IN THE SUPREME COURT OF FLORIDA

JAMES EDWARDS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 93,880

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

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ATTORNEYS FOR PETITIONER

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 pt.

STATEMENT OF THE CASE AND FACTS

On October 9, 1996, the State Attorney for the Twelfth Judicial Circuit, in and for Sarasota County, Florida, filed a two-count information against the Petitioner, James Edwards, Jr. The information alleged on or about September 21, 1996, Mr. Edwards had committed aggravated child abuse with a deadly weapon in violation of section 827.03(1), Florida Statutes (1995); and aggravated child abuse in violation of section 827.03(1)(a), Florida Statutes (1995). (V1/R72-73)

On March 3, 1997, Mr. Edwards entered a no contest plea to both charges. (V1/R91,153-166) The record does not indicate that Mr. Edwards has ever filed a motion to withdraw the plea. The trial court held a sentencing hearing on March 27, 1997. (V1/R1-59) Mr. Edwards argued for a downward departure from the sentencing guidelines to the trial court. (V1/R3) The sentencing guidelines range was 98.25 to 163.75 months. (V1/R103-104) Mr. Edwards agreed the sentencing guidelines scoresheet was accurate. (V1/R3-4)

The trial court refused to depart and sentenced Mr. Edwards to concurrent terms of 131 months in state prison on each count to be followed by two concurrent terms of three years of probation on each count. (V1/R57-58, 126-128, 130-133) The total sentence on each count (approximately 14 years) is within the statutory maximum of 15 years for the second-degree felony of aggravated child abuse. See section 827.03, Florida Statutes (1995), and section 775.082, Florida Statutes (1995). The trial court also imposed certain

conditions of probation--some were announced orally and others were not. (V1/R57, 132-133) Mr. Edwards filed a timely notice of appeal on April 24, 1997. (V1/R134)

On appeal the only issue raised was the erroneous imposition of certain probation conditions that were special conditions yet were not orally announced.

On June 10, 1998, the Second District affirmed Petitioner's appeal but certified the following question to this Court as was certified in Williams v. State, 700 So. 2d 750 (Fla. 2d DCA 1997):

> 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 (1995), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

It is to be noted that the Second District had reversed the sentence and the State had to pursue the certified question in Williams.

On June 4, 1998, this Court issued a decision in State v. Williams, Case No. 91,655 (Fla. June 4, 1998), and answered the certified question "by holding that the requirement that a defendant pay for drug testing is a special condition of probation which the trial court must pronounce orally at sentencing, and we approve the decision below." Based on this Court's decision in Williams, Petitioner timely filed a Motion for Rehearing with the Second District on June 15, 1998. On August 27, 1998, the motion for rehearing was denied without any explanation. On August 31,

1998, Petitioner timely filed his Notice to Invoke this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

Inasmuch as this Court has already answered the certified question in this case in Petitioner's favor, the only reason Petitioner can give for the Second District's failure to reverse Petitioner's case for resentencing must be Petitioner's failure to raise the issue at the trial level.[1] Such an error as unpronounced probation conditions should be reversed when raised for the first time on direct appeal as a fundamental sentencing error or as an error based on ineffective assistance of counsel that can be raised on the direct appeal.

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[1] Undersigned counsel has consulted with counsel for Williams in State v. Williams, Case No. 91,655 (Fla. June 4, 1998), and learned that Williams' sentencing took place before the Criminal Appeal Reform Act became effective on July 1, 1996.

ARGUMENT

ISSUE I

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 (1995), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

In State v. Williams, Case No. 91,655 (Fla. June 4, 1998), this Court answered the above certified question by holding "that the requirement that a defendant pay for drug testing is a special condition of probation which the trial court must pronounce orally at sentencing." Thus, although the Second District knew the above certified question had been answered by this Court, it continued to certify the same question as set forth in Williams without altering it and without granting Mr. Edwards any relief. The only conclusion that can be reached is that Mr. Edwards was denied relief in spite of the Williams decision given by this Court because the unpronounced special probation conditions were not first attacked on the trial level. Thus, the certified question in this case should be modified to:

> WHEN SPECIAL CONDITIONS OF PROBATION THAT MUST BE ORALLY ANNOUNCED AT SENTENCING ARE NOT ORALLY ANNOUNCED, CAN THEIR IMPOSITION ON THE WRITTEN SENTENCE BE RAISED FOR THE FIRST TIME ON APPEAL?

In his direct appeal Mr. Edwards attacked three special conditions of probation that were not orally announced but wound up on the written judgment and sentence:

Condition (2) of the "Order of Probation" indicates that Mr. Edwards must pay a surcharge of $3.28 per month towards the cost of his supervision. The trial court did not orally announce that Mr. Edwards was responsible for this discretionary cost and failed to cite any statutory authority for it. Therefore, it must be stricken. Felix v. State, 709 So. 2d 547 (Fla. 2d DCA 1997); Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995).

Likewise, condition (10) indicates Mr. Edwards is responsible for a 4% processing fee on every payment he makes. As with the surcharge in condition (2), the trial court failed to orally announce this fee or cite any authority for it. It must be stricken as well. Felix; Powell v. State, 681 So. 2d 722 (Fla. 2d DCA 1996); Reyes.

The portion of condition (12) that requires Mr. Edwards to pay for any drug and alcohol tests is not a standard condition of probation authorized by section 948.03, Florida Statutes (1995), or Fla. R. Crim. P. 3.986. As the court failed to orally announce this portion of condition (12), it must be stricken. Williams.

Since it has been determined that it was error to impose such special conditions of probation without announcing them, the only question remaining is whether such an issue can be raised for the first time on direct appeal. This issue is one of several that falls under a much larger category--what sentencing errors can be raised on a direct appeal in light of the Criminal Appeal Reform Act of 1996. The district courts of appeal are all over the map in this area, and even the individual panels within each district

court are setting forth inconsistent results. Thus, Mr. Edwards' case--even though the certified question set forth in his Second District opinion has been answered by this Court--needs to be decided by this Court. He is entitled to have his sentence reversed and corrected as either fundamental error or error obvious on the face of the record caused by ineffective assistance of counsel.

As noted above, the district courts of appeal are having a difficult time trying to decide what to do with obvious sentencing errors that have not been preserved:

First District: Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997), rev.denied, 698 So. 2d 543 (Fla. 1997), refused to review an improper departure issue not preserved for appeal but did find fundamental error the improper imposition of attorney fees issue raised for the first time on direct appeal. Mason v. State, 710 So. 2d 82 (Fla. 1st DCA 1998), reversed a sentence it described as illegal in that it exceeded the statutory maximum period. Because an illegal sentence constitutes fundamental error, the sentence was remanded for correction. The sentencing error was not raised on the trial level. Dodson v. State, 710 So. 2d 159 (Fla. 1st DCA 1998), held that the attorney lien was fundamental error that could be addressed for the first time on appeal and then certified the question as to whether such an issue can be raised for the first time on appeal. Seven days later in Matthews v. State, 714 So. 2d 469 (Fla. 1st DCA 1998), the Court held that the cost issue that had not been preserved could not be raised on direct appeal.

However, six days after Matthews in Mike v. State, 708 So. 2d 1042 (Fla. 1st DCA 1998), the Court held attorney fees and costs that had been wrongfully imposed could be raised and addressed for the first time on the direct appeal. In Speights v. State, 711 So. 2d 167 (Fla. 1st DCA 1998), the appellant was wrongfully habitualized to a 22-year sentence when the felony used as a predicate to classify the appellant as a habitual violent felony offender was not one of the felonies statutorily authorized to be a predicate offense. No objection was made at the trial level, yet the error was plain. The court denied relief due to a lack of preservation for review but certified the question as to whether such a sentencing error can be raised and corrected on the direct appeal without preservation. The court had a problem with an "illegal" sentence being beyond the statutory maximum that constitutes fundamental error and a habitualized sentence where the sentence falls within the statutory maximum for habitualized sentences, but is beyond the non-habitualized statutory maximum, and the habitualization is erroneous on its face.

Second District: In Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998), the court examined the issue of unpreserved sentencing issues in light of the Criminal Appeal Reform Act. The appellant had one preserved sentencing issue and two serious unpreserved sentencing issues. The court questioned the constitutionality of a statute designed 'to unreasonably restrict the court's scope or standard of review when due process and the orderly administration of justice require the court review such issues.' Id. at 1228.

The court noted that since it already had jurisdiction over a criminal appeal because of a properly preserved issue, it was not avoiding a "frivolous appeal" or achieving "efficiency by ignoring serious, patent sentencing errors. Limiting our scope or standard of review in these circumstances is not only inefficient and dilatory, but also risks the possibility that a defendant will be punished in clear violation of the law." Id. at 1228, 1229. Denson went on to note that the legislature's definition of "fundamental error" and the court's definition were very different. Under the Criminal Reform Act the concept of "fundamental error" was much narrower than the court's definition; and even though Denson did not reach the issue, the court noted that "the Fifth District may be correct in concluding that no sentencing error is fundamental for purposes of this new act." Id. at 1229. The court then cites to Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998). Denson then went on to note several policy reasons for an appellate court to deal with sentencing issues at hand instead of ignoring them:

> As tempting as it may be to wash our hands of every unpreserved sentencing error on direct appeal, we are troubled by a rule which would require us to close our eyes when a serious error is obvious in the record. This court has held that Florida Rule of Criminal Procedure 3.800(a) cannot be used to review a sentencing error that could have been raised on direct appeal but for the failure to file a motion pursuant to rule 3.800(b). See Chojnowski, 705 So. 2d at 915. Prisoners are entitled to legal representation on direct appeal, but not in most postconviction proceedings. See §924.051(9), .066(3). At least until our newly revised rules of appeal for sentencing errors have been fully delineated,

there is a real risk that serious sentencing errors, raising significant due process concerns, may not be corrected or may not be corrected in time to provide meaningful relief to a prisoner filing pro se motions if they cannot be corrected with the assistance of counsel on direct appeal.

If a goal of criminal appeal reform is efficiency, we are hard pressed to argue that this court should not order correction of an illegal sentence or a facial conflict between oral and written sentences on a direct appeal when we have jurisdiction over other issues. Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more postconviction motions to correct errors that can be safely identified on direct appeal. Both Mr. Denson and the Department of Corrections need legal written sentences that accurately reflect the trial court's oral ruling. We conclude that our scope and standard of review in a criminal case authorizes us to order correction of such a patent error.

Efficiency aside, appellate judges take an oath to uphold the law and the constitution of this state. The citizens of this state properly expect these judges to protect their rights. When reviewing an appeal with a preserved issue, if we discover that a person has been subjected to a patently illegal sentence to which no objection was lodged in the trial court, neither the constitution nor our own consciences will allow us to remain silent and hope that the prisoner, untrained in the law, will somehow discover the error and request its correction. If three appellate judges, like a statue of the "see no evil, hear no evil, speak no evil" monkeys, declined to consider such serious, patent errors, we would jeopardize the public's trust and confidence in the institution of courts of law. Under separation of powers, we conclude that the legislature is not authorized to restrict our scope or standard of review in an unreasonable manner that eliminates our judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors.[13]

> [13] To avoid any confusion, we do not regard typical errors concerning costs, conditions of probations, or jail credit as falling within this description.

Denson, 711 So. 2d at 1229, 1230. Denson did not involve the kind of sentencing errors involved in Mr. Edwards' case--i.e., improperly imposed probation conditions and costs, but 3 months later in Fortner v. State, 23 Fla. L. Weekly D1907 (Fla. 2d DCA August 14, 1998), the court reversed an illegal sentence but declined to consider the remaining issues because they were not fundamental or serious sentencing errors. However, in Fisher v. State, 709 So. 2d 640 (Fla. 2d DCA 1998), and Benton v. State, 708 So. 2d 1002 (Fla. 2d DCA 1998), the court reversed special conditions of probation that were not orally pronounced at sentencing (Benton and Fisher) and a fine and cost that was imposed without oral pronouncement (Benton) on the direct opinion. Although the date of sentencing is not mentioned in either opinion, both cases were handled by attorneys in undersigned counsel's office and both sentences were after July 1, 1996.

Third District: In Mizell v. State, 23 Fla. L. Weekly D1978 (Fla. 3d DCA Aug. 26, 1998), the court refused--at least at this point--to join in on the "fratricidal warfare" as to what sentencing issues are fundamental and can be raised for the first time on direct appeal. Instead, when faced with an obvious and state-conceded sentencing error (14 year sentence imposed on a misdemeanor), the court found ineffective assistance of counsel on the face of the record and remanded for resentencing. In this way the court avoided "the legal churning...which would be required if we made

the parties and the lower court do the long way what we ourselves should do the short. Thus, we agree with Maddox, 708 So. 2d at 621, that the lack of preservation in the sentencing area necessarily involves ineffective assistance of counsel, but strongly disagree that anything is accomplished by not dealing with the matter at once." Mizell, 23 Fla. L. Weekly at D1979. Of particular note is footnote 1:

> [1] It is ironic that, although this amendment to the Florida Appellate Rules, and, more to the point, the Criminal Appeal Reform Act of 1996, ch.96-248, Laws of Fla.; §924.051, Fla.Stat. (Supp. 1996), which engendered it, were largely meant to reduce a supposedly oppressive appellate caseload, they have had quite the opposite effect. In addition to creating an entirely new and difficult body of law of its own--including en banc consideration and certified questions of such arcane matters as whether an unpreserved error should result in affirmance or dismissal, Thompson v. State, 708 So. 2d 289 (Fla. 4th DCA 1998)--the Act has, as in this very case, required a resort to creative judging to achieve results which had been routinely and straightforwardly arrived at before. We will not resist the urge to refer to the relative merits of the cure and the disease or to observe that one should not repair something that is in no need thereof.

Mizell, 23 Fla. L. Weekly at D1979.

Fourth District: In Louisgeste v. State, 706 So. 2d 29 (Fla. 4th DCA 1998), the court held that the appellate court may consider the imposition of a public defender's fee without preservation of the issue in the trial court. In Harriel v. State, 710 So. 2d 102 at 104 (Fla. 4th DCA 1998), the en banc court said in dicta that illegal sentences that exceed the statutory maximum may be raised at any time and noted conflict with Maddox on this issue. Finally,

in Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA June 3, 1998), the en banc court receded from Louisgeste, affirmed the dicta in Harriel as to an illegal sentence being fundamental error, and held that from now on "[i]n this district, we will no longer entertain on appeal the correction of sentencing errors which are not properly preserved." Hyden, 23 Fla. L. Weekly at D1342. The decision in Hyden was written "to impress upon the criminal bar of this district the essential requirement of the new Florida Rule of Appellate Procedure 9.140(d)." Hyden, 23 Fla. L. Weekly at D1342.

> Our strict enforcement of Rule 9.140(d) should have the effect of alerting the criminal bar of the absolute necessity for reviewing the sentencing orders when received to determine whether correction is necessary. If they do not, relief will not be afforded on appeal. thus, counsel's duties do not end with the pronouncement of the sentence. Trial counsel can no longer rely on appellate counsel to request correction of errors in the appellate court.

Id.

Fifth District: Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), has come to stand for this court's position on sentencing errors and the Criminal Appeal Reform Act. This en banc decision clearly states:

> that no sentencing error can be considered in a direct appeal unless the error has been "preserved" for review, i.e. the error has been presented to and ruled on by the trial court. This is true regardless of whether the error is apparent on the face of the record. And it applies across the board to defendants who plead and to those who go to trial. As

> for the "fundamental error" exception, it now appears clear, given the recent rule amendments, that "fundamental error" no longer exists in the sentencing context.

Id. at 619. The court receded from several of its earlier opinions in Maddox and stated that this "policy decision" would relieve the workload of the appellate courts while placing the correction of errors on the trial court. The court concluded with a belief that the defendant would not be harmed:

> Certainly, there is little risk that a defendant will suffer an injustice because of this new procedure; if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion within thirty days in accordance with the rule, the remedy of ineffective assistance of counsel will be available. It is hard to imagine that the failure to preserve a sentencing error that would formerly have been characterized as "fundamental" would not support an "ineffective assistance" claim.

Id. at 621. Maddox is presently pending before this Court in Maddox v. State, Case No. 92,805. The court in Hyden agreed with part of the Maddox opinion.

The problem with the holdings or "policy decisions" in the Fourth and Fifth Districts is the naive belief that the unrepresented indigent criminal defendant will not suffer any injustice from the appellate courts' refusal to deal with sentencing errors obvious on the face of the record. The Second District is far more correct in its concern that sentencing errors may not be corrected in time to provide meaningful relief if the pro se defendant is filing post-conviction motions after his appeal or they may not be

corrected at all. It is the latter problem that poses the real danger to the indigent criminal defendant.

It has been 3 years since the Second District issued Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995), yet discretionary costs are continuously imposed improperly without oral pronouncement. The trial courts continue to sign these improper sentences, and neither defense counsel nor the assistant state attorneys call these erroneous cost impositions to the trial court's attention. The same holds true for erroneously imposed probation conditions. It is quite common for standard probation forms to be used in each county that have as standard conditions in the form conditions that are not in the statute or criminal rules. Thus, these special probation conditions are not orally pronounced at the trial level, are not pointed out by either trial defense counsel or the assistant state attorney, but are regularly imposed as a matter of course on the written form. It is not until the appeal level that the improperly imposed probation condition is pointed out. It is no coincidence that Williams, Fisher, Benton, and Mr. Edwards' cases all arose from Polk county. If trial courts continue to illegally impose probation conditions and costs year after year in spite of legions of cases that point out the error and if trial counsel continue to ignore such errors, then taking away the defendant's right to raise them for the first time on direct appeal when the defendant has counsel is to basically say that no one will ever address these problems.

The State may argue that the responsibility falls on the defendant to raise such issues in post-conviction motions, but at that point, as noted in Denson, the defendant has no legal representation. The indigent pro se defendant will have to be legally savvy enough to raise sentencing issues not discovered by two attorneys and a judge on the trial court level. In addition, if no objection is made at sentencing, there will not be a sentencing transcript in the appellate record. Under Fla. R. App. P. 9.140 the trial attorney is responsible for setting out the issues in the Statement of Judicial Acts and for indigent defendants can only ask for those portions of the record where issues are noted. If the trial attorney did not make any objections to the sentence, then--if appellate counsel is forbidden to raise any sentencing issue--the sentencing cannot be transcribed at county expense. The defendant may have a copy of his written sentence and probation conditions; but without a transcript, the defendant will not be able to know what special conditions and discretionary costs were not orally pronounced (it is highly unlikely that anyone--let alone a defendant at the time of sentencing--will be able to recall what was and what was not orally pronounced without the aid of the sentencing transcript). At this point in time appellate counsel has access to the sentencing transcripts and can easily point out the errors. If this Court decides sentencing issues can no longer be raised for the first time on appeal, appellate counsel for indigent defendants will no longer have automatic access or the right to such a transcript. Thus, appellate counsel will not be

able to point out sentencing errors to the defendant for purposes of post-conviction motions; and even if appellate counsel does see an unpreserved sentencing error, appellate counsel will not be able to raise it in the brief so as to put the defendant on notice that such an error exists. Without access to transcripts or legal counsel, the indigent criminal defendant will be at a distinct disadvantage. It is at this point the question of denial of due process and equal protection will come into play. The rich defendant will be able to obtain his/her sentencing transcripts and have legal counsel examine these transcripts and the written sentence while the poor criminal defendant will have no such protection.

The Fourth and Fifth seem to believe that their "policy" statement will put trial counsel on notice of their responsibility to review the sentencing orders when received to determine if correction is necessary. However, the issue in Mr. Edwards' case clearly demonstrates that reviewing the written sentencing order will not be enough. There is no way trial defense counsel will be able to recall what the trial court did and did not orally pronounce. All trial counsel would have to take extremely detailed notes at each sentencing hearing in order to know what was and was not said, and the fact of real life is that an assistant public defender representing many indigent defendants at several sentencings that all take place on the same docket will not have the time to represent his clients and take copious notes at the same. The question then becomes will each county pay for a transcript of each

sentencing hearing for every indigent criminal defendant so that trial counsel is able to properly review the oral with the written sentence to see what errors occurred. With money constraints being what they are, it is most doubtful that the counties will accept this new financial burden willingly. Yet, trial defense counsel will not be able to catch sentencing errors without the transcript.

Of course, the sentencing errors in Mr. Edwards' case may be considered minor by the courts (see Denson ftnt.13); but if a defendant is going to have his probation violated because he is not paying for tests and costs he was never orally told he was to pay and had no opportunity to object, then such a sentencing error is not minor to the defendant. Other sentencing errors, however, can be easily overlooked without a transcript--whether multiple sentences were to run concurrent or consecutive, what priors were used to habitualize a sentence, the exact configuration of multiple sentences when the trial court is imposing prison and probation, etc. Not all sentencing errors are obvious on the face of written sentence.

The Fourth and Fifth Districts are placing too much emphasis on the trial attorney's responsibility for sentencing errors when, in reality, trial counsel does not have the necessary tools for such a job. The Fifth District went on to state that if the trial attorney does not object to sentencing errors in 30 days, the defendant will have no difficulty in submitting a claim for ineffectiveness of counsel. How a defendant is supposed to make such a claim without a sentencing transcript or legal counsel and

why trial counsel should be ineffective when he is not given what he needs to properly review a sentence--i.e., the sentencing transcript--is, of course, not addressed by the Fourth and Fifth districts. Yet, if trial counsel is ineffective for not objecting to sentencing errors obvious on the face of an appellate record that includes a written and oral transcript of the sentence--as the Fifth District states--then the Third District's conclusion and remedy is the most correct. The Third District extended the Fifth District's finding to the next step--if trial counsel is ineffective on the face of the appellate record, the appellate court can address the ineffectiveness of trial counsel and order the error corrected. After all, there cannot be any trial tactic in allowing a client to be erroneously sentenced without objection so that the client is harmed; and the appellate court would only be dealing with those sentencing errors apparent on the face of the record. Usually, the State concedes the error; but in light of the Criminal Reform Act, it takes the position that the appellate courts can do nothing about such an obvious error. This position, as noted in the Third District and the Second District, merely adds to the delay and the trial court litigation.

Referring back to the Second District's decision in Denson, the State's philosophy forces the appellate courts to ignore obvious errors in spite of the constitution and the appellate judges' own consciences and would result in jeopardizing the public's trust and confidence in the institution of the courts. If appellate counsel can continue to raise fundamental sentencing errors--even if it is

under the guise of ineffectiveness of trial counsel on the face of the record, then appellate counsel can continue to get sentencing transcripts and review them for errors. The legislature, via the Criminal Reform Appeal Reform Act, cannot be allowed to restrict the scope or standard of review in an unreasonable manner that eliminates the appellate courts' judicial discretion to order the correction of sentencing errors. See Denson. Where Mr. Edwards disagrees with the Second District is the court's belief that only "illegal sentences or other serious patent sentencing errors" should be fundamental error. What is and is not illegal has caused severe problems for the First and Fourth Districts, and no one can truly say when a sentence rises to the level of being "serious."

For example, the court in Mizell--the Third District case finding ineffectiveness of trial counsel on the face of the record--was dealing with seven convictions that all had 14-year-concurrent sentences imposed. The fact that one of the counts was only a misdemeanor made one of the 14 year concurrent sentences erroneous. Taken out of context, 14 years on a misdemeanor is "illegal" and a "serious patent sentencing error"; but in the context of Mizell, it was hardly going to make much of a difference to that overall sentence. There can be no rule of law that tries to separate "serious patent sentencing errors" from the "non serious." All sentencing errors are serious if they can result in a loss of liberty or property. All sentencing errors should be addressed and considered to be fundamental if obvious on the face of the appellate record.

Whether the error of erroneously imposing special probation conditions and discretionary costs without orally pronouncing said conditions and costs is fundamental error or ineffectiveness-of-counsel-on-the-face-of-the-record error, the errors in Mr. Edwards' sentence should be ordered corrected by the appellate court to the trial court.

CONCLUSION

Based on the above-stated legal arguments and authorities, this Court should order the Second District to reverse the erroneous sentence in Mr. Edwards' case and remand the case to the trial court for correction.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES EDWARDS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 97-01791

Opinion filed June 10, 1998.

Appeal from the Circuit Court for Sarasota County, Robert W. McDonald, Judge.

James Marion Moorman, Public Defender, and Jeffrey Sullivan, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, for Appellee.

A

PER CURIAM.

We affirm and certify to the Florida Supreme Court the following question certified in Williams v. State, 700 So. 2d 750 (Fla. 2d DCA 1997):

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 (1995), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

PARKER, C.J., QUINCE and WHATLEY, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JAMES EDWARDS, JR., :

Appellant, :

vs. : Case No. 97-01791

STATE OF FLORIDA, :

Appellee. :

_____:

MOTION FOR REHEARING

Appellant, JAMES EDWARDS, JR., moves for rehearing in the above-styled cause and as grounds states as follows:

1. On June 10, 1998, this Court affirmed Appellant's appeal but certified the following question to the Florida Supreme Court certified in Williams v. State, 700 So. 2d 750 (Fla. 2d DCA 1997):

> 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 (1995), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

It is to be noted that this Court reversed the sentence and the State had to pursue the certified question in Williams.

2. On June 4, 1998, the Florida Supreme Court issued a decision in Williams and answered the certified question "by holding that the requirement that a defendant pay for drug testing is a special condition of probation which the trial court must pronounce orally at sentencing, and we approve the decision below."

3. Based on the Supreme Court's decision in Williams,

B

this Court must reverse and strike the special condition of probation requiring that he pay for drug testing.

WHEREFORE, Appellant asks this Court to grant this motion for rehearing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Assistant Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 15th day of June, 1998.

Respectfully submitted,

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/dkb

Supreme Court of Florida

STATE OF FLORIDA,
Petitioner,

vs.

CHUCK JUNIOR WILLIAMS,
Respondent.

No. 91,655

[June 4, 1998]

WELLS, J.

We have for review a decision of the Second District Court of Appeal which passed upon the following question certified to be of great public importance:

> 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 (1995), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

Williams v. State, 700 So. 2d 750, 751-52 (Fla. 2d DCA 1997). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed herein, we hold that the requirement that a defendant pay for drug testing is a special condition of probation which the trial court must pronounce orally at sentencing.

After a jury convicted respondent on three counts of violating state drug laws, the trial judge adjudicated the respondent guilty on all counts and sentenced him to a term of imprisonment followed by three years of drug offender probation. At the sentencing hearing, the trial judge ordered that respondent, as a condition of probation, be subject to "[e]valuation, treatment, warrantless search, [and] random urinalysis." In its written order of probation,[1] however, the trial court ordered that respondent comply with, inter alia, the following conditions of probation:

> (8) You will submit to and pay for random testing as directed by the supervising officer or professional staff of the treatment center where you are receiving treatment to determine the presence of alcohol or controlled substances.[2]
>
> . . . .
>
> (20) You shall submit to and pay for an evaluation to determine whether or not you have any treatable problem with (alcohol) (any illegal drug). If you have said problem, you are to submit to, pay

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[1]We note that the trial judge did not use the probation order form suggested in Florida Rule of Criminal Procedure 3.986(e). Rule 3.986(a) states: "The forms . . . shall be used by all courts." (Emphasis added.)

[2]At sentencing, the trial court ordered respondent to undergo random urinalysis testing as a condition of probation. The trial court did not, however, make this specific form of testing a part of its order of probation.

> for, and successfully complete any recommended treatment program as a result of said evaluation, all to be completed at the direction of your Supervising Officer.
>
> . . . .
>
> (24) You will obtain an evaluation to determine if you are in need of inpatient drug treatment. If so, you will enter and successfully complete, at your own expense, the recommended inpatient treatment program at DOC. You will abide by all the rules, regulations and programs set forth by the treatment center. You will complete and pay for any aftercare treatment as recommended by the inpatient facility.

On appeal, respondent argued that the trial judge erred in requiring respondent to pay for random drug testing, evaluation, and treatment. Specifically, respondent claimed that requiring him to pay for drug testing, evaluation, and treatment is a special condition of probation which must be announced orally at sentencing. Therefore, because the trial court failed to announce the payment requirements at sentencing, it could not include them in its final order. The district court agreed and reversed. Williams v. State, 700 So. 2d 750, 751-52 (Fla. 2d DCA 1997). The district court relied on precedent from this Court and its own previous decisions to hold that requiring a defendant to pay for alcohol or drug testing is a special condition of probation. Id. (citing Curry v. State, 682 So. 2d 1091 (Fla. 1996); Wallace v. State, 682 So. 2d 1139 (Fla. 2d DCA 1996); Malone v. State, 652 So. 2d 902 (Fla. 2d DCA 1995)).

The State, however, argued that none of these precedent cases addressed section 948.09(6), Florida Statutes (1995),[3] which authorizes the Department of Corrections to require offenders under any form of supervision to submit to and pay for urinalysis drug testing. The State claimed that this statute supported the conclusion that the probation condition requiring respondent to pay for drug testing is a general condition of probation. Unsure of the effect of the State's argument in light of the precedent cases, the district court certified the aforementioned question as one of great public importance.

This Court has previously set out the difference between a general and special condition of probation. Due process and Florida Rule of Criminal Procedure 3.700(b), which mandates that the sentence or other final disposition "shall be pronounced in open court," command that a defendant be given notice of the conditions of probation to be imposed. Justice v. State, 674 So. 2d 123, 125 (Fla. 1996); State v. Hart, 668 So. 2d 589, 591-92 (Fla. 1996); Vasquez v. State, 663 So. 2d 1343, 1345 (Fla. 4th DCA 1995). A general condition of probation is one in which notice is provided by statute or by Florida Rule of Criminal Procedure 3.986(e) (paragraphs

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[3]Section 948.09(6), Florida Statutes (1995), provides in relevant part:

> 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.

one through eleven). General conditions of probation may be included in a written order of probation even if not pronounced orally at sentencing. Hart, 668 So. 2d at 592. The rationale for this rule is that statutes and court rules provide constructive notice of the subject matter contained therein and that such notice comports with procedural due process. Hart, 668 So. 2d at 592; Vasquez, 663 So. 2d at 1346.

On the other hand, a special condition of probation is one which is not statutorily authorized or mandated and not found in rule 3.986(e) (paragraphs one through eleven). Because a defendant is not on notice of special conditions of probation, these conditions must be pronounced orally at sentencing in order to be included in the written probation order. Hart, 668 So. 2d at 592. We also note that there is a judicial policy that the actual oral imposition of sanctions should prevail over any subsequent written order to the contrary. Justice, 674 So. 2d at 125.

Turning to the issue in this case, the State acknowledges that this Court has determined that requiring a defendant to pay for drug testing is a special condition of probation because it is not statutorily authorized. See Brock v. State, 688 So. 2d 909, 911 n.4 (Fla. 1997); Curry. However, the State argues that section 948.09(6), Florida Statutes (1995), provides a statutory basis for classifying a requirement that a defendant pay for urinalysis drug testing as a general condition of probation. Based on this statute, the State requests that we affirm conditions 8, 20, and 24, as general conditions of probation insofar as they relate to requiring the respondent to pay for urinalysis drug testing.

We do not believe it appropriate in this case to recast the certified question as the State suggests so as to limit it to urinalysis testing for drug usage. While section 948.09(6), Florida Statutes (1995), is limited to "urinalysis testing," the trial court's order, in this case, specifies the broader "drug testing," and the certified question specifically asks whether requiring a defendant to pay for "drug testing" is a general condition of probation. Moreover, the statute cited by the State merely provides the Department of Corrections with the discretion to require payment for urinalysis testing. We hold that the discretion afforded to the Department of Corrections in section 948.09(6), Florida Statutes (1995), is insufficient to serve as statutory notice that the court can make payment for drug testing a mandatory condition of probation.

Accordingly, we answer the certified question by holding that the requirement that a defendant pay for drug testing is a special condition of probation which the trial court must pronounce orally at sentencing, and we approve the decision below.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, HARDING, ANSTEAD and PARIENTE, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 96-01923

(Polk County)

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James Marion Moorman, Public Defender and Richard P. Albertine, Jr., Assistant Public Defender, Tenth Judicial Circuit, Clearwater, Florida,

for Respondent

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

AUGUST 27, 1998

JAMES EDWARDS, Appellant(s), v. STATE OF FLORIDA, Appellee(s).	)	Case No. 97-01791

BY ORDER OF THE COURT:

Counsel for appellant having filed a motion for rehearing in the above-styled case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Ron Napolitano, A.A.G.
Deborah K. Bruekheimer, A.P.D.
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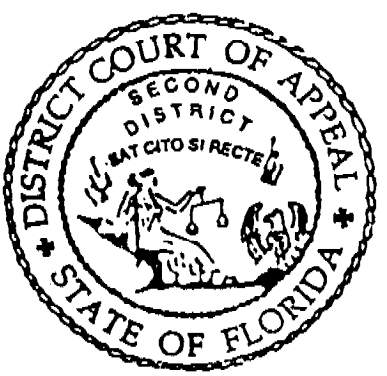

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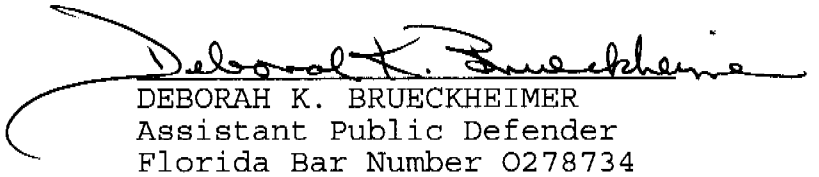
CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 9th day of October, 1998.

Respectfully submitted,



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