Filing # 57715457 E-Filed 06/13/2017 05:54:54 PM

IN THE CIRCUIT COURT OF THE
18TH JUDICIAL CIRCUIT IN AND
FOR BREVARD COUNTY, FLORIDA

CASE NO. 05-2015-CF-039871-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

vs.

DANA LOYD,

Defendant.
_____/

DEFENDANT'S MOTION TO CORRECT SENTENCING ERRORS

Defendant, **DANA LOYD**, by and through undersigned counsel, files this Motion to Correct Sentencing Errors and, in support thereof, states as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On August 28, 2015, Appellant, DANA LOYD ("LOYD"), was arrested and later charged by Information with false reporting of child abuse, abandonment, or neglect, in violation of Fla. Stat. § 39.205(9).

2. Trial commenced on March 27, 2017. On March 30, 2017, the jury returned a verdict of guilty as charged. On April 6, 2017, LOYD presented herself for sentencing, and was sentenced to two (2) years community control, with LOYD being imprisoned for a term of one (1) year as a condition of community control with (1) day credit for time incarcerated, followed by three (3) years probation.

3. On April 7, 2017, LOYD filed her Notice of Appeal regarding the final judgment adjudicating guilt and sentence entered by this Court.

4. Fla. R. App. P. 9.140(e) provides, in relevant part:

> (e) Sentencing Errors. A sentencing error may not be raised on appeal unless the alleged error has first been 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 3.800(b).

Id. The sentencing errors raised in the instant motion were not brought to the attention of this Court at the time of sentencing. Hence, consistent with Fla. R. App. P. 9.140(e), this Motion is brought pursuant to Fla. R. Crim. P. 3.800(b).

II. MOTION

Defendant moves, pursuant to Fla. R. Crim. P. 3.800(b)(2) (Motion Pending Appeal), to correct the following sentencing errors, which are special conditions of community control and probation (hereinafter "special conditions"):

> d. (24) Other: No mention of the victim or victim's father for any reason
>
> e. (25) Other: Do not post on any subject referencing the victim or victim's father
>
> f. (26) Other: Do not access or participate on any social media during supervision
>
> * * *
>
> h. (28) Other: Do not own any material related to the victim or victim's family by your husband
>
> i. (29) Other: Have 'Banker Boxes' turned over to your counsel immediately
>
> j. (30) Other: No early termination of any supervision

(See Ex. 1 at 7, Judgment, attached hereto) (alterations added).

III. MEMORANDUM OF LAW

Fla. R. of Crim. P. 3.800(b)(2) sets forth the procedure for a Motion to Correct Sentencing Errors where, as here, the Defendant's case is currently pending on appeal:

> (2) Motion Pending Appeal. If an appeal is pending, a defendant . . . may file in the trial court a motion to correct a sentencing error. The motion may be filed by appellate counsel and must be served before the party's first brief is served.[1]
>
> * * * *
>
> (A) The motion shall be served on the trial court and on all trial and appellate counsel of record.
>
> * * * *
>
> (B) The trial court shall resolve this motion in accordance with the procedures in subdivision (b)(1)(B), except that if the trial court does not file an order ruling on the motion within 60 days, the motion shall be deemed denied. Similarly, if the trial court does not file an order ruling on a timely motion for rehearing within 40 days from the date of the order of which rehearing is sought, the motion for rehearing shall be deemed denied.

The term "sentencing error[,]" as that term is used in Fla. R. Crim. P. 3.800(b), includes "an illegal sentence or incorrect jail credit[.]" See id. As such, the illegal special conditions of community control and probation imposed by this Court are properly challenged, as procedural matter, by the instant Motion.

As set forth in each of the below sections, all of the special conditions listed above, (see supra at 2), are illegal as a matter of law. As such, this Court should enter an Amended Judgment removing all of the aforementioned special conditions.

---

[1] LOYD's first brief has not yet been filed before the Fifth District Court of Appeal.

A. The Judgment cites the wrong offense[2]

The Judgment, (Ex. 1 at 1), incorrectly states that LOYD was convicted of Fla. Stat. § 39.205**(6)**. (Emphasis added). However, LOYD was charged with, and convicted under, Fla. Stat. § 39.205**(9)**. As such, this Court should amend the Judgment to correct that apparent scrivener's error.

B. Special conditions 24, 25, 26, and 28 are impermissibly overbroad

A special condition of probation can be deemed valid if "(1) it has a relationship to the crime for which the offender was convicted; (2) it relates to conduct which is in itself criminal; or (3) it forbids conduct which is reasonably related to future criminality." Graham v. State, 658 So.2d 642, 643 (Fla. 5th DCA 1995) (citing Biller v. State, 618 So.2d 734 (Fla. 1993)).

However, a condition of probation is "overbroad and must be stricken" where "it can be easily violated unintentionally." See Dean v. State, 629 So.2d 1106 (Fla. 4th DCA 1994). For example, a "condition of probation forbidding [a probationer] from entering 'any places that sell alcohol' is overbroad and must be stricken, as it can be easily violated unintentionally such as by entering a grocery store or a gas station." Id. Similarly overbroad is a condition which, in blanket fashion, forbids a probationer's "contact with minor children[,]" as "[t]he language of the condition must be more specific, so that [a probationer] may not be charged with unintentional violation of it." Oliver v. State, 672 So.2d 105, 105 (Fla. 4th DCA 1996).

---

2 Undersigned counsel conferred with Assistant State Attorney Sean Sendra with respect to this argument, ASA Sendra advised that the State concedes that this scrivener's error does need to be corrected to reflect Fla. Stat. § 39.205(9), rather than 39.205(6).

Other impermissibly broad special conditions include a probationer being forbidden from being "within three blocks of a 'high drug area' as defined by his probation officer[,]" Huff v. State, 554 So.2d 616, 617 (Fla. 4th DCA 1989), as well as a condition of probation prohibiting a defendant from residing in central Florida. Almond v. State, 350 So.2d 810, 810 (Fla. 4th DCA 1977) ("The requirement that Appellant reside elsewhere than Central Florida is not sufficiently definite to advise Appellant of the limits of the restriction[.]").

In the instant matter, it is clear that special conditions 24, 25, 26, and 28 are impermissibly overbroad. (See Ex. 1 at 7).

Special condition 24 states that LOYD can make "[n]o mention of the victim or victim's father for any reason[.]" (Id.) (alterations added). Does this condition mean that LOYD violates her community control and probation by communicating with her lawyers about the victim and the victim's father? Does it include both written and verbal "mention[ings]"? Does it mean that if she is asked, by anyone, at any time, during the pendency of her community control or probation, about either the victim or the victim's father that she is forbidden by law to answer such questions? Indeed, a cursory analysis of special condition 24 reveals that it is "overbroad and must be stricken" because "it can be easily violated unintentionally." See Dean, 629 So.2d 1106. It is also violative of LOYD's First Amendment rights. See United States v. Richards, 385 F. App'x 691, 693 (9th Cir. 2010) ("With respect to the First Amendment issue, the conclusion of this panel is that the [probation] restriction imposed upon the defendant, with respect to public comments concerning Candice Trummell, violates the defendant's First Amendment rights.").

Special condition 25 states that LOYD may not "post on any subject referencing the victim or victim's father[.]" (Ex. 1 at 7) (alteration added). But the condition does not

specify where (The *entire* internet, including private, secure-access websites? Print media?) LOYD is forbidden from posting. The condition also does not specify what is meant by the phrase "any subject referencing the victim or victim's father." Does this mean that if LOYD "posts" an article online, and is then criticized in an online comment for her conviction in this case, that she is then forbidden from further posting or responding on that same web page? Is she forbidden from making any online posts proclaiming her innocence, notwithstanding the fact that her appeal is still pending? Furthermore, what exactly does "post" mean? According to Merriam-Webster's Dictionary, "post" means, "to publish, **announce**, or advertise by or as if by use of a placard." See MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/post (last visited June 8, 2017) (emphasis added). Therefore, does this condition also mean if someone is to erect a billboard that coincidentally carries both LOYD and either the victim or the victim's father's name, LOYD is now in violation of the foregoing condition? This condition is patently ambiguous and can be "easily violated unintentionally." See Dean, 629 So.2d 1106; see also Richards, 385 F. App'x at 693.

Special condition 26 broadly states that LOYD may not "access or participate on **any** social media during supervision[.]" (Ex. 1 at 7) (alterations and emphasis added). But the Judgment does not define what constitutes "access" or "social media." Does "access" include merely visiting/viewing a "social media" website, without commenting or posting? Does "social media"[3] include LOYD's online news publication *Brevard's Best News*? Can

[3] To the extent that "social media" refers to well-known outlets such as Twitter, Facebook, or LinkedIn, such a condition would be impermissible because it has no relationship to the crime for which LOYD was convicted, does not relate to conduct which is in itself criminal, and is not reasonably related to future criminality. See Graham, 658 So.2d at 643.

she comment on anything, anywhere on the internet, on "social media"—whatever that is — or is it all forbidden? This condition can be "easily violated unintentionally." See Dean, 629 So.2d 1106; see also Richards, 385 F. App'x at 693.

Special condition 28 states that LOYD cannot "own any material related to the victim or victim's family[.]" (Ex. 1 at 7) (alteration added). Does that mean she cannot "own" the discovery in this case, which, of course, directly relates to the victim or the victim's family? Can LOYD "borrow" or "possess" any material related to the victim or victim's family so long as LOYD does not "own"[4] the material? This condition can be "easily violated unintentionally." See Dean, 629 So.2d 1106.

These conditions—24, 25, 26, and 28—are not "sufficiently definite to advise the [LOYD] of the limits of the restriction[s.]" Almond, 350 So.2d at 810. As such, this Court should strike those conditions on the basis that they are unlawfully overbroad. See id.

C. Special Condition 29 should be stricken because it is beyond LOYD's control

Special condition 29 states that LOYD must "have 'banker boxes' turned over to [her] counsel immediately by [her] husband." (Ex. 1 at 7) (alterations added). This condition should be stricken: LOYD cannot compel anyone, including her husband, to comply with this Court's directive—particularly while she is in custody. See Dean, 629 So.2d 1106.

D. Special Condition 30 should be stricken because it is unlawful

Special condition 30, precluding early termination of "any supervision[,]" (Ex. 1 at 7) (alterations added), "must be stricken" because this Court "is not authorized to divest the

[4] According to Merriam-Webster's Dictionary, to "own" material means, "to have or hold as property." See MERRIAM-WEBSTER.COM, https://www.merriamwebster.com/dictionary/own (last visited June 8, 2017).

Department of Corrections of its authority to recommend early termination of probation." See Baker v. State, 619 So.2d 411, 412 (Fla. 2d DCA 1993); see also Fla. Stat. §§ 948.04(3), 948.05.

Florida Statutes Section 948.05 explicitly provides that "[a] court may **at any time** cause a **probationer or offender in community control** to appear before it to be admonished or commended, and, . . . **it may discharge the probationer or offender in community control** from further supervision." Id. (emphasis added).

Indeed, in circumstances similar to those sub judice, the State has confessed error on the illegality of the imposition of a "no early termination" condition. See Arriaga v. State, 666 So.2d 949, 949–50 (Fla. 4th DCA) ("The state concedes error in the trial court's inclusion of a special condition of probation that appellant may not be considered for early termination of probation. We agree that this condition should be stricken."); see also Enea v. State, 171 So.3d 219, 221 (Fla. 5th DCA 2015) ("By refusing to consider Enea's motion for termination of probation on the merits, we find that the trial court departed from the essential requirements of law by failing to afford him procedural due process.").

Consequently, this Court should enter an Amended Judgment, one which contains no condition precluding early termination of community control or probation. See id.

IV. CONCLUSION

WHEREFORE, Defendant, **DANA LOYD**, for good cause shown, prays this Honorable Court grant this Motion to Correct Sentencing Errors, and issue such other and further relief as may be just and proper.

Respectfully submitted,

GRAY ROBINSON, P.A.
Attorneys for Defendant
333 S.E. 2nd Avenue
Suite 3200
Miami, Florida 33131
Telephone: (305) 416-6880
Facsimile: (305) 416-6887
brian.bieber@gray-robinson.com
alex.strassman@gray-robinson.com

By:
s/Brian H. Bieber
BRIAN H. BIEBER
Florida Bar #8140

s/Alexander Strassman
ALEXANDER STRASSMAN
Florida Bar #111788

POSITION OF OPPOSING COUNSEL

The undersigned, through his associate Alexander Strassman, conferred with Assistant State Attorneys Susan Stewart and Sean Sendra with respect to this Motion, and inquired as to the State's position on each of the arguments raised by Defendant. Assistant State Attorney Sendra advised that the State concedes that the Judgment "does need to be corrected to reflect Fla. Stat. [§] 39.205(9)" but that the State "is not conceding error as to any other matter."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed this 13th day of June, 2017 to:

Sean M. Sendra, Assistant State Attorney
State Attorney's Office
18th Judicial Circuit
400 South St, Ste. D
Titusville, Florida 32780-7683
ssendra@sa18.state.fl.us

L. Charlene Matthews, Esq.
Office of the Attorney General
Criminal Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
crimappdab@myfloridalegal.com
linda.matthews@myfloridalegal.com

s/Brian H. Bieber
BRIAN H. BIEBER