

IN THE
SUPREME COURT OF FLORIDA

ALAN OSTERHOUDT, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-303

Lower Tribunal No(s): 5D13-4277
2012-404-CF

JURISDICTIONAL BRIEF OF THE PETITIONER

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Alan Osterhoudt, Jr. (hereinafter “Petitioner Osterhoudt”) was convicted following a jury trial of manslaughter. Post-sentencing, Petitioner Osterhoudt filed a Florida Rule of Criminal Procedure 3.800(b) motion challenging the discretionary fine¹ imposed by the trial court because the discretionary fine was not individually/specifically pronounced during the sentencing hearing. The trial court failed to rule on Petitioner Osterhoudt’s rule 3.800(b) motion within the sixty-day window afforded by rule 3.800(b) and therefore the motion was deemed denied. Petitioner Osterhoudt then presented this claim on direct appeal to the Fifth District Court of Appeal, and the Fifth District affirmed the denial of this claim, stating:

Alan Osterhoudt (the defendant) appeals his judgment and sentence, which were entered by the trial court after a jury found him guilty of committing the crime of manslaughter. . . . [W]e write to address the defendant’s contention that the trial court erred in imposing certain fees, costs, and fines.

Post-sentencing, the defendant filed a motion for sentencing relief pursuant to rule 3.800 of the Florida Rules of Criminal Procedure. Among other things, the motion alleged error in the imposition of certain fees, costs, and fines. The motion was denied. The defendant now contends that the trial court reversibly erred in imposing certain fees, discretionary fines, and costs. We conclude that these claims were not properly preserved for appellate review.

Our court has held that a defendant waives his right to raise issues on direct appeal relating to a trial court’s imposition of unpronounced conditions of probation if the defendant only raises “procedural and not

¹ The discretionary fine was imposed pursuant to section 775.083(1), Florida Statutes.

substantive challenges” to those discretionary assessments in a rule 3.800 motion. *See Velez-Pizzini v. State*, 58 So. 3d 278, 279 (Fla. 5th DCA 2011) (“Because the appellant did not raise a substantive objection to [an] unpronounced, but otherwise unobjectionable special condition, it need not be stricken.”); *Grubb v. State*, 922 So. 2d 1002 (Fla. 5th DCA 2006) (*en banc*) (holding that the defendant’s due process rights regarding unpronounced special probation conditions were adequately protected by rule 3.800 and, thus, special conditions that were not orally pronounced during sentencing hearing, but were otherwise proper, were not required to be stricken from written probation order where defendant had notice of conditions in time to file a motion to correct sentence).² The reasoning of these cases is equally applicable to alleged improper assessments imposed as fees, costs, and fines. As such, appellate review of the defendant’s claims of error regarding his discretionary fees, costs, and fines were waived when he raised only procedural, and not substantive, claims in his 3.800 motion.

Osterhoudt v. State, 182 So. 3d 16, 17 (Fla. 5th DCA 2015) (footnote added).

² In *Grubb*, the *en banc* Fifth District addressed a rule 3.800(b) claim challenging an unannounced *condition of probation* and the Fifth District held:

In the instant case, Grubb’s counsel filed a timely rule 3.800(b) motion seeking to strike the unpronounced, but otherwise proper, conditions of probation contained in Grubb’s probation order. When the trial court failed to rule on the motion within the requisite sixty days, the motion was deemed denied. Grubb asserts no substantive objections to the unpronounced probation conditions. *Grubb’s only objection to the conditions of probation was the purported violation of procedural due process resulting from the failure to pronounce them at sentencing.*

Because we find Grubb’s procedural due process rights were adequately protected when she raised her concerns in her timely 3.800(b) motion, we affirm. In doing so, we recede from [our] cases holding that unpronounced, but otherwise unobjectionable, conditions of probation contained in probation orders must be stricken and cannot be reimposed.

Grubb, 922 So. 2d at 1004 (emphasis added) (footnote omitted).

D. JURISDICTIONAL STATEMENT AND SUMMARY OF ARGUMENT

The Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. *See* art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The Fifth District's decision below conflicts with numerous decisions from the First and Second District Courts of Appeal.

E. ARGUMENT AND CITATIONS OF AUTHORITY

The decision below is within the discretionary jurisdiction of the Court because the decision expressly and directly conflicts with several decisions of other district courts of appeal on the same point of law.

The issue in this case is whether a trial court must individually announce a discretionary fine during a sentencing hearing – thereby giving the defendant notice of the intent to impose the discretionary fine and the opportunity to object to the discretionary fine. As explained below, the Fifth District’s decision in this case is in conflict with numerous decisions from the First District and the Second District on the same point of law.

The lead case on the issue of whether discretionary fines must be individually announced at a sentencing hearing is the Second District’s *en banc* decision in *Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995).³ Writing for the entire Second District, Judge Altenbernd explained the reason for requiring trial courts to individually announce discretionary fines during sentencing hearings:

So long as the statutes establish a complex system of mandatory and discretionary costs, coupled with fines and restitution to various victims, *all discretionary costs must be individually announced by the trial judge at sentencing to give the defendant an opportunity to object to the specific imposition.* Written cost orders must assess both mandatory and discretionary costs with adequate disclosure of the statutory authority supporting the assessment so that the defendant, the appellate court, and those responsible for collecting and remitting

³ *Superseded by statute on other grounds*, § 938.15, Fla. Stat.

payments of costs and restitution will be able to identify the basis for the assessment.

....

It is not uncommon for a criminal defendant to have caused injury that far exceeds his or her ability to pay. This is not a problem that should invoke much sympathy for the defendant. On the other hand, an order that imposes costs and restitution well beyond the defendant's ability to pay may have two undesirable results. First, a discretionary cost may have statutory priority over a victim's opportunity to collect restitution. Second, an overwhelming burden of costs and restitution may directly or indirectly cause a defendant on probation to commit acts that result in a violation of probation. If there is actually a chance that a defendant can be rehabilitated through probation, then there is reason for society to forgive some costs. *These policy concerns have caused the legislature to enact many discretionary costs that can only be imposed after case-specific consideration. Accordingly, this court has insisted that trial courts orally announce discretionary costs at sentencing hearings not only to avoid possible problems with due process, but also for other valid policy reasons.*

....

Statutory costs that are "discretionary" are costs that the trial court may decide to impose or not to impose, depending upon the defendant's ability to pay and other circumstances involved in the case. The statutes place the defendant on notice that these costs are a possibility, but not a certainty. As such, the trial court must give the defendant notice of these costs at sentencing. Discretionary costs must be individually announced in a manner sufficient for the defendant to know the legal basis for the cost imposed. If the statute does not specify a dollar amount for the discretionary cost, the trial court must make certain that the defendant is on notice of the dollar amount assessed. The defendant must have an opportunity in open court to object to the imposition of these discretionary costs. If these costs are not separately identified in the cost order, the clerk of court cannot determine where to

deposit payments as they are collected.

Reyes, 655 So. 2d at 114-16 (emphasis added) (footnotes omitted). For all of the reasons articulated in Judge Altenbernd's well-reasoned opinion in *Reyes*, when the trial court in the instant case failed to individually announce the discretionary fine that was ultimately imposed, Petitioner Osterhoudt filed a rule 3.800(b) motion challenging the discretionary fine.

There are numerous decisions from the First District and the Second District that have granted relief on this exact issue – and none of those courts have distinguished between procedural/substantive rule 3.800(b) challenges to the monetary assessments in question. *See, e.g., Aguirre v. State*, 159 So. 3d 1033 (Fla. 1st DCA 2015); *Talbot v. State*, 159 So. 3d 365 (Fla. 1st DCA 2015); *Boyington v. State*, 125 So. 3d 327 (Fla. 1st DCA 2013); *Colson v. State*, 114 So. 3d 415 (Fla. 1st DCA 2013); *Nix v. State*, 84 So. 3d 424 (Fla. 1st DCA 2012); *Dadds v. State*, 946 So. 2d 1129 (Fla. 2d DCA 2006) ; *Gant v. State*, 682 So. 2d 1137 (Fla. 2d DCA 1996); *Milhouse v. State*, 673 So. 2d 911 (Fla. 2d DCA 1996). The Fifth District's decision in the instant case is in conflict with all of these cases.

Most recently, on March 2, 2016, the Second District stated the following in *Williams v. State*, 41 Fla. L. Weekly D533, D533-34 (Fla. 2d DCA Mar. 2, 2016):

Jeffrey Williams appeals his jury conviction for aggravated abuse of a disabled adult and the imposition of a \$333 discretionary fine and

5 percent surcharge. *We reverse in part and remand with instructions for the circuit court to strike the discretionary fine pursuant to section 775.083, Florida Statutes (2011), and the five percent surcharge pursuant to section 938.04, Florida Statutes (2011), totaling \$333. We do so because the circuit court failed to orally pronounce this discretionary statutory fine and surcharge at the sentencing hearing. We affirm all other issues raised by Williams without comment.*

On April 21, 2014, Williams was adjudicated guilty of aggravated abuse of a disabled adult and sentenced to seven years' imprisonment. At sentencing the circuit court orally pronounced the imposition of an aggregate fine of \$1002. It is unclear, however, precisely how the circuit court derived that aggregate amount. *Importantly, though, the circuit court made no mention of the discretionary statutory fine and surcharge being challenged here.* A few weeks later, the circuit court entered the written Judgment for Fines and Costs, where it then became clear that the \$1002 aggregate fine was, in part, made up of a discretionary fine and 5 percent surcharge, totaling \$333.

Williams thereafter properly preserved a challenge to the imposition of that \$333 fine and 5 percent surcharge by filing a motion to correct sentencing error, arguing in that motion, as he does here, that the discretionary statutory fine and surcharge should be struck because the circuit court neglected to specify them in its oral pronouncement. Dadds v. State, 946 So. 2d 1129, 1130 (Fla. 2d DCA 2006) (citing Fla. R. Crim. P. 3.800(b)(2)). Although the State agreed with the merits of the motion, the circuit court nonetheless denied Williams's request to correct that error.

A fine imposed pursuant to section 775.083 is discretionary *and must be orally pronounced.* *Dadds, 946 So. 2d at 1130; see also Lamoreaux v. State, 88 So. 3d 379, 381 (Fla. 1st DCA 2012) ("A discretionary fine imposed and the statutory surcharge on the fine must be stricken if the discretionary fine was not orally pronounced at sentencing." (citing Pullam v. State, 55 So. 3d 674, 675 (Fla. 1st DCA 2011))).* *Because the trial court did not make that oral pronouncement at the sentencing hearing, the discretionary fine and 5 percent surcharge totaling \$333 cannot stand.* We thus reverse the \$333 fine and surcharge and remand with directions that they be stricken. *Dadds, 946 So. 2d at 1130.*

Affirmed in part, reversed in part, remanded with directions to

strike the \$333 discretionary fine and 5 percent surcharge.

(Emphasis added). Petitioner Osterhoudt’s case is indistinguishable from *Williams*. As in *Williams*, in Petitioner Osterhoudt’s case, the trial court failed to orally pronounce the discretionary fine at the sentencing hearing. And as in *Williams*, Petitioner Osterhoudt filed a rule 3.800(b) motion arguing that the discretionary fine should be struck because the trial court neglected to specify it in its oral pronouncement (and in the words of the Fifth District, this was a “procedural” claim). Yet, the Fifth District below denied relief, but the Second District in *Williams* granted relief (and in granting relief, the Second District did *not* distinguish between procedural/substantive rule 3.800(b) challenges to the fine.⁴ Thus, the Fifth District’s

⁴ As explained in footnote 2, the decision below adopted the alleged distinction between procedural and substantive rule 3.800(b) challenges from its earlier decision in *Grubb* – a case that concerned a rule 3.800(b) claim challenging an unannounced *condition of probation*. While the procedural/substantive distinction may be valid in the context of unpronounced *conditions of probation*, see *Grubb*, the distinction is not valid in the context of unpronounced *discretionary fines* – for all of the reasons articulated by Judge Altenbernd in *Reyes*. A discretionary fine must be individually announced by the trial court at sentencing in order to give the defendant an opportunity to object to the specific imposition. Depending upon the defendant’s ability to pay and other circumstances involved in the case, the trial court can decide to impose *or not to impose* the discretionary fine (and if a fine is imposed, how much to impose). By individually announcing the intention to impose a discretionary fine in open court, the defendant is afforded an opportunity to object to the imposition of the discretionary fine (or argue for a lower fine). Hence, when a trial court fails to comply with *Reyes*, the appropriate vehicle to raise the claim is a rule 3.800(b) motion (which is exactly what Petitioner Osterhoudt did in the instant case). Upon the error being raised, the improperly assessed fine should be stricken and the matter should

decision below is in conflict with *Williams*.⁵

For all of the reasons set forth above, Petitioner Osterhoudt asserts that the Fifth District's decision in the instant case is in conflict with numerous decisions from the First and Second Districts – and most recently the Second District's March 2, 2016, decision in *Williams*. Petitioner Osterhoudt prays the Court to grant review in order to resolve this conflict.

be remanded to the trial court to conduct a new sentencing hearing, where the trial court can consider – in open court in the presence of the defendant – the factors discussed in *Reyes*, and then the trial court can ultimately decide whether a fine should be imposed (and if a fine is imposed, the appropriate amount). *See Nix*, 84 So. 3d at 426 (“On remand, the trial court may reimpose the fine and surcharge after providing notice to Appellant and following the proper procedure.”).

⁵ Earlier this month, the First District also considered a case in the identical posture as Petitioner Osterhoudt's case and the First District granted relief. *See Odom v. State*, 41 Fla. L. Weekly D589, D589 (Fla. 1st DCA Mar. 8, 2016) (“In addition to the mandatory costs, the written judgment reflected a discretionary cost of \$342.86 pursuant to section 775.083 and a surcharge of \$17.14 pursuant to section 938.04. However, at sentencing, the trial court merely pronounced: “Court cost is 775, a hundred dollar Local Government Trust, a hundred cost of prosecution and \$300 PD fee will be reduced to a judgment.” *Contrary to the trial court's order denying Appellant's rule 3.800(b)(2) motion, this pronouncement was insufficient to notify Appellant that such a fine and surcharge would be imposed.* This court has held repeatedly that the fine authorized by section 775.083 is a discretionary fine which must be specifically pronounced at the sentencing hearing. *See, e.g., Nix v. State*, 84 So. 3d 424, 426 (Fla. 1st DCA 2012). The trial court may re-impose the discretionary fine and surcharge on remand after giving Appellant notice and following the proper procedure. *See, e.g., id.; Oliver v. State*, 75 So. 3d 349, 350 (Fla. 1st DCA 2011).”) (emphasis added).

F. CONCLUSION

For the reasons set forth above, Petitioner Osterhoudt requests the Court to accept jurisdiction in this case in order to resolve the conflict between the Fifth District and the First and Second Districts regarding whether a rule 3.800(b) motion raising the “procedural” claim that a discretionary fine should be struck because the trial court neglected to specify the fine in its oral pronouncement is sufficient to properly preserve this claim for direct appeal.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief and the appendix have been furnished to:

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Jurisdictional Brief of the Petitioner complies with the type-font limitation.

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