

# **CHAPTER 5**

## **SENTENCING**

## Chapter 5 - Sentencing

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## **SENTENCING**

### **5.01 KEY POINTS**

- Must be pronounced in open court, entered into the record or docketed
- Must review any plea discussion or agreements
- Must impose Public Defender lien pursuant to Section 938.29, Florida Statutes
- Must occur upon conviction of DUI
- If after trial, must inform defendant of the finding of guilt and of the judgment
- Must inquire as to any legal grounds why sentence should not be imposed, including:
  - Insanity, or
  - Pardoned, or
  - The defendant is not the same person against whom the verdict or finding was rendered.
- Should consider all relevant submissions and evidence
  - **Maximum Penalties**
    - MISDEMEANOR - 1ST DEGREE
      - Incarceration 0 - 364 days
      - Fines: 0 - \$1,000
      - Probation up to 1 year
      - Total probation plus incarceration may not exceed one (1) year
    - MISDEMEANOR - 2ND DEGREE
      - Incarceration 0 - 60 days
      - Fines: 0 - \$500
      - Probation up to 6 months
      - Total probation plus incarceration may not exceed 6 months
      - May be enhanced to up to one year if alcohol is involved for certain offenses

### **5.012 Special Statutory Penalties**

- Conviction(s) under Section 316.193, Florida Statutes are prior convictions for purpose of boating under the influence penalties (Section 327.35, Florida Statutes)
- If financial inability is determined, fine and court costs may be converted to community service at a rate not less than the federal minimum wage
- Must order restitution unless clear and compelling reason(s)
- Fleeing or attempting to elude a police officer: may suspend driver's license for up to one year
- Driving while license is suspended/revoked:
  - Second conviction is a first degree misdemeanor
  - Third degree felony, under Section 322.34(5), Florida Statutes if habitual traffic offender
- Possession or sale of controlled substances - license revoked by DHSMV for 2 years or until defendant completes a drug treatment program, upon receipt of conviction by clerk - Section 322.055, Florida Statutes
- Sentence of incarceration requires adjudication of guilt
- Misdemeanors involving death or injury to another - may impose additional fine up to \$10,000

### **5.13 Mandatory Costs**

#### MANDATORY COSTS IN ALL CASES

- Section 938.01(1), Florida Statutes
  - All courts shall, in addition to any fine or other penalty, assess \$3 as a court cost against every person convicted for violation of state penal or criminal statute or convicted for violation of a municipal or county ordinance
  - Sections 938.03(1) and 938.04, Florida Statutes (Crimes Compensation Trust Fund)
    - \$50.00, plus 5% of fine and penalty or forfeiture, if pleads, convicted of, or adjudicated delinquent for violation of a criminal law, municipal or

county ordinance which adopts by reference any misdemeanor, whether or not adjudication is withheld

- Considered assessed unless specifically waived by the court. If not ordered judge must state, on the record, detailed reasons
- Section 938.05(1), Florida Statutes (Local Government Criminal Justice Trust Fund)
  - If pleads to, or is found guilty...these costs shall be made a part of any plea agreement”
    - Felonies .....\$ 200.00
    - Misdemeanors .....\$ 50.00
    - Criminal Traffic Offenses. ....\$ 50.00

**MANDATORY COSTS IF AUTHORIZED BY LOCAL GOVERNMENT AUTHORITY**

- Section 938.13, Florida Statutes (Substance Abuse Programs)
  - \$15 if found guilty of any misdemeanor in which the unlawful use of drugs or alcohol is involved.
  - (Applies only in counties which have adopted an appropriate ordinance)
- Section 938.15, Florida Statutes (Criminal Justice Education)
  - \$2.00 if pleads or found guilty in criminal case.
  - (Applies only in counties which have adopted an appropriate ordinance.)
- Section 938.17(2), Florida Statutes (County Delinquency Prevention)
  - \$3.00 if counties adopt a mandatory cost, in addition to any other authorized cost or fine, on every person who pleads to or is convicted of a misdemeanor
  - (Applies only where sheriff is a partner in a juvenile justice assessment center or suspension program developed in conjunction with the school board, and the board of county commissioners has adopted an appropriate ordinance.)
- Section 938.19(1), Florida Statutes

- Counties may adopt a mandatory cost of \$3 to be assessed against every person who, in county or circuit court, pleads guilty or nolo contendere to, or is convicted of, regardless of adjudication, a violation of a state criminal statute or municipal ordinance or a county ordinance or who pays a fine or civil penalty for any violation of Chapter 316, Florida Statutes.
- (Applies only where a teen court has been created and the board of county commissioners has adopted an appropriate ordinance.)

#### MANDATORY COSTS IN SPECIFIC CASES

- D.U.I.
  - Section 938.07, Florida Statutes: A court cost of \$135 shall be added to any fine imposed under Section 316.193, Florida Statutes
- HANDICAPPED OR ELDERLY VICTIMS
  - Section 938.09, Florida Statutes
    - Upon a plea of guilty or nolo contendere to, or a conviction of, any felony or misdemeanor or any county or municipal ordinance in which any victim is handicapped or elderly, there shall be imposed an additional cost of \$20.
    - Note: The costs imposed by this section apply only in counties containing housing projects as defined in Section 426.002(6), Florida Statutes.
- HANDICAPPED OR ELDERLY VICTIMS
  - Section 938.11, Florida Statutes
    - In addition to any fine for any criminal offense or any county or municipal ordinance, when any victim is handicapped or elderly, a 10-percent surcharge shall be imposed by all county and circuit courts.
    - Note: The costs imposed in this section apply only in counties containing housing projects as defined in Section 426.002(6), Florida Statutes.

#### **5.014 Discretionary Costs**

- CONTROLLED SUBSTANCES, D.U.I., DISORDERLY INTOXICATION, AOPEN HOUSE PARTIES,” BEVERAGE LAW VIOLATIONS
  - Section 938.21, Florida Statutes
  - Section 938.23, Florida Statutes

- In addition to any fine imposed by law for any criminal offense under this chapter or for any criminal violation of Chapter 893 (controlled substances), Section 316.193 (DUI), Section 856.011 (disorderly intoxication), Section 856.015 (Open house parties”), or Chapter 562, 567, or 568 (beverage laws), the court may impose an additional assessment in an amount up to the amount of the fine authorized for the offense.
    - Note: The court may only order this cost if it finds that the defendant has the ability to pay the underlying fine (and this court cost) and will not be prevented thereby from being rehabilitated or from making restitution.”
- SALE, MANUFACTURE, DELIVERY OR POSSESSION OF CONTROLLED SUBSTANCE
  - Section 938.25, Florida Statutes
    - The court may assess the amount of \$100 against any defendant who pleads guilty or nolo contendere to, or is convicted of, a violation of Section 893.13, without regard to whether adjudication was withheld, in addition to any fine or other penalty.

### 5.015 Probation

- Special conditions must be pronounced in open court. See Section 948.03, Florida Statutes
  - Special conditions not pronounced at sentencing are unenforceable
  - Defendant must have opportunity to object to special conditions. Mark v. State, 646 So.2d 762 (Fla. 2d DCA 1994)
  - Defendant is on constructive notice of statutorily-authorized conditions. Hayes v. State, 665 So.2d 339 (Fla. 4th DCA 1995)
  - Failure to timely object to expressed conditions constitutes a waiver
  - Probation cannot be rejected in favor of electing jail by defendant
    - Compare Morganti v. State, 557 So.2d 593 (Fla. 4th DCA 1990) with
    - Bentley v. State, 411 So.2d 1361 (Fla. 5th DCA 1982)
  - Can place defendant on probation with or without adjudication, regardless of the imposition of jail as a condition of probation

- Probation can be imposed after trial or plea (Section 948.01, Florida Statutes)
- Probation not discretionary in DUI (Section 316.193(5), Florida Statutes)
- Probation is not applicable for civil infractions
- Cannot impose community control for a misdemeanor
- The probation must be supervised.
- If there is more than one offense, separate orders for each offense must be entered
- Term of probation cannot exceed the statutory maximum sentence. Conrey v. State, 624 So.2d 793 (Fla. 5th DCA 1993).
- Misdemeanant's supervision shall be for six (6) months unless authorized by the court
- If alcohol is involved, may be up to one (1) year
- Consecutive probations and jail sentences can be imposed. Armstrong v. State, 656 So.2d 455 (Fla. 1995)
- Term of probation cannot be indefinite
- Probation begins when imposed

### **5.016 Conditions of Probation**

- Valid conditions must be imposed pursuant to Sections 948.03 and 948.031, Florida Statutes
  - Must be reasonably related to the offense and rehabilitation or to prevent future criminal activity or protect the public
  - Conditions are invalid which are:
    - Not reasonably related to the offense and rehabilitation. Brock v. State, 688 So.2d 1368 (Fla. 1996), or

- Related to conduct which is not in itself criminal. Brock v. State, 688 So.2d 1368 (Fla. 1996), or
- Not related to prevention of future criminal activity, or
- Constitutionally vague. Morris v. State, 383 So.2d 1116 (Fla. 4th DCA 1980), or
- Overbroad and can be violated unintentionally. Morris v. State, 383 So.2d 1116 (Fla. 4th DCA 1980), or
- Unnecessarily burdensome or oppressive. Nichols v. State, 528 So.2d 1282 (Fla. 1st DCA), or
- Impossible to perform. Peters v. State, 555 So.2d 450, (Fla. 4th DCA 1990)
- No authority for court to delegate to probation officer the imposing of special conditions. Barber v. State, 344 So.2d 913 (Fla. 3d DCA 1977) and Kiess v. State, 642 So.2d 1141 (Fla. 4th DCA 1994)

#### **5.017 Restitution**

- Restitution must be imposed in all applicable cases. Sections 775.089 and 948.032, Florida Statutes
  - Defendant must be ordered to pay for damage or loss caused directly or indirectly by the offense or defendant's criminal episode
  - Restitution may be monetary or non-monetary
  - Restitution shall be a condition of probation
  - Failure to order restitution, in full or in part, must be on the record
  - Negotiated plea(s) can include restitution for offenses for which defendant does not enter a plea
- Restitution is proper unless contested by the defendant
  - A plea agreement estops the defendant from denying the legality of restitution. Ronan v. State, 666 So.2d 205 (Fla. 2nd DCA 1995)
  - Can be for uncharged or unproven crimes and other counts if agreed to. Crowder v. State, 334 So.2d 819 (Fla. 4th DCA 1976)
  - Investigative costs by police are not recoverable as restitution, although

can be ordered as a condition of probation if appropriate. Standt v. State, 616 So.2d 600 (Fla. 4th DCA 1993)

- Defendant's ability to pay
  - Burden on defendant to prove by clear and convincing evidence of present inability to pay, along with an absence of future financial ability
  - Court must consider resources of defendant and his/her dependents
  - Must be determined before entering an order of restitution
  - Reasonable amount of restitution shall be ordered within defendant's ability
  - As long as restitution is ordered within sixty (60) days, amount may be set at a later time. Evans v. State, 678 So.2d 863 (Fla. 2d DCA 1996)
  - While defendant may not be able to contest imposition of restitution, he/she can contest dollar amount at any time. Nettles v. State, 611 So.2d 103 (Fla. 5th DCA 1992)
  - Defendant waives the right to have a determination of ability to pay if he/she accepts negotiated plea. Ronan v. State, 666 So.2d 205 (Fla. 2d DCA 1995)

#### **5.018 Modification of Probation Terms**

- Enhancements or extensions after initial sentencing violate the double jeopardy clause of the U.S. Constitution if:
  - Additional hardships are added; and/or
  - Conditions are more restrictive on defendant. See, Lippman v. State, 633 So.2d 1061 (Fla. 1994)
- Orders of probation cannot be changed in the absence of proof of a violation. Clark v. State, 579 So.2d 109 (Fla. 1991)
- Defendant cannot waive his/her right to notice and a hearing. Clark v. State, 579 So.2d 109 (Fla. 1991)
- Upon a violation, defendant can be reinstated or placed on a new period of probation with different terms and/or conditions

## 5.019 Violations of Probation

- Court's jurisdiction
  - Affidavit must be filed with the clerk, not merely signed by the court
  - Must be filed prior to probation expiring. Tyson v. State, 655 So.2d 214 (Fla. 1st DCA 1995)
  - Amended affidavits must be timely filed before expiration. Jett v. State, 722 So.2d 211 (Fla. 1st DCA 1998)
- Court does not retain jurisdiction to revoke probation unless arrest warrant is delivered for execution before probationary period expires. Paulk v. State, 733 So. 2d 1096 (Fla 3rd DCA 1999)
  - Probationer cannot be violated for behavior occurring after expiration of probation. Kimble v. State, 396 So.2d 815 (Fla. 4th DCA 1981)
  - Probation is not tolled in the absence of probationer absconding. Hughes v. State, 667 So.2d 916 (Fla. 4th DCA 1996)
- Hearing
  - Bail may not be automatically denied on a probation violation. Glossom v. Solomon, 490 So.2d 94 (Fla. 3rd DCA 1986)
  - Affidavit must state:
    - Facts concerning the violation. Kune v. State, 397 So.2d 1169 (Fla. 3rd DCA 1981)
    - Nature, time, place of occurrence. Kune v. State, 397 So.2d 1169 (Fla. 3rd DCA 1981)
  - Due process considerations
    - Defendant's presence required. Summvall v. State, 588 So.2d 31 (Fla. 3rd DCA 1991)
    - Defendant has right to notice and confrontation of witnesses. Hall v. State, 512 So.2d 303 (Fla. 1st DCA 1987)
    - Defendant has right to written findings. King v. Florida Parole and Probation Commission, 306 So.2d 506 (Fla. 1978)

- Rules of discovery apply. Cuciak v. State, 410 So.2d 916 (Fla. 1982)
- Defendant has qualified 4th and 5th Amendment rights. Grubbs v. State, 373 So.2d 905 (Fla. 1979)
  - Self-incrimination applies to criminal conduct which would expose probationer to prosecution for a crime different from that for which he/she was already convicted. Dearing v. State, 388 So.2d 296 (Fla. 3rd DCA 1980)
  - Self-incrimination does not apply to technical violations
- Right to counsel
  - While right to counsel attaches to hearings, can be waived
  - Court needs to conduct *Faretta* hearing for a waiver
- Evidentiary issues
  - State must establish defendant as probationer
  - Standard of proof: preponderance of the evidence, greater weight of the evidence, or satisfies the conscience of the court
    - In violations for failure to pay restitution, burden on State to prove defendant's ability to pay. Edwards v. State, 439 So.2d 1028 (Fla. 3rd DCA 1983)
    - In violation for failure to pay costs, only need to establish failure by probationer to pay. McQuitter v. State, 622 So.2d 590 (Fla. 1st DCA 1993)
    - Burden on defendant to establish lack of ability to pay. Section 948.06 (5), Florida Statutes
    - Hearsay is admissible, but cannot be the **sole basis** for revocation
    - Lab reports, properly admitted as a business record exception under Section 90.803(6), Florida Statutes can be

sole basis for violation. Walker v. State, 426 So.2d 1180 (Fla. 5th DCA 1983)

- Probation can be revoked only for non-compliance with expressed conditions imposed by the court. Thomas v. State, 635 So.2d 1009 (Fla. 1st DCA 1994)
- Defendant's probation cannot be violated unless actions are willful and substantial. Salzano v. State, 664 So.2d 23 (Fla. 2d DCA 1995)
- Ability to pay
  - Before incarceration for failure to pay, state must establish the defendant:
    - Has/has had ability to pay
    - Failure to pay is/was willful
- Allegations of new criminal activity
  - Arrests alone do not give grounds for revocation. Hines v. State, 358 So.2d 183 (Fla. 1978)
  - Probation cannot be revoked based on a dismissed charge. Pendergrass v. State, 601 So.2d 1250 (Fla. 2d DCA 1992)
  - Probation can be revoked based upon a plea of guilty or no contest or confession to other criminal activity: Plea: Thomas v. State, 350 So.2d 568 (Fla. 3rd DCA 1977); Maselli v. State, 446 So.2d 1079 (Fla. 1984); Confession - Waring v. State, 504 So.2d 786 (Fla. 2d DCA 1987)
  - Probation can be based upon certified copy of conviction for other offense. Stevens v. State, 409 So.2d 1051 (Fla. 1982)

#### **5.0191 Sentencing After Probation Violation**

- Must be written and conform to oral pronouncement. Amador v. State, 713 So.2d 1121 (Fla. 3rd DCA 1998)
  - For each offense there must be a separate sentence

- General sentence not permitted
  - Basis for revocation must be stated. Thames v. State, 709 So.2d 650 (Fla. 2d DCA 1998)
- Options
    - Incarceration
      - Revoke and impose any legal sentence which could have been imposed upon initial sentencing
      - Jail and probation combined cannot exceed the statutory maximum
      - Separate misdemeanor offenses can be sentenced consecutively
      - Modify or extend probation
        - Requires notice and hearing
        - Cannot extend probation when the probationary period has already expired
      - Reinstate probation and reimpose old or add new conditions

## **5.02 AUTHORITIES**

## **5.03 TIPS/NOTES**

## **5.04 CHECKLIST/FORMS**

## Chapter 5 -- Sentencing

### Sentencing

Once a person has been declared a habitual traffic offender and his license revoked, upon his first DWLSR charge following the designation, he must be charged with a misdemeanor under §322.34(2)(a), rather than a felony under §322.34(1), even though he may have had numerous prior DWLSR charges. Under the plain meaning of §322.34, a habitual traffic offender is treated differently than a non-habitual offender, and may be entitled to a lighter, rather than heavier, sentence.

**S. v. Harvey, 693 So. 2d 1009 (4th DCA 1997), 22 F.L.W. D902 (4/9/97)**

Defendant convicted of multiple misdemeanors who receives consecutive sentences may be incarcerated in a county jail for a total of more than one year.

**Armstrong v. S., 656 So. 2d 455 (Fla. 1995), 20 F.L.W. S235 (5/18/95)**

In the absence of specific direction that sentences are to be served consecutively, sentence resulting from crimes charged in the same information shall be served concurrently.

When felony and misdemeanor sentences for crimes in the same information are sentenced to concurrent time, defendant must get credit for time served on all counts.

**Gulley v. S., 706 So. 2d 110 (2d DCA 1998), 23 F.L.W. D527 (2/20/98)**

Defendant sentenced on two misdemeanors can get two years (one year on each consecutive) in the county jail. Exceeding one year in county jail on misdemeanors is permitted, not on felonies.

**Armstrong v. S., 640 So. 2d 1250 (5th DCA 1994), 19 F.L.W. D1725 (8/12/94)**

County court properly sentences defendant, convicted of fifteen misdemeanor traffic offenses and several contempt of court charges (apparently FTAs) to consecutive county jail sentences totaling 12 years. Defendant is properly ordered to serve that length of time in the county jail.

**Gwynn v. Orange County, 527 So. 2d 866 (5th DCA 1988)**

Defendant pled to a second degree misdemeanor and was placed on one year of probation. After more than six months passed, a VOP warrant was issued. Held: Despite defendant's agreement to the plea and sentence, sentence was illegal and defendant may not be violated.

**Purvis v. Lindsey, 587 So. 2d 638 (4th DCA 1991)**

Defendant was charged with leaving the scene and driving with a suspended license. At restitution hearing, the court found that damages from the accident could not be imposed based on the leaving, but could under the DWLSR. Held: Since the court had sentenced defendant to time served on the misdemeanor, it could not later at a restitution hearing require restitution, as there was no probation to which it could attach.

**Uribe v. S., 596 So. 2d 768 (5th DCA 1992)**

### **Costs**

An acquitted non-indigent defendant is entitled to reimbursement under §939.06 only for witness fees, sheriff's expenses, and clerk's fees. Expert witness fees, video deposition costs, deposition transcripts, fees paid to private process servers, and copy expenses are not taxable to the county.

**Wolf v. Volusia County, 703 So. 2d 1033 (Fla. 1997), 22 F.L.W. S192 (4/7/97)**

Imposing PD fees without prior notice does not constitute fundamental error, and the failure to object or move to set aside the fees waive review on appeal.

**•Locke v. S., 719 So. 2d 1249 (1st DCA 1998), 23 F.L.W. D2399 (10/21/98)**

Court errs in imposing prosecution costs based solely on the prosecutor's statement of costs. Under §938.27, the state must prove the amount of costs imposed.

**Tucker v. S., 832 So. 2d 840 (2d DCA 2002), 27 F.L.W. D2483 (11/15/2002)**

At a hearing contesting the fees imposed for a public defender, the defendant is entitled to be represented but is not entitled to appointed counsel.

**Hill v. S., 734 So. 2d 443 (2d DCA 1999), 24 F.L.W. D1128 (5/5/99)**

### **Probation**

Before defendant's probation conditions can be modified, he must be found in violation of his probation. Modifying his probation to add a condition without finding a violation of probation is a double jeopardy violation, in that it provides multiple punishments for the same offense.

A double jeopardy violation is not procedurally barred from being raised in a 3.850 where the issue was not raised on direct appeal. The prohibition is fundamental, and where defendant did not knowingly waive his right the issue can be raised in a 3.850.

**Lippman v. S., 633 So. 2d 1061 (Fla. 1994), 19 F.L.W. S129 (3/17/94)**

Before defendant's probation conditions can be modified, he must be found in violation of his probation. Modifying his probation to add a condition without finding a violation of probation is a double jeopardy violation, in that it provides multiple punishments for the same offense.

**Lippman v. S., 633 So. 2d 1061 (Fla. 1994), 19 F.L.W. S129 (3/17/94)**

DUI probation does not differ from probation for felony, misdemeanor, or criminal traffic, and court may impose any lawful conditions under §948.03(4).

**Goldschmitt v. S., 490 So. 2d 123 (2d DCA 1986)**

Court may not add conditions of probation when probation is modified, it may only modify the conditions previously imposed. See §948.03(7).

**Bernatelli v. S., 555 So. 2d 1315 (5th DCA 1990)**