court. “The facts in a case are of utmost importance.” Mancini v. State, 312 So.2d 732, 733 (Fla. 1975) “Our jurisdiction cannot be invoked merely because we might disagree with the decision of the District Court...” Id. See also, Mystan Marine, Inc. v. Harrington, 339 So.2d 200, 201 (Fla. 1976) (this court’s discretionary jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants). In the instant case, the District Court did not announce a rule inconsistent with rules of law previously announced. Petitioner merely disagrees with the decision of the Second District Court of Appeal.

The state’s claim of conflict jurisdiction with Novaton v. State, 634 So.2d 607 (Fla. 1994) is misguided. In Novaton, this court held that a defendant who enters into a plea bargain and agrees to the convictions and sentences waives any double jeopardy claim that may affect either the conviction or sentence. Unlike Novaton, the instant case has absolutely nothing to do with a defendant entering into a plea bargain. However, the exception to the rule announced in Novaton would be inapplicable here; that in cases of a general plea where sentencing is left up to the trial judge there can be no waiver of double jeopardy protections.

Petitioner also argues that the District Court’s reliance

on Lippman v. State, 633 So.2d 1061 (1994) was erroneous and its decision is in express and direct conflict with the Lippman decision. In Lippman, this court found that "the double jeopardy protection against multiple punishments include the protection against enhancements of conditions of probation." Id. at 1064. This court noted that Lippman 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 a double jeopardy claim on direct appeal after his revocation hearing. Id. at 1064-1065. Petitioner has not established conflict jurisdiction in this case because there is no conflict with this Court's decisions in Lippman and Novaton.

As to the merits, in its brief, Petitioner asserts 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. (PB 7) Petitioner's assertion, however, is based on the premise that Respondent knowingly waived his double jeopardy rights in 1991 in exchange for his release on his own recognizance from pending charges which the trial court at the time found insufficient to form the basis for a revocation of probation.

An effective waiver of a constitutional right must be

knowing, voluntary, and intelligent. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970); see also, State v. Upton, 658 So.2d 86 (Fla. 1995). In the instant case, there was no affirmative showing on the record that Respondent agreed with the waiver. The trial judge did not conduct a colloquy with Respondent concerning the waiver nor was there a written waiver. The record is insufficient to demonstrate that Respondent agreed with a waiver of his double jeopardy protections.

Notwithstanding, the Second District Court of Appeal correctly relied upon this Court's decisions in Lippman and Clark v. State, 579 So.2d 109 (Fla. 1991) in concluding that even though a trial court has the right to rescind or modify the terms and conditions of probation at any time, absent proof of a violation, a trial court cannot change an order of probation by enhancing its terms. In Clark, the defendant actually signed a waiver of rights and motion to modify community control two days after probation was imposed at a sentencing hearing. The purpose of the modification was to allow him to complete a program at the Lakeland Probation and Restitution Center. Two months later he was charged with violating the condition by leaving the institution. The trial court found the violation. The District Court found that the enhancement was enforceable because the defendant agreed to it, even though it was imposed without a finding that he had

violated the original conditions of his probation. This Court held, however, that absent proof of a violation, a trial court cannot change an order of probation or community control by enhancing the terms thereof, even if the defendant has agreed in writing with his probation officer to allow such a modification and has waived notice and hearing. Clark, 579 So.2d at 110-111. Thus, Clark stands for the proposition that a defendant is not precluded from challenging an enhancement of probation simply because he agreed to it.

Without proof of a violation, no agreement by a probationer to an enhancement can preclude a defendant from raising a double jeopardy violation. See, Waldon v. State, 670 So.2d 1155 (Fla. 4th DCA 1996). Thus, Petitioner's argument to this Court that it should find that the double jeopardy clause did not prohibit the trial court's modification of Respondent's probation because Respondent voluntarily negotiated the modification with the trial court in the presence of counsel in exchange for a benefit is simply unavailing. (PB 12) This Court should reject Petitioner's argument that Respondent waived his double jeopardy protection in 1991 and approve the decision of the district court.

Petitioner next argues that the Second District Court of Appeal erred in finding that the 1995 revocation hearing was a nullity and that the trial court's 1995 order of modification is not reviewable or subject to constitutional attack at this

time is also without merit. (PB 12-13) However, the trial court's April 27, 1995 order of modification of probation specifically found that Respondent violated the enhanced condition in the order of modification of probation dated August 8, 1991 as alleged in the affidavit for violation of community control/probation dated February 7, 1995. (Exh. 6) Since the trial court found and the state conceded at the 1991 hearing that there was no violation of probation in 1991, it was a double jeopardy violation to then enhance the terms and conditions of Respondent's probation in the absence of a violation. Simply stated, the enhancement in 1991 violated the double jeopardy prohibition against multiple punishments for the same offense. See Delancey v. State, 653 So.2d 1062 (Fla. 4th DCA 1995). Because Respondent's 1995 modification and his 1996 revocation was based on the 1991 enhancement, jeopardy had already attached and Respondent could not be subjected to multiple punishments for the same offense.

Accordingly, Respondent requests that this Court approve the decision of the Second District Court of Appeal.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Respondent respectfully requests that this Honorable Court approve the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to Stephen D. Ake, Senior Assistant Attorney General, Westwood Center, Suite 700, 2002 N. Lois Avenue, Tampa, Florida, 33607-2366, this _____ day of October, 1998.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

ROBERT FRIEDMAN #500674
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458
COUNSEL FOR RESPONDENT