ORIGINAL

FILED
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OCT 30 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES EDWARDS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 93,880

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts except for the following additions:

On appeal the state of Florida argued, in addition to the merits, that the issue raised on direct -the erroneous imposition of certain conditions of probation - was procedurally barred to the appellant/petitioner's failure to raise the issue at the trial level as required by Fla. R. Crim. Pro 3.800(b) (1997).

SUMMARY OF THE ARGUMENT

Sentencing errors such as special conditions of probation or lack of statutory delineation of costs cannot be raised on direct appeal if not properly preserved below by motion to correct sentencing error pursuant to Fla. R. Crim. Pro 3.800(b), as required by Fla. R. App. Pro. 9.140(d). There is no such thing as "fundamental error" in a sentencing context under the Criminal Appeal Reform Act; there are just sentencing errors. If the error amounts to an illegal sentence - which is not the case in the instant appeal - then the matter can always be raised by a motion to correct an illegal sentence under Fla. R. Crim. Pro 3.800(a) at any time. If the sentencing error is merely a procedural one - as is the case in the instant appeal - the error is waived if not properly preserved below. If there is such a thing as "fundamental error" in the sentencing context then the failure of the counsel to properly preserve the error can be raised by post-conviction motion filed pursuant to Fla. R. Crim. Pro 3.850 for ineffective assistance of counsel.

ARGUMENT

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 OF PROBATION THAT REQUIRES ORAL PRONOUNCEMENT?

Appellee acknowledges that based upon this Court's ruling in State v. Williams, 712 So.2d 762 (Fla. 1998), this certified question should be answered that the requirement that a defendant pay for drug testing is a special condition of probation which must be orally pronounced at sentencing and since it was not it must be struck. However, as petitioner has properly pointed out to this Court, when the Second District Court of Appeals refused to grant a rehearing in spite of the Williams, *id.*, decision, the only conclusion that can be reached is that the petitioner was denied relief because the unannounced special condition of probation of probation was not attacked at the trial level. Appellee agrees that the certified question should be modified to read:

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

This Court never addressed the procedural bar argument in Williams, *id.*, because, as petitioner points out in footnote 1 of his brief, William's sentencing took place before the effective date of the Criminal Appeal Reform act. Such is not the factual sce-

nario in the instant case.

Appellant's offenses were committed after July 1, 1996 (R 72-73) and his sentencing took place after January 1, 1997 - specifically on March 27, 1997 (R 1, 57, 126-126-133). Therefore the Florida Criminal Appeal Reform Act, which took effect July 1, 1996 [Ch.96-248, at 953-957] and the amendments to the Florida Rules of Criminal Procedure and Florida Rules of Appellate procedure which took effect January 1, 1997, are applicable to the petitioner. *See* Neal v. State, 688 So.2d 392 (Fla. 1st DCA 1997) and Thomas v. State, 662 So.2d 1334 (Fla. 1st DCA 1995), *rev. denied* 669 So.2d 252 (Fla. 1996).

In Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996) [as corrected on denial of rehearing original cited at 685 So.2d 773 (Fla. 1996)], this Court amended Fla. R. App. Pro. 9.140 regarding appeals in criminal cases. As amended, Fla. R. App. 9.140(b)(2)(A) and(B) and 9.140(d) provide:

> (2) Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal identifying with particularity the point of law preserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (I) the lower court's lack of subject matter jurisdiction;
>
> (ii) a violation of the plea agreement, if

preserved by a motion to withdraw plea;

(iii) an involuntary plea, if preserved by 000000a motion to withdraw plea.

(iv) *a sentencing error, if preserved;* or

(v) as otherwise provided by law.

* * *

(d) Sentencing Errors. *A sentencing error may not be raised on appeal unless the alleged error is first brought to the attention of the lower tribunal:*

(1) at the time of sentencing; or

(2) by motion pursuant to Florida Rule of Criminal Procedure 3.00(b).

(696 So.2d at 1129-1131)(Emphasis added)

This amendment became effective January 1, 1997. *Id.* at 1107. The amendment was enacted to conform the rules of appellate procedure to the newly enacted "Criminal Appeal Reform Act of 1996" (the act) which became effective July 1, 1996. *Id.* at 1104. The Court was particularly concerned with those portions of the act regarding preservation of error for purposes of appeal, s.924.051(4) provides, "If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly preserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence." The Court recognized that the Legislature could reasonably condition the right to appeal upon the preservation of prejudicial error or the asser-

tion of a fundamental error. *Id.* At 1105. As the Court then went on to reason:

> Anticipating that we might reach such a conclusion, this Court on June 27, 1996, promulgated an emergency amendment designated as new Florida Rule of Criminal procedure 3.800(b) to authorize the filing of a motion to correct a defendant's sentence within 10 days. *Amendments to Florida Rule of Appellate procedure 9.02.(g) & Florida Rule of Criminal Procedure 3.800*, 675 So.2d 1374 (Fla. 1996) However since our adoption of the emergency amendment, a number of parties have expressed the view that the ten day period is too short. They say that because of the copying process in the clerk's office or FOR other reasons, attorneys often do not timely receive copies of sentencing orders. Others point out that as a result of the short time period, many public defenders are ordering expedited transcripts of the sentencing hearing at additional cost to the state. FOR these reasons, we have extended the time FOR filing motions to correct sentencing errors under rule 3.800(b) to 30 days.
>
> The other issue immediately before us is the effect of the ACT on the prosed rule on appeals from pleas of guilty or nolo contendere without reservation. In *Robinson v. State*, 373 So.2d 898 (Fla. 1979), this Court addressed the validity of section 924.06(3), Florida Statutes (1997) which read:
>
> > A defendant who pleads guilty or nolo contendere with no express reservation of the right to appeal shall have no right to direct appeal. Such a defendant shall obtain review by means of collateral attack.
>
> The Court agreed that the statute properly foreclosed appeals from matters which took place before the defendant agreed to the judgment of conviction. However, the Court held that there was a limited class of issues which

occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. These included: (1) subject matter jurisdiction; (2) illegality of the sentence: (3) Failure of the government to abide by a plea agreement; and (4)the voluntary and intelligent nature of the plea. *Robinson*, 373 So.2d at 502.

Section 924.051(b)(4) is directed toward the same end but is worded in a slightly differently. In so far as it says that a defendant who pleads nolo contendere or guilty without expressly reserving the right to review a legally dispositive issue cannot appeal the judgment, we believe that the principle in *Robinson* controls. A defendant must have the right to appeal that limited class of issues described in *Robinson*.

There remains, however, another problem. Section 924.051(b)(4) also states that a defendant pleading guilty without expressly reserving the right to appeal a legally dispositive issue cannot appeal the sentence. However, a defendant has not yet been sentenced at the time of the plea. Obviously, one cannot expressly reserve a sentencing error which has not yet occurred. By any standard, this is not a reasonable condition to the right to appeal. Therefore, we construe this provision of the Act to permit a defendant who pleads guilty or nolo contendere without reserving a legally dispositive issue to nevertheless appeal a sentencing error, providing it has been timely preserved by a motion to correct the sentence. (Citations omitted) (Emphasis added)

Accordingly, we have rewritten rule 9.140 to accomplish the objectives set forth above. Consistent with the Legislature's philosophy of attempting to resolve more issues at the trial court level, we are also promulgating Florida Rule of Criminal Procedure 3.170(L), which authorizes the filing of a motion to withdraw the plea after sentencing within thirty days from the rendition of sentence, but only upon the grounds recognized by *Robinson*, or otherwise provided by law.

696 So.2d at 1105)

The Court, in Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253, 1257 (Fla. 1996), as stated above, amended Fla. R. Crim. 3.170, which amendment became effective January 1, 1997, adding a new subsection (L) which reads:

> (L) Motion to Withdraw the Plea After Sentencing. A defendant who pleads guilty or nolo contendere without expressly reserving the right to appeal a legally dispositive issue may file a motion to withdraw the plea within 30 days after the rendition of sentence, but only upon the grounds specified in Florida Rules of Appellate Procedure 9.140(b)(2)(B)(I-v)

In the instant case, petitioner cannot raise the issue of the trial court's failure to announce special conditions of probation because he did not bring this alleged sentencing error to the attention of the trial court by filing a motion to correct sentencing error pursuant to Fla. R. Crim. Pro 3.800(b) as required by Fla. R. App. Pro. 9.140(d) (1997). Since the issue was not properly preserved for appeal, the appellate courts should not address the issue and rule that it is procedurally barred from review on direct appeal. Hyden v. State, 715 So.2d 960 (Fla. 4th DCA 1998) *en banc.; See generally* Maddox v. State, 708 So.2d 617) *en banc.*

Aside from the Fourth and Fifth DCA *en banc* decisions, respondent acknowledges that the other district courts of appeal have issued contradicting decisions by different panels within each district. Petitioner quotes extensively from the decision of the Second District Court of Appeals in Denson v. State, 711 So.2d

1225 (Fla. 2d DCA 1998). Although the court in Denson, *id.*, reach the merits of the unpreserved sentencing errors in that case, it did so only because it believed it could do so because it already had jurisdiction because of other preserved errors. *Id.* at 1226. The Second District did not reach the issue of whether any sentencing error could be raised on direct appeal if not preserved if the appellate court did not already have jurisdiction based upon some other preserved issue. Had the Second District reached that issue it is clear that at least the panel in Denson would have found that the issue was not preserved FOR review on direct appeal. As the court stated therein:

> ...The error which the legislature is describing in section 924.051(3) is an error that is not merely correctable on direct appeal without preservation, but it is an error that is so egregious and without alternative remedy that it warrants the appellate court exercising jurisdiction in the case solely FOR the purpose of correcting that error. So defined, there is little question that "fundamental error" forR purposes of the Criminal Appeal Reform Act is a narrower species of error than some of the errors previously described as fundamental in case law. Because the sentencing errors in this case could have been challenged by a motion pursuant to Florida Rule of Criminal Procedure 3.800(b) prior to appeal and because they may still be challenged by postconviction motions, neither of the sentencing errors in this case fits within this definition of fundamental error.[11] Indeed, although we do not reach the issue, the Fifth District may be correct in concluding that no sentencing error is fundamental FOR purposes of this new act. See Maddox, 708 So. 2d at 618. Without a preserved error, these unpreserved sentencing errors would not give us jurisdiction over this appeal.[12]

> [11] Because the oral/written discrepancy in this case is intertwined with the illegal sentence, it is clear that it can be corrected in conjunction with the illegal sentence. *Cf. Middleton*, 689 So.2d at 304 (erroneous habitual offender sentence not fundamental error and not reviewable on direct appeal under act). Minor sentencing errors are not fundamental even when it is unlikely that they can be corrected by postconviction motion. See *Mason v. State*, 698 So.2d 914 (Fla. 4th DCA 1997) ($1000 cost item not orally announced is not fundamental error under act).
>
> [12] Although we agree with much of the discussion in *Harriel v. State*, 710 So.2d 102 (Fla. 4th DCA 1998), our decision conflicts with Harriel in holding that an illegal sentence is not fundamental for purposes of the Criminal Appeal Reform Act. Although illegal sentences may be corrected "any time," because the place for that correction is in the trial court 0pursuant to rule 3.800(a), we cannot conclude that they are fundamental errors giving jurisdiction to the district courts of appeal to review these issues on direct appeal as a matter of right.

Id. at 1229 (Emphasis added)

Furthermore, although the Second District reached the merits of the unpreserved sentencing errors in Denson because it believed it could do so since it already had jurisdiction because of other preserved errors, it specifically stated in footnote 13 that:

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

Id. at 1230 (emphasis added)

Petitioner, after analyzing the decisions of the different district courts goes on to argue that discretionary costs and spe-

cial conditions of probation are not caught by trial counsel because they since they are not orally pronounced counsel is aware that they are being imposed in the written sentencing documents and there is no trial transcript made of the sentencing hearing because trial counsel is unaware of the need for it. What petitioner fails to to recognize is that this Court recognized this problem. In Amendments to Florida Rule of Appellate procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374 (Fla. 1996), this Court originally provided for a 10 day period to file a motion to correct a sentencing error - "to correct the sentence or order of probation " - after sentence is rendered and furthermore stated that if such a motion is filed the motion is not effected by the filing of any notice of appeal. In Amendments to the Florida Rule of Appellate Procedure, 686 So.2d at 1105, this court extended the time period such a motion to 30 because it recognized the problems of delay in attorneys receiving copies of sentencing orders and that many attorneys were ordering expedited transcripts of sentencing hearings at additional cost to the state. Contrary to petitioner's argument, it is clear that defense attorneys are aware of the problem of unannounced costs and conditions of probation or even discrepancies between oral pronouncements and written orders and that is why this Court extended the time to 30 days to file the motion to correct sentence under 3.800(b). Petitioner is now telling this Court to allow district courts of appeal to ignore the procedural requirements

this Court has said is necessary to preserve sentencing issues for review on direct appeal. This Court should not do so.

In addition to to the safeguards that this Court has provided by enacting rule 3.800 (b), criminal defendants also have the right independent of 3.800(b) to file a 3.800(a) motion to correct an "illegal" sentence at any time, and if such a motion is filed while a direct appeal is pending, the trial court retains jurisdiction to correct such an error while an appeal is pending. *See Fla. R. App. Pro. 9.600 (1997):*

> RULE 9.600. JURISDICTION OF LOWER TRIBUNAL PENDING REVIEW
>
> * * * *
>
> (d) Criminal Cases. The lower tribunal shall retain jurisdiction to consider motions pursuant to Florida Rule of Criminal Procedure 3.800(a) and in conjunction with post-trial release pursuant to rule 9.140(g). While an appeal is pending, the movant under the rule 3.800(a) shall within 10 days of the date of any order granting relief under that rule file a copy of the order with the trial court.

The real problem is what is an "illegal sentence" which can be raised at any time under rule 3.800(a) and other sentencing errors which must be preserved by objection at the time of sentencing or within 30 days after rendition of the sentencing order by a motion pursuant to rule 3.800(b) and what is "fundamental error" as far as sentencing errors are concerned.

Respondent submits that the Fifth District analysis in Maddox

is correct, that there is no such thing as fundamental error as regards sentencing errors under the Criminal Appeal Reform Act there are only sentencing errors:

> The net effect of the statute and the amended rules is that *no* sentencing error can be considered in direct 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 or not the error is apparent on the face of the record. And it applies across the board to defendant's who plead and to those who go to trial. As for the "fundamental error" error exception, it now appears clear, given the recent rule amendments, that "fundamental error" now longer exists in the sentencing context. The supreme court has recently distinguished sentencing error from trial error, and has found fundamental error only in the later context. *Summers v. State*, 684 So.2d 729, 729 (Fla. 1996)("The trial court failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived."); *Archer v. State*, 673 So.2d 17, 20 (Fla.)(Fundamental error is 'error which reaches down into the validity of the trial itself to the extent that the verdict of guilty could not have been obtained without the assistance of the alleged error.'"), *cert. denied.* ---U.S. ----, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996). It appears that the supreme court has concluded that the notion of "fundamental error" should be limited to trial errors, not sentencing errors. The high court could have adopted a rule that paralleled the Criminal Appeal Reform Act, which would allow FOR review of fundamental errors in non plea cases, but the court did not do so and made it clear in its recent amendment to rule 9.140 that unpreserved sentencing errors cannot be raised on appeal.
>
> The language of Rule 9.140(b)(2)(B)(iv) could not be clearer. And why should there be "fundamental error" where the courts have cre-

ated a "failsafe" procedural device to correct any sentencing error or omission at the trial court level? Elimination of the concept of "fundamental error" in sentencing will avoid the inconsistency and illogic that plagues the case law and will provide a much needed measure of clarity, certainty, and finality,. Even those who remain committed to the concept of "fundamental error" in the sentencing context would be hard pressed to identify errors in sentencing that are serious enough to require correction in the absence of an objection at the trial level. The supreme court has concluded that the only type of sentencing error that is even "illegal" is a sentence that exceeds the statutory maximum. *Davis v. State*, 661 So.2d 1193, 1196. Yet, under the current statutory sentencing scheme, a sentence can exceed the maximum if warranted by the guidelines score. s. 921.00124(1)(a), Fla. Stat. (1996). Here we are dealing with a $1 assessment and a $5 overcharge. If an improper $1 cost assessment is "fundamental error" then any sentencing error, no matter how minor, would be fundamental.

* * * *

....We also disagree that sentencing errors can be raised on direct appeal without preservation, simply because the sentence that results is illegal. (Citations omitted)....

* * * *

....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 or 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 formally have been characterized as "fundamental" would not support an "ineffective assistance" claim.

Maddox, *supra.*, at 619-622.

Sentences which are truly "illegal" can be corrected at anytime by the trial court under Fla. R. Crim. 3.800(a):

> A court may at anytime correct an illegal sentence imposed by it, or an incorrect calculation in a sentencing guidelines score sheet.
>
> (Emphasis added)

Other sentencing errors must be preserved by object at the time of sentencing or by motion filed within 30 days of the rendition of the sentencing order.

With respect to special conditions of probation, particularly the condition attacked in the instant appeal - payment for drug testing - that condition is not per se illegal. Its illegality rests only in the fact that it was not orally pronounced at sentencing. as was stated in Larson v. State, 572 So.2d 1368, at 1371 (Fla. 1991):

> In the absence of a contemporaneous objection, we believe that a defendant may appeal a condition of probation only if it is so egregious as to be the equivalent of fundamental error. The mere fact that a certain condition of probation is subject to reversal on appeal once a proper objection is raised at trial does not necessarily mean it is illegal for the purposes at hand.

The fact that this particular condition - payment for drug testing - was not orally pronounced at sentencing no longer deprives a defendant of bringing it to the trial court's attention, because, as stated earlier, he has 30 days from the date the order is rendered to file a motion to correct such a sentencing error.

Furthermore, most, if not all practitioners of criminal defense law are well aware of standard orders used by the courts in circuits in which they practice and are well aware of the common practice to of including certain special conditions which are not orally pronounced in these orders. These conditions are not per se illegal and any error in procedurally implementing them should be and can be readily attained by the process established by this Court under 3.800(b).

With regard to the statutory authorization of certain costs, if there is statutory authorization and it is simply not delineated then the cost is not illegal and the failure to preserved it by motion to correct sentencing error under 3.800(b) waives the issue. If the cost is illegal - has not statutory authorization - then the "illegal" sentence can be raised at any time under 3.800(a).

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court answer the modified certified question by holding that sentencing errors not raised at the trial level by object at the time of sentencing or within 30 days after rendition of the sentence cannot be raised on direct appeal.

Respectfully submitted,

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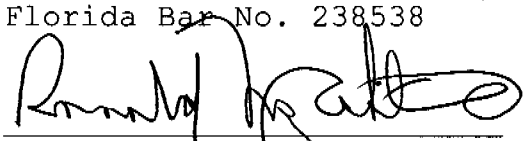

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831, this 28 day of October, 1998.

Leonard Ingalsbee
COUNSEL FOR RESPONDENT

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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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

---

[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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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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DISTRICT COURT OF APPEAL * SECOND DISTRICT * STATE OF FLORIDA
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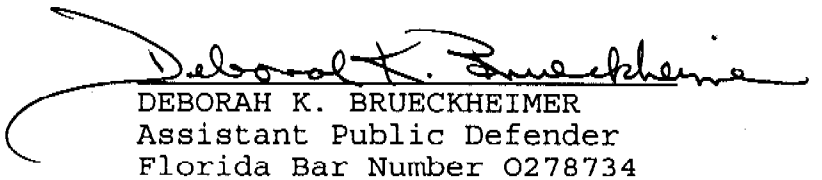
CERTIFICATE OF SERVICE

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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