IN THE SUPREME COURT OF FLORIDA

STEPHEN J. KLARICH, JR.,	)	
	)	
Petitioner,	)	
	)	S. CT. CASE NO. 95,705
vs.	)	DCA CASE NO. 98-172
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT AND THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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_____	)	

STATEMENT OF THE CASE

Petitioner's Statement of the Case are as follows:

The State Charged the Petitioner, Stephen Klarich, in an amended information, filed on November 17, 1997, with resisting an officer with violence and battery. (R 36; Vol. 1) A pretrial hearing was held prior to jury voir dire on November 17, 1997, during which defense counsel requested a continuance so that she could depose a defense witness, Tim Williams. (SR 74)[1] Petitioner proceeded to jury trial on November 20, 1997, before Acting Circuit Judge, Stasia Warren. (T 1-202; Vol. 2)

At the close of the State's case-in-chief, defense counsel made a motion for

[1] SR = Supplemental volume.

judgment of acquittal. (T 95-6; Vol. 2) The trial court denied the motion as to each of the offenses. (T 96; Vol. 2)

The Petitioner received a sentence of a year of community control, followed by three years of drug offender probation for the resisting arrest with violence. (R 14-17, 58-62; Vol. 1) As for the misdemeanor battery offense, the Petitioner received a sentence of time served. (R 25; Vol. 1)

The Petitioner filed a timely notice of appeal on January 14, 1998. (R 68; Vol. 1) The Office of the Public Defender was appointed to represent the Petitioner in this appeal on January 14, 1998. (R 69; Vol. 1) The Fifth District Court of Appeal, upon rehearing, affirmed the Petitioner's judgements and sentences in ***Klarich v. State***, 730 So.2d 419 (Fla. 5th DCA 1999). [Appendix A] Petitioner filed a notice to invoke this Court's discretionary jurisdiction on May 21, 1999. This Court accepted jurisdiction in an order dated August 24, 1999.

STATEMENT OF THE FACTS

Gerald Wilson testified that the Petitioner lived two trailers down from him. (T 35-36; Vol. 2) On the night of the incident, Gerald's brother came over to Gerald's trailer and stayed to drink beer with Gerald until approximately eleven O'clock. (T 37-8; Vol. 2) Gerald further testified that, sometime later, he heard a commotion outside and went to investigate. (T 36; Vol. 2)

Gerald additionally testified that the argument involved a friend's brother, Jethro, the Petitioner, and the Petitioner's father. (T 36, 39; Vol. 2) When Gerald walked outside, the Petitioner, according to Gerald, punched him under his right eye. (T 39-42; Vol. 2) Gerald was knocked out. He later told the police he had been struck five of six times, based on viewing his own injuries, but he had actually only been struck once. (T 42-43; Vol. 2) Finally, Gerald testified that the Petitioner and Jethro returned to his trailer and knocked on the side of the trailer saying: "That's what [you] get, come on back outside[;] I'll give you more." (T 48; Vol. 2)

Deputy Tara Savercool testified that she first contacted Gerald subsequent to the incident and found him bleeding in the area of his right eye, along with having cuts and a swollen face on one side. (T 54; Vol. 2) After an initial search for the Petitioner was unsuccessful, a second search, according to Deputy Savercool, was successful in locating the Petitioner who was pursued by Deputy Savercool. (T 56-63; Vol. 2) As

the Petitioner briefly stopped, Deputy Savercool testified that she grabbed the Petitioner and held him in a headlock in an attempt to pull the Petitioner down. (T 63; Vol. 2) According to Deputy Savercool, this is when the Petitioner stood straight up and started to come off the ground causing Deputy Savercool to feel pressure in the area of her waist. (T 64; Vol. 2) In addition, Deputy Savercool stated that she continued to yell at the Petitioner to get down on the ground, but the Petitioner did not comply, as Deputy Dana White struck the Petitioner with a flashlight in the area of the Petitioner's shoulder blade. (T 65-7; Vol. 2)

A second strike by Deputy White to the Petitioner's lower back area was also witnessed by Deputy Savercool. (T 67; Vol. 2) The Petitioner, however, according to Deputy Savercool, then went down on his knees, fell forward on his hands in a push up position, but ultimately fell down with his chest on the ground and continued to struggle with both deputies. (T 67-8; Vol. 2) Finally, Deputy Savercool testified that Deputy Edward Turk also assisted in attempting to handcuff the Petitioner after wrestling the Petitioner's arms behind his back. (T 68; Vol. 2)

Sergeant Dana White testified that when he arrived at the trailer park, an individual by the name of Jeffery Uptagraft was standing in the street, yelling obscenities at Gerald's trailer, and singing a song at the top of his lungs. (T 77-8; Vol. 2) As Mr. Uptagraft began to walk away from Sergeant White, the Petitioner,

according to Sergeant White, also ran from the area and was followed by Sergeant White. (T 78-80; Vol. 2) Sergeant White further testified that he could hear Deputy Savercool telling him where she and the Petitioner were and that, upon his arrival at that location, he saw the Petitioner trying to break away from the headlock of Deputy Savercool. (T 81-2; Vol. 2) Sergeant White next stated that he immediately grabbed the Petitioner by the shoulder or arm rasing his left hand since his right hand held a flashlight. (T 82-3; Vol. 2)

Sergeant White also testified that the Petitioner did not respond to his verbal commands to get down as he pulled back on the Petitioner in an attempt to force the Petitioner off balance. (T 82-3; Vol. 2) At this point, Sergeant White stated that he struck the Petitioner with the flashlight between the Shoulder blades in the center of the Petitioner's back having no effect on the Petitioner. (T 83; Vol. 2) A second blow with the flashlight was then made by White to the Petitioner's right hip area upon which the Petitioner went to the ground continuing to struggle. (T 83; Vol. 2) This is when, according to White, Deputy Turk arrived and the Petitioner was handcuffed. (T 84; Vol. 2)

Tim Williams testified that he lives in the Petitioner's trailer park and was standing outside when the incident occurred. (T 97-9; Vol. 2) Tim described the events as beginning with Gerald walking over to the Petitioner's trailer, at the Petitioner's request, when a fight developed between them. (T 99; Vol. 2) According

to Tim, Gerald first swung at the Petitioner and then the Petitioner hit Gerald four or five times. (T 100, 104-105; Vol. 2)

Shana Ryan testified that the Petitioner has been her boyfriend for approximately twelve years and have three children together. (T 108; Vol. 2) As for the incident, Shana testified that she witnessed a male deputy sheriff hit the Petitioner and put his feet on the Petitioner's back. (T 109; Vol. 2) Just prior to this, the Petitioner was standing by his mother's trailer with Jeff Uptagraft Jethro. (T 109; Vol. 2) Shana did not see what happened between the Petitioner and Gerald outside during the argument, but she did see that the Petitioner never picked up or made any contact with the female deputy. (T 109-111; Vol. 2) She further testified that Gerald had once turned to get her to go out to some woods with him. (T 113-114; Vol. 2) Finally, Shana testified that Gerald had a reputation at the trailer park for drinking and starting fights. (T 114; Vol. 2)

Cynthia Bell testified that she is the Petitioner's sister-in-law and that she witnessed the Petitioner being struck with a flashlight by the deputies and that the Petitioner's head was to the ground in the dirt. (T 125-6; Vol. 2) When she walked outside to see what was going on, she was told to get back inside by the deputies or she would go to jail. (T 126-7; Vol. 2) She also testified that she never saw the

Petitioner picking up the female deputy. (T 127; Vol. 2)

The Petitioner testified that the incident began when he was on his patio driveway with his father moving a bed into his house and Gerald walked by and said nothing. (T 132; Vol. 2) Sometime later, when one of the Petitioner's children was present, Gerald came back to the Petitioner's yard, swung at him and missed. (T 132; Vol. 2) The Petitioner responded by hitting Gerald two or three times causing Gerald to hit a concrete slab on his face when he fell. (T 132; Vol. 2) As for Gerald's reputation for peacefulness or violence, the Petitioner stated that Gerald "...had a bunch of violent incidents in [the trailer park]." (T 132; Vol. 2) Two particular incidents described by the Petitioner pertained to Gerald punching a former girlfriend's new boyfriend in the face and pulling the hair of the mother of another girlfriend, followed by throwing the mother to the ground and beating her while on top of her. (T 133; Vol. 2)

SUMMARY OF ARGUMENT

The Petitioner's written community control/ probation order contains several special conditions which were not orally pronounced by the trial court at sentencing. Specifically, the Petitioner's written community control/ probation order includes special conditions (15) and (24) which require the Petitioner to be responsible for the payment of any cost of fees related to any recommended drug or alcohol evaluation, referral, treatment, or testing. In addition, the Petitioner's written community control/ probation order includes a special condition (19) that the Petitioner enroll in the Probationer's Education Growth (PEG) program. None of these conditions were orally announced by the trial court at sentencing and should be stricken.

Finally, the Petitioner's written probation order improperly includes a $250.00 "cost of investigation" fee, payable to the State Attorney's Office, and a $150.00 "investigative costs" payable to the Volusia County Sheriff's Office. Neither of these costs were supported by any documentation and there is no statutory authority for a "State attorney's fee" to be recoverable as a "cost of prosecution." Thus, each of the aforementioned costs or fees should also be stricken. The Fifth District, therefore, incorrectly affirmed each of the sentencing errors raised in the instant appeal, which are fundamental in nature, and correctable on direct appeal.

ARGUMENT

THE PETITIONER'S WRITTEN COMMUNITY

CONTROL/ PROBATION ORDER CONTAINS CERTAIN INVALID SPECIAL CONDITIONS.

During the Petitioner's sentencing hearing, the trial court sentenced the Petitioner to one year of community control, followed by three years of probation. (R 13-26, 58-62) The Petitioner's written community control/ probation order, however, contains several special conditions, namely, condition numbers (15) and (24), which require the Petitioner to pay for any fees related to any drug and/or alcohol test evaluations, referrals, and treatment, including any urinalysis, breathalyser, or blood test requested by his probation officer. (R 60-1) The trial court did not orally pronounce, during the sentencing hearing, that the Petitioner would be responsible for the payment of any costs or fees for such drug and/or alcohol treatment evaluation, referrals, or treatment. (R 13-27; Vol. 1)

As this Court recently held in ***State v. Williams***, 712 So.2d 762 (Fla. 1998), the trial court's oral pronouncement of this special condition of community control and/or probation is required in order for a defendant's written community control and/or probation order to include such a special condition. Similarly, the trial court did not orally pronounce at the sentencing hearing any requirement that the Petitioner enroll in the Probationer's Education Growth (PEG) program. (R 13-27; Vol. 1) Therefore, special condition number (19) of the Petitioner's written community control and/or probation order should also be stricken. ***See also Jackson v. State***, 685 So. 2d 1386

(Fla. 5th DCA 1997)

In addition, the trial court's imposition of a $250.00 fee for "cost of investigation", listed in special condition number (28), and a $150.00 "law enforcement investigative cost", payable to the Volusia County Sheriff's Office, listed in special condition number (29), should be stricken as well. (R 22-3, 26-7, 58-62; Vol. 1) This is because, as pointed out by the Fifth District in ***Pickett v. State***, 678 So. 2d 857 (Fla. 5th DCA 1996), the $250.00 "cost of investigation" payable to the Office of the State Attorney is totally unsupported by any documentation and is not recoverable as a cost of prosecution under any Florida Statute. (R 13-27; Vol. 1) Further, as to the $150.00 "law enforcement investigation costs," payable to the Volusia County Sheriff's Office, there was no documentation presented by the State to support this fee so, it too, must be stricken from the Petitioner's written probation order. (R 13-27; Vol. 1) ***Id***.

The Fifth District affirmed the Petitioner's sentence involving the unauthorized "State Attorney" fee, the undocumented "costs of investigation", and the unannounced special written community control/probation conditions, citing ***Maddox v. State***, 708 So.2d 917 (Fla. 5th DCA 1998), rev granted, 718 So. 2d 169 (Fla. 1998). ***Klarich v. State***, 730 So. 2d 419 (Fla. 5th DCA 1999) Petitioner would first maintain that, under this Court's decision in **Williams, supra,** the instant sentencing errors are

fundamental in nature and, therefore, correctable on direct appeal. Specifically, the Fifth District held in **Maddox, supra**, that any sentencing errors, even those previously held by the district courts and this Court to be "fundamental" in nature, are waived on direct appeal under Section 924.051, Florida Statutes (Supp. 1996) if they are not objected to at sentencing or 30 days thereafter. Petitioner would submit that this analysis by the Fifth District is incorrect, particularly when dealing with fundamental sentencing errors. As pointed out by the Second District in **Bain v. State**, 730 So. 2d 296 (Fla. 2d DCA 1999):

> "...appellate review of fundamental error is, by its nature, an exception to the requirement of preservation...no rule of preservation can impliedly abrogate the fundamental error doctrine because the doctrine is an exception to every such rule. It makes no difference this particular rule is codified." [Emphasis added] **Id.** at 302

Petitioner would submit that this is the appropriate reasoning which this Court should adopt in lieu of that adopted by the Fifth District in **Maddox** and relied on by the Fifth District in resolving the instant case. See also, **Nelson v. State**, 719 So.2d 1230 (Fla. 1st DCA 1998), **Sanders v. State**, 698 So.2d 377, 378 (Fla. 1st DCA 1997), and **Powell v. State**, 719 So.2d 963 (Fla. 4th DCA 1998). The Fifth District's holding in the case sub judice that, under **Maddox**, **supra**, Section 924.051, Florida Statutes (Supp. 1996), bars appellate review of each of the aforementioned sentencing

errors is erroneous and should be reversed by this Court and the challenged fees and unpronounced special conditions stricken.

CONCLUSION

Based on the authorities and argument cited herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District and strike the requirements in special conditions numbers (15) and (24) of Petitioner's written community control/ probation order which require the Petitioner to pay for any drug and/or alcohol testing evaluation, referral, or treatment. Further, special conditions (19), (28), and (29), must also be stricken by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Stephen J. Klarich, 602 6th Street, Holly Hill, FL 32117, this _____ day of September 1999.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

_____

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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Petitioner,	)	
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STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

A P P E N D I X

Klarich v. State, 730 So.2d 419 (Fla. 5th DCA 1999)

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agreement, but otherwise stems from the underlying dispute over the management of the dealership, as the statements were allegedly made in conjunction with Andrews' termination. Respondents have more claims against petitioners than petitioners have against respondents, but the fact remains that all the claims in the instant case originated from the same set of the underlying facts. Under *Towers*, therefore, "the claims are interrelated and one lawsuit can resolve the issues."

Finally, it is worthwhile to recall the policy considerations underlying *Mabie*. In *Lightsey v. Williams*, 526 So.2d 764, 766 (Fla. 5th DCA 1988), this court explained that the rule set forth in *Mabie* is "intended to prohibit a race to judgment." Allowing the trial court's order in the instant case to stand will not further the policy considerations underlying *Mabie*.

Accordingly, we grant the petition for writ of certiorari, quash the order denying the motion to abate and remand to the trial court to grant the petitioners' motion to abate. *See Fasco Indus., Inc. v. Goble*, 678 So.2d 916, 917 (Fla. 5th DCA 1996) ("[J]urisdiction lies in the court where service first is perfected against all defendants").

PETITION GRANTED; ORDER QUASHED; REMANDED with directions.

DAUKSCH and GOSHORN, JJ., concur.

1

Stephen J. KLARICH, Appellant,

v.

STATE of Florida, Appellee.

No. 98–172.

District Court of Appeal of Florida, Fifth District.

April 23, 1999.

Appeal from the Circuit Court for Volusia County; Stasia Warren, Acting Judge.

James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Maximillian J. Changus, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING

PER CURIAM.

We grant rehearing, withdraw our original opinion and substitute the following in its place.

Appellant contends that certain special conditions of his probation order are illegal and thus should be set aside. However, appellant made no objection to these conditions at the trial level nor did he file a motion to amend the probation order. Thus, his contentions have not been preserved for appeal. *See* § 924.051(3), Fla. Stat. (1997); Fla. R.App. P. 9.140(d); *Maddox v. State*, 708 So.2d 617 (Fla. 5th DCA 1998), *rev. granted*, 718 So.2d 169 (Fla.1998); *Mason v. State*, 698 So.2d 914 (Fla. 4th DCA 1997). The errors complained of here do not appear to be fundamental in nature.

AFFIRMED.

GRIFFIN, C.J., W. SHARP, J., and ORFINGER, M., Senior Judge, concur.

2

Dencil Lee CHAPMAN, Appellant,

v.

STATE of Florida, Appellee.

No. 98–2.

District Court of Appeal of Florida, Fifth District.

April 23, 1999.

Appeal from the Circuit Court for Brevard County, Warren W.C. Burk, Judge.