

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502018AP000030AXXXMB
L.T. NO.: 502017MM015123AXXXMB

JAMES M. HERRINGTON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed: JUL 11 2019

Appeal from the County Court in and for Palm Beach County,
Judge Debra Moses Stephens.

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PER CURIAM.

James M. Herrington appeals the court's order withholding adjudication and sentencing him to a term of probation for one count of Battery (Domestic). On appeal, Appellant challenges the propriety of the court's decision to provide the standardized deadlocked jury instruction after the jury indicated it was at an impasse and requested further instruction. Appellant also challenges his sentence of probation, asserting that the written order of probation violates his right to due

process and the protection against double jeopardy because it ordered Appellant to pay \$50 a month towards the cost of supervision and to pay for the cost of substance abuse treatment although the court did not orally pronounce these conditions at sentencing. We affirm on the jury instruction issue without further comment. We also affirm the probation order as it pertains to the monthly cost of supervision without further discussion. *See* § 948.09(1)(b), Fla. Stat. (2018) (providing for the monthly cost of probation supervision in misdemeanor cases); *State v. Hart*, 668 So. 2d 589, 592 (Fla. 1996) (holding that conditions of probation listed in a statute do not need to be orally pronounced). However, for the reasons set forth below, we are compelled to reverse and remand on the cost-of-substance-abuse condition of probation.

Conditions of probation that are not delineated by statute or rule are considered special conditions and must be orally pronounced. *Thompson v. State*, 239 So. 3d 1269, 1270 (Fla. 2d DCA 2018). The payment of substance abuse evaluation and treatment expenses by a defendant is a special condition of probation that must be orally pronounced separate and distinct from the requirement that the defendant attend treatment. *Id.* Here, the court orally ordered Appellant to attend substance abuse evaluation and treatment but, in making this pronouncement, did not specify that Appellant was to bear the cost of such treatment. Nonetheless, the corresponding written probation order provided that Appellant was responsible for the cost of substance abuse evaluation and treatment.

A court's failure to orally pronounce a special condition which it later reduces to writing violates a defendant's right to due process and, if the written order is more severe than the oral pronouncement, also violates the constitutional protection against double jeopardy. *Id.*; *Ashley v. State*, 850 So. 2d 1265, 1267 (Fla. 2003) ("once a sentence has been imposed and the person begins to serve the sentence, the sentence may not be increased without running afoul of double

jeopardy”). Due process violations may be remedied via a Motion to Correct Illegal Sentence under Florida Rule of Criminal Procedure 3.800(b). *Thompson*, 239 So. 3d at 1270. Double jeopardy violations, however, require reversal. *Ashley*, 850 So. 2d at 1267; *Evans v. State*, 675 So. 2d 1012, 1014 (Fla. 4th DCA 1996).

In the instant case, Appellant raised the cost of treatment issue in a timely Motion to Correct Sentencing Errors but was denied relief following a hearing. Therefore, because Appellant had the opportunity to be heard on his objection to the payment of the substance abuse program and treatment condition, any due process concerns were remedied. *Thompson*, 239 So.3d at 1269-1270. However, as the State properly concedes, by virtue of the payment provision, the written probation order was more severe than the court’s oral pronouncement. Therefore, the written probation order violates Appellant’s constitutional protection against double jeopardy. *Evans*, 675 So. 2d at 1014 (holding that court’s failure to orally pronounce a special condition which was contained in a written probation order created a double jeopardy violation).

Accordingly we **AFFIRM** Appellants conviction but **REVERSE** the payment provision contained in the written probation order and **REMAND** for the entry of a corrected order.

COLBATH, J. MARX, and CARACUZZO, JJ., concur.

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JAMES MARSHALL HERRINGTON,
Appellant,

Opinion/Decision filed: JUL 11 2019

v.

Appeal from County Court in and for
Palm Beach County, Florida;
Judge Debra Moses Stephens

STATE OF FLORIDA,
Appellee.

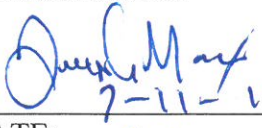
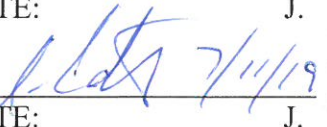

Appealed: March 2, 2018

_____/_____
DATE OF PANEL: JUNE 24, 2019

PANEL JUDGES: J. MARX, COLBATH, CARACUZZO

AFFIRMED/REVERSED/OTHER: AFFIRMED IN PART, REVERSED IN PART

DECISION BY: PER CURIAM

CONCURRING:)	DISSENTING:)	CONCURRING SPECIALLY:)
)	With/Without Opinion)	With/Without Opinion)
DATE: 7-11-19 J.)))
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DATE: 7/11/19 J.)))
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