

IN THE SUPREME COURT OF FLORIDA

Orig 47
~~Supp 209~~
FILED

SID J. WHITE

DEC 11 1997

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 91,852

TERRY L. SMITH,

Respondent.

CERTIFIED QUESTION FROM
THE FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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and

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STATEMENT OF THE CASE AND FACTS

The Respondent, Terry L. Smith, pleaded no contest to possession of cocaine and possession of marijuana, reserving his right to appeal the dispositive motion to suppress. The Second District, on direct appeal, affirmed his conviction without discussion. However, the Second District struck certain portions of the order of probation for the possession of the cocaine conviction. No notice was given at sentencing that Respondent would be required to pay for drug testing. The Second District followed precedent and struck this condition. However, the court below now asks this Court whether the requirement that a criminal defendant pay for drug testing be treated as a general condition of probation for which notice is provided by state statute or should drug testing be treated as a special condition that requires oral announcement. Petitioner, on behalf of the Second District, presents this certified question to this Court.

SUMMARY OF THE ARGUMENT

The Second District has certified a question of great public importance to this Court. There is statutory authority that as a general condition of probation a criminal defendant may be required to pay for drug testing without oral announcement.

CERTIFIED QUESTION

SHOULD THE REQUIREMENT THAT A DEFENDANT PAY FOR DRUG TESTING BE TREATED AS A GENERAL CONDITION OF PROBATION FOR WHICH NOTICE IS PROVIDED BY SECTION 948.09(6), FLORIDA STATUTES (1965), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

(As Stated by the Second District)

In reference to the above question, Petitioner agrees with the former and rejects the latter. The Second District in its opinion has recognized Section 948.09(6), Florida Statutes (1995) which provides:

(6) In addition to any other required contributions, the department, at its discretion, may require offenders under any form of supervision to submit to and pay for urinalysis testing to identify drug usage as part of the rehabilitation program. Any failure to make such payment, or participate, may be considered a ground for revocation by the court, the Parole Commission, or the Control Release Authority, or for removal from the pretrial intervention program by the state attorney. The department may exempt a person from such payment if it determines that any of the factors specified in subsection (3) exist.

Section 948.09(3), Florida Statutes (1995) designates the extenuating circumstances which exempt a person from payment of urinalysis testing to identify drug usage.

This issue has been addressed in two other cases in the Second District. See, Williams v. State, 700 So.2d 750 (Fla. 2d DCA 1997) [West Reserved Citation] and Huff v. State, 700 So.2d 787 (Fla. 2d DCA 1997). [West Reserved Citation] The lead case before this Court is State v. Williams, Fla. 91,655 (pending); and, also before this Court on the same certified question is State v. Huff, Fla. 91,851 (pending).

For purposes of brevity and clarity, Petitioner adopts and incorporates the argument presented to this Court in State v. Williams, Fla. 91,655 (pending). This Court and the Second District have determined that requiring a defendant to pay for drug testing constitutes a special condition of probation because it is not authorized by statute. Brock v. State, 688 So.2d 909, fn 4 (Fla. 1997); Curry v. State, 682 So.2d 1091 (Fla. 1996); and, Malone v. State, 652 So.2d 902 (Fla. 2d DCA 1995). However, the Second District had been struck by Petitioner's argument in reference to payment for urinalysis testing for drugs. See, Johnson v. State, 696 So.2d 831 (Fla. 2d DCA 1997). In Johnson, the Second District struck only that portion of the condition requiring payment for *breathalyser* or *blood testing* to determine the presence of alcohol because that portion of the condition was not enumerated in the statutory conditions of probation. The

Court cited to Section 948.03(1)(k) (Submit to random testing as directed by the correctional probation officer or the professional staff of the treatment center where he is receiving treatment to determine the presence of alcohol or controlled substances) and Section 948.09(6) (payment for urinalysis testing to determine drug usage).

Petitioner submits that Section 948.09(6), Florida Statutes (1995) specifically authorizes that a criminal defendant under any form of supervision may be required to submit to *and pay for urinalysis testing to identify drug usage as part of any rehabilitation program*. And, this Court in Hart v. State, 668 So.2d 589, 592 (Fla. 1996) states:

It has been held that the usual "general conditions" of probation are those contained within the statutes. (Citation omitted). In other words, a condition of probation which is statutorily authorized or mandated...may be imposed and included in a written order of probation even if not orally pronounced at sentencing. (Citation omitted). "The legal underpinning of this rationale is that the statutes provides 'constructive notice of the condition which together with the opportunity to be heard and raise any objections at the sentencing hearing satisfies the conditions of procedural due process.'"

Thus, it is appropriate for this Court to answer the certified question holding that the requirement that the Respondent satisfy

the fee for urinalysis testing to identify drug usage is a general condition of probation. Petitioner, and the Second District, recognize that this Court in Brock stated that requiring a defendant to pay for drug testing is a special condition of probation which lacks statutory authorization and must be orally announced at sentencing. However, perhaps this Court has overlooked or failed to consider that Section 948.09(6) specifically authorizes urinalysis drug testing.

Petitioner would pause to point out that in a categoric risk analysis of this nation's federal and state penal system, one major contributing factor is drug abuse. Inherent in so many of the crimes [such as the theft offenses] is a drug habit which needs to be supported. Many times, an examination of a theft trial transcript makes no mention of drug usage. There are both habilitative and rehabilitative goals for those who become clients of the criminal justice system. It seems a rather small matter to require a criminal defendant to pay for urinalysis testing for drug usage as this involves the subject in his treatment. This is a condition which does not need to be announced.

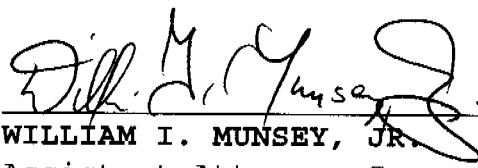
CONCLUSION

Based on the foregoing facts, arguments, and authorities, Petitioner would pray that this Court would make and render an opinion answering the question certified that the requirement that a criminal defendant pay for drug testing be treated as a general condition of probation for which notice is provided by Section 948.09(6), Florida Statutes (1995) and on remand direct that Condition 12 be reimposed.

Respectfully submitted,
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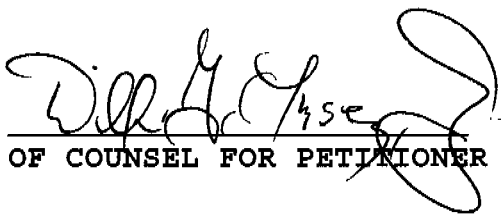


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to, A. Victoria Wiggins, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 9th day of December, 1997.


William G. Hise
OF COUNSEL FOR PETITIONER



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December 9, 1997

Honorable Sid J. White, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399

FILED

SID J. WHITE

DEC 11 1997

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RE: State of Florida v. Terry L. Smith
Sup. Ct. No. 91,852

Dear Mr. White:

Enclosed please find the original and seven (7) copies of the Merits Brief of Petitioner on the above-styled case. A "3.5" diskette of the same is included.

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cc: A. Victoria Wiggins