IN THE SUPREME COURT OF FLORIDA

MICHAEL LEVANDOSKI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. SC17-962

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, Michael Levandoski, was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. The petitioner will be referred to herein as "Appellant." The respondent, State of Florida, was the prosecution in the trial court and the appellee before the Fourth District Court of Appeal and will be referred to as the "the prosecution," "the State" or "Appellee."

In this brief, the following symbols will be used:

IB = Appellant's Initial Brief on the Merits

R = Record on Appeal

SR = Supplemental Record

T = Hearing or Trial Transcripts

STATEMENT OF THE CASE AND FACTS

On July 14, 2009, Appellant was charged with Lewd Computer Solicitation Of A Child in violation of F.S. §847.135(3)(a), and Traveling To Meet A Minor For Unlawful Sexual Activity in violation of F.S. §847.135(4), (R 1-2). On August 30, 2010, Appellant entered a plea to the court (R 43-49). On **October 5, 2010**, **Appellant specifically requested that the trial court sentence Appellant to "sex offender probation"** (SR 271; 273-274). The trial court sentenced Appellant on Count I, to 48 months in the Department of Corrections followed by one-year Sex Offender Probation, (R 56; SR 276-278), and on Count II, Appellant was sentenced to 15 years Sex Offender Probation consecutive to Count I (R 64). On November 15, 2010, Appellant filed a direct appeal (R 69). On August 15, 2012, Appellant's conviction was Per Curiam Affirmed by the Fourth District (R 119). *See also Levandoski v. State*, 96 So. 3d 907 (Table) (Fla. 4th DCA 2012).

On **July 31, 2015**, Appellant filed a Motion To Strike Sex Offender Conditions Of Probation, Or In The Alternative, To Modify Probation (R 167-172). Appellant specifically stated his motion was not filed as a 3.800 Motion (T 11). Nor was the motion filed as a 3.850 motion. On December 17, 2015, a hearing was held on Appellant's motion (T 1-44). The trial court noted that Appellant didn't file a 3.800 motion (T 11). The trial court stated that if it was not addressed on appeal, which has already been affirmed, then Appellant remains on

sex offender probation (T 13). The trial court stated **it was the intent of all the parties, <u>even defense counsel</u> at the time**, **<u>that sex offender probation would be imposed</u>** (T 22-23). The trial court stated it would deny the striking of sex offender probation entirely, but would consider the merits of the modification (T 23-24).

Defense counsel stated they would like the ability for Appellant to have contact with minors, specifically two minor grandchildren and authority to leave the county to work overnight (T 27-28). It was later clarified that the children were not related by blood or marriage (T 30-31). The trial court stated it would not grant visitation with children without live testimony of the people involved and the therapist (T 37-38; R 208). The trial court granted travel for work (T 42; R 208).

The Fourth District treated the appeal as the denial of a motion to correct an illegal sentence pursuant to Fla.R.Crim.P. 3.800(a). The Fourth District affirmed, noting that Appellant acknowledges the **trial court orally imposed "all standard condition of sex offender probation at sentencing."** The Fourth District held "Sex Offender Probation" is a term of art describing certain conditions of probation. The Fourth District held:

> Due process is satisfied, and the defendant is put on notice, when the court states at sentencing that it is imposing sex offender probation. When a court clearly imposes sex offender probation as a special condition of probation, **it need not individually specify <u>each item</u> contained within the umbrella of sex offender probation conditions**.

Levandoski v. State, 217 So. 3d 215, 219 (Fla. 4th DCA 2017), *review granted*, No. SC17-962, 2017 WL 3484351 (Fla. June 30, 2017). The Fourth District certified conflict with the First District's opinion in *Snow I*, 157 So.3d 559 (Fla. 1st DCA 2015), *clarified on remand*, 193 So.3d 1091 (Fla. 1st DCA 2016). This Court granted review. *Levandoski v. State*, No. SC17-962, 2017 WL 3484351, at *1 (Fla. June 30, 2017).

SUMMARY OF ARGUMENT

"Sex offender probation" is defined in Fla. Stat. §948.001 (13) and the conditions of sex offender probation are contained within Fla. Stat. §948.30. There was no reason for the trial court to further pronounce the individual conditions of sex offender probation. Appellant specifically requested that the trial court impose "sex offender probation" and was on notice of those conditions.

As to Point II, Appellant was sentenced to sex-offender probation. Double jeopardy does not bar re-imposing sex-offender conditions. Appellant concedes *Stapler v. State*, 190 So.3d 162 (Fla. 5th DCA 2016) holds that double jeopardy does not prevent the trial court from re-imposing sex offender conditions (IB 18). *See also Arias v. State*, 65 So.3d 104, 105 (Fla. 5th DCA 2011) and *Sturges v. State*, 980 So.2d 1108 (Fla. 4th DCA 2008).

POINT I

ARGUMENT

PETITIONER HAS FAILED TO SHOW THAT THIS COURT SHOULD FIND THAT ANY SEX OFFENDER CONDITION THE TRIAL COURT INTENDS TO IMPOSE AS A SPECIAL CONDITION OF PROBATION MUST BE ORALLY PRONOUNCED AT SENTENCING AND THEREFORE LEVANDOWSKI'S SENTENCE IS ILLEGAL.

Standard of Review

When an issue presents a pure question of law, the appellate court's review is *de novo*. *Plott v. State*, 148 So.3d 90 (Fla. 2014); *See also State v. Flynn*, 95 So. 3d 436, 437 (Fla. 4th DCA 2012) ("'Because a motion to correct a sentencing error involves a pure issue of law, our standard of review is *de novo*.' *Kittles v. State*, 31 So.3d 283, 284 (Fla. 4th DCA 2010)").

Argument

Appellant claims that his sentence is illegal because the trial court did not orally pronounce each and every condition of "sex offender" probation as set forth in the statute in order to satisfy due process (IB 9-15).

"Sex offender probation" is defined in Fla. Stat. §948.001 (13) and the conditions of sex offender probation are contained within Fla. Stat. §948.30. There was no reason for the trial court to further pronounce the individual conditions of sex offender probation to place Appellant on notice of the conditions of probation. "Sex offender probation" is a word of art, as found by the Fourth District. Due process was satisfied and Appellant was put on notice of the conditions of his probation when the trial court stated it was imposing "sex offender probation."

The Fourth District correctly noted Appellant was on notice that the trial court sentenced him to "sex offender probation" as demonstrated by Appellant filing two motions after sentencing acknowledging he was on sex offender probation and by his counsel filing an *Anders*[1] brief on direct appeal acknowledging that Appellant had been sentenced to sex offender probation.

In the instant case, Appellant specifically requested that the trial court impose "sex offender probation" stating:

> MR. LANDERS: **We're asking the court to give him sex offender probation** with house arrest. ***If he goes to prison***, Judge – ***we're asking for sex offender probation***, Judge, and **we think that's appropriate**.

(SR 273-274).

Having specifically asked for sex offender probation, Appellant's claim that he was not placed on notice of the conditions of sex offender probation is without merit. Additionally, any alleged error would have to be deemed invited error. "Under the invited error rule, a party cannot successfully complain about an error for which he or she is responsible **or of rulings that he or she invited the court to make**." *Anderson v. State*, 93 So. 3d 1201, 1203 (Fla. 1st DCA 2012) (citations omitted).

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[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)

A similar issue arises when a trial court orders drug offender probation or sex offender treatment. This Court has held that a trial court need not specify all the details of the Defendant's treatment. *See Lawson v. State*, 969 So.2d 222, 235 (Fla. 2007) (every detail need not be spelled out and the language should be interpreted in its common, ordinary usage); *See also Adams v. State*, 979 So.2d 921, 928 (Fla. 2008) (Adopting a bright-line rule requiring probation orders to specify the number of attempts the defendant will be given to complete sex offender treatment, or the time parameters for completing treatment, would limit the trial courts' needed flexibility).

Appellant cites *Snow v. State*, 157 So.3d 559 (Fla. 1st DCA 2015), *clarified on remand*, 193 So.3d 1091 (Fla. 1st DCA 2016), as holding the trial court is specifically required to orally pronounce each and every condition of "sex offender probation" as outlined in section 948.30 (IB 9). There is no indication in *Snow* that the defendant specifically requested that the trial court impose "sex offender probation," nor is there any indication in *Snow* that the defendant filed motions after sentencing acknowledging he was on sex offender probation or that his counsel filed an *Anders* brief acknowledging that he had been sentenced to sex offender probation. The instant case is therefore distinguishable from *Snow*, although the Fourth District certified conflict. Furthermore, *Snow* is incorrect because "Sex offender probation" is defined in Fla. Stat. §948.001 (13), the

conditions of sex offender probation are contained within Fla. Stat. §948.30 and further recitation of the statute by the trial court is not required. More importantly, repeating the conditions adds nothing to promote due process and simply elevates form over substance

POINT II

ARGUMENT

PETITIONER HAS FAILED TO SHOW THAT ON REMAND THE TRIAL COURT MUST STRIKE THE SPECIAL CONDITIONS OF PROBATION NOT ORALLY PRONOUNCED AND MAY NOT REIMPOSE THEM.

Standard of Review

When an issue presents a pure question of law, the appellate court's review is *de novo*. *Plott v. State*, 148 So.3d 90 (Fla. 2014).

Argument

Appellant contends it would violate his double jeopardy rights to allow the trial court to impose any special condition of probation the court did not orally pronounce at sentencing, citing *Young v. State*, 699 So.2d 624, 625 (Fla. 1997) *Justice v. State*, 674 So.2d 123, 126 (Fla. 1996), S*now v. State*, 193 So.3d 1091 (Fla. 1st DCA 2016) and *Parkerson v. State*, 163 So.3d 683 (Fla. 4th DCA 2015) (IB 16-17).

In *Young*, the trial court imposed written conditions of probation requiring him to pay for random drug testing and mental health counseling, which the trial

court did not orally announce at sentencing. See *Young v. State*, 663 So. 2d 1376, 1378 (Fla. 5th DCA 1995), *decision quashed*, 699 So. 2d 624 (Fla. 1997). In the instant case Appellant specifically requested "sex offender probation" and the trial court orally pronounced it was imposing "sex offender probation." The instant case is therefore distinguishable from *Young*.

In *Justice*, the defendant's probation order contained numerous special probation conditions that were not orally pronounced and that were not found within the Florida Statutes or contained within the general conditions of the rule 3.986(e) form. *Justice*, 674 So.2d at 125. In the instant case Appellant specifically requested "sex offender probation" and the trial court orally pronounced it was imposing "sex offender probation" **and "sex offender probation" is defined and found within the Florida Statutes**. The instant case is therefore distinguishable from *Justice*.

In *Snow*, the trial court orally pronounced it was imposing "sex offender probation". The First District held that those conditions not orally pronounced at sentencing must be stricken because double jeopardy principles prevent them from being imposed at resentencing. There is no indication in *Snow* that the defendant specifically requested "sex offender probation" and the instant case is therefore distinguishable, although the Fourth District certified conflict with *Snow*. *Snow* is also incorrect in requiring the trial court to read into the record the various

conditions of sex offender probation that are already set forth in the statute as discussed above.

In *Parkerson*, the trial court did not orally pronounce it was imposing "sex offender probation" at sentencing, although handwritten in the written order of probation was "sex offender conditions apply". *Parkerson v. State*, 163 So. 3d 683, 688 (Fla. 4th DCA 2015). In the instant case Appellant specifically requested "sex offender probation" and the trial court orally pronounced it was imposing "sex offender probation." The instant case is therefore distinguishable from *Parkerson*.

Appellant concedes that *Stapler v. State*, 190 So.3d 162 (Fla. 5th DCA 2016), holds that double jeopardy did not prevent the trial court from re-imposing sex offender conditions of probation as special conditions of probation (IB 18). Appellant attempts to distinguish *Stapler* from the instant case because the trial court in *Stapler* pronounced "sex offender probation *with all the standard conditions.*" *Stapler* is not distinguishable from the instant case. Appellant also concedes that in *Arias v. State*, 65 So.3d 104, 105 (Fla. 5th DCA 2011), the Fifth District stated that the trial court, upon resentencing, could impose a term of probation with or without special conditions that relate to the defendant's conviction (IB 18-19). *See also Sturges v. State*, 980 So.2d 1108 (Fla. 4th DCA

2008) (In resentencing, the court may impose probation and special conditions of probation which reasonably relate to the underlying charges).

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court approve the Fourth District's decision, and disapprove *Snow* to the extent it disagrees with *Levandoski*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Joshua LeRoy, LeRoy Law, PA, 224 Datura Street, Suite 1416, West Palm Beach, FL 33401 via email at jleroy@leroylawpa.com, on September 27th, 2017.

/s/ Allen R. Geesey
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14-point type and complies with the font requirements of Rule 9.210.

/s/ Allen R. Geesey
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