D95 w/app

IN THE SUPREME COURT OF FLORIDA

BENJAMIN BILLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,613
Fourth DCA Case No. 91-3446

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE

Petitioner, Benjamin Biller, was convicted of carrying a concealed firearm and weapon. At sentencing, the trial court imposed as a condition of probation that Petitioner not use or possess alcoholic beverages during his probationary term (A1).

On August 12, 1992, the Fourth District Court of Appeal upheld the trial court's condition of probation that Petitioner not use or possess alcoholic beverages during his probationary term. In so doing, the district court concluded that the trial did not abuse its discretion in imposing such a condition of probation even though there was nothing in the record before them which specifically related Petitioner's crime or conduct to alcohol. The Fourth District did note, however, that their opinion may be in conflict with Stonebraker v. State, 594 So.2d 351 (Fla. 2d DCA 1991). Judge Anstead dissented without opinion (A1-A3).

On August 26, 1992, Petitioner filed a motion for rehearing and/or express certification of conflict. On September 10, 1992 the Fourth District Court of Appeal denied Petitioner's motion for rehearing and/or express certification of conflict (A4). Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction.

STATEMENT OF THE FACTS

The decision, at bar, expressly and directly conflicts with the Second District's decision in Stonebraker v. State, 594 So.2d 351 (Fla. 2d DCA 1991). The Fourth District noted that Stonebraker may be in conflict with its written opinion herein. Thus, Petitioner has properly invoked the conflict jurisdiction of this Court.

ARGUMENT

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner must demonstrate that there is "express and direct conflict" between the decision challenged herein, and those holdings of other Florida appellate courts or this Court on the same rule of law to produce a different result than other state appellate courts faced with the substantially same facts. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Article v, § 3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(iv).

In the present case, the Fourth District Court of Appeal expressly found that the trial court did not abuse its discretion in imposing the condition of probation upon Petitioner that he not use or possess alcohol during his probationary term even though there was nothing in the record that specifically related petitioner's crime or conduct of carrying a concealed firearm and weapon to alcohol. The opinion of the Fourth District Court of Appeal expressly and directly conflicts with the Second District's decision in Stonebraker v. State, 594 So.2d 351 (Fla. 2d DCA 1991). In Stonebraker, the defendant was convicted of grand theft and he was placed on probation with a special condition that restricted his use of alcohol and his visitation of premises upon which alcohol or intoxicants were sold. The district court struck down

this condition as being unrelated to the crime of grand theft for which he was convicted.

A condition of probation must be reasonably related to the offense in which a defendant is convicted or reasonably related to prevent future criminal conduct. A trial court cannot impose a condition of probation restricting non criminal conduct. Rodriquez v. State, 378 So.2d 7 (Fla. 2d DCA 1979); Wilkinson v. State, 388 So.2d 1322 (Fla. 5th DCA 1980); Cole v. State, 521 So.2d 297 (Fla. 1st DCA 1988).

The opinion by the Second District in Stonebraker is expressly and directly in conflict with the Fourth District herein on the same question of law. Thus, the Biller opinion expressly and directly conflicts with a decision of another district court of appeal. Petitioner has validly invoked the conflict jurisdiction of this Court in the instant case.

Petitioner respectfully requests this Honorable Court to grant his petition for review and reverse the decision of the lower court.

CONCLUSION

The decision of the Fourth District Court of Appeal herein expressly and directly conflicts with a decision of another district court of appeal on the same question of law. This Honorable Court should grant Petitioner's request for jurisdiction and hear this cause on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL COBURN ASBURY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by courier this 15 day of OCTOBER, 1992.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

BENJAMIN BILLER, Petitioner. vs. STATE OF FLORIDA, Respondent.	CASE NO. Fourth DCA Case No.: 91-3446

APPENDICES 4

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1992

BENJAMIN BILLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-3446.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed August 12, 1992

Appeal from the Circuit Court for Broward County; J. Leonard Fleet, Judge.

Richard L. Jorandby, Public Defender, and Robert Friedman, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellee.

STONE, J.

We affirm appellant's conviction and sentence for carrying a concealed firearm and weapon. The trial court imposed a condition of probation that appellant not use or possess alcoholic beverages. The validity of this condition is the sole issue on appeal. The appellant contends that the condition is not reasonably related to these circumstances. In Stonebraker v. State, 594 So.2d 351 (Fla. 2d DCA 1992), the court struck a similar condition as being unrelated to the crime of grand theft. See also Cole v. State, 521 So.2d 297 (Fla. 1st DCA 1988).

However, notwithstanding that nothing in the record before us specifically relates the appellant's crime or conduct to alcohol, we find no abuse of discretion in the court imposing restrictions concerning the use or possession of alcohol on the appellant's probation. Such a condition is appropriate where it may be related to the past or future criminality of the defendant or where it is used as a tool for rehabilitation. E.g., Brown v. State, 406 So.2d 1262 (Fla. 4th DCA 1981); Coulson v. State, 342 So.2d 1042 (Fla. 4th DCA 1977).

Here we do not have the benefit of reviewing the presentence investigation report, which was before the trial court, and we have no information as to its content. However, it does not appear that the trial court was relying specifically on the report in reaching its decision to impose the condition. Nor can we tell from this record what, if anything, the trial court may have previously observed in its contacts with the defendant. The record only reflects the trial court's statement:

> The special conditions of probation have to have a reasonable relation to the offense which occurred. Given the peculiar circumstances of this particular case, I am of the opinion this gentleman should refrain from the ingestion of any alcohol in order to not be in a position in which his judgment would be impaired which would cause him to repeat the activities for which he now stands convicted which results in impaired judgment under these circumstances.

In Coulson, this court upheld a special condition of probation, following a burglary conviction, that the defendant obtain and maintain employment. At the same time, we struck as punitive a companion requirement that he draw no unemployment compensation. In Coulson, Judge Downey recognized that:

> It is well settled that the primary purpose of probation is to rehabilitate the individual while he is at liberty under supervision. Bernhardt v. State, 288 So.2d 490 (Fla. 1974). In the matter of granting probation and specifying conditions thereof trial courts are necessarily vested with a broad, but not unbridled, discretion. Kominsky v. State, 330 So.2d 800 (Fla. 1st DCA 1976). And the terms and conditions of probation are valid if the activities restricted bear a reasonable relation to the past or future criminality of the probationer, notwithstanding that such activities may be lawful in themselves. See, e.g., Malone v. United States, 502 F.2d 554 (9th Cir. 1974). Because of the broad discretion reposing in the trial judge appellate courts should be wary of interfering with his design of conditions to effectuate a successful probation. However, if a special condition of probation is so punitive as to be unrelated to rehabilitation, it can not be imposed. Kominsky v. State, supra.

In that case, the court recognized that maintaining employment was an effective tool in rehabilitation. We can discern no reason why a trial court could not similarly conclude the same as to the abstinence from the use or possession of alcohol.

Certainly there will be instances where a restriction on lawful activity is unnecessary, but that is also true of many valid conditions of probation, not the least of which is the trial court's unbridled authority to incarcerate a defendant for up to 365 days without any more record than is before us today. We conclude that the ends of justice are best served by affirming the court's exercise of discretion. We recognize that this opinion may be in conflict with Stonebraker.

POLEN, J., concurs.
ANSTEAD, J. dissents without opinion.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

BENJAMIN I. BILLER

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 91-03446

L.T. CASE NO 90-24308 CF
BROWARD

September 10, 1992

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed August 26, 1992, for rehearing and/or express certification of conflict to the Florida Supreme Court is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK.

cc: Public Defender 15
Attorney General-W. Palm Beach

/CH

RF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Appendix has been furnished by courier to CAROL COBURN ASBURY, Assistant Attorney General, Elisha Newton Dimick Building, Suite, 204 111 Georgia Avenue, West Palm Beach, Florida 33401 this 15th day of OCTOBER, 1992.

of Counsel.