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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80613

Fourth DCA CASE NO. 91-3446

BENJAMIN BILLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON CERTIORARI FROM THE DISTRICT COURT OF THE STATE OF FLORIDA
FOURTH DISTRICT

****

RESPONDENT'S BRIEF IN OPPOSITION TO JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Benjamin Biller, the criminal defendant and appellant below in the appended Biller v. State, 17 F.L.W. D1873 (Fla. 4th DCA August 12, 1992), will be referred to as "Petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State" or "Respondent."

No references to the record on appeal will be either necessary or appropriate.

Any emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts that Petitioner's Statement of the Case and Facts.

STATEMENT OF JURISDICTION/SUMMARY OF ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Honorable Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) to review Biller v. State on grounds that this decision allegedly conflicts with Stonebraker v. State, 594 So.2d 351 (Fla. 2nd DCA 1991).

No basis for juridiction exists.

ARGUMENT

THE DECISION BY THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH STONEBRAKER

Petitioner seeks to establish this Court's "conflict" jurisdiction pursuant to Article V, Section 3(b)(3) Fla.Const. (1980), alleging that the decision below conflicts with Stonebraker v. State, 594 So.2d 351 (Fla. 2nd DCA 1992). Respondent disagrees as the decision sub judice on its face, does not expressly and directly conflict with Stonebraker, as a result, this Honorable Court lacks jurisdiction to grant Petitioner's application for discretionary review.

Under Article V, Section 3(b)(3) of the Florida Constitution this Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Thus, "conflict" jurisdiction is properly invoked when: 1) the district court announces a rule of law which conflicts with a rule previously announced by the Supreme Court or by another district, or 2) the district court applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975).

In order for two court decision to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under 9.030(a)(2)(A)(iv), the

decisions should speak to the same point of law, in factual contexts of sufficient similarity to compel the conclusion that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally Mancini v. State, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). It is the cases' holding which is dispostitive for "conflict" jurisdiction. While a district court cannot thoroughly misapply a precedent of another court and then escape conflict certiorari review of its decision, see Ascensio v. State, 497 So.2d 640, 641 (Fla. 1986), this is not what happened here. "Obviously, two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So.2d 778, 783 (Fla. 4th DCA 1981), affirmed, 428 So.2d 220 (Fla. 1982), cert. denied, 464 U.S. 821 (1983). A careful review of the decision with which the decision below is alleged to conflict will reveal that they are legally consistent therewith.

Petitioner agrees with the Fourth District Court in the general principal of law. A condition of probation must be reasonably related to the offense in which a defendant is convicted or reasonably related to the past or future criminality of the probationer. (Petitioner's Brief page 5). The use of the conjunctive "or" is important. A condition of probation must be reasonably related to either 1) the offense for which the defendant is convicted or 2) to the past or future criminality of the probationer. This recognizes the well settled principal 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).

Under the facts of Stonebraker, the appellate court held that the imposition of a condition of probation that a defendant not use or possess alcoholic beverages was unrelated to the crime of grand theft. Although this may be true, the Fourth District Court sub judice held that this same condition of probation "may be related to the past or future criminality of the defendant or where it is used as a tool for rehabilitation." The Fourth District Court found that, under the facts sub judice, the trial court's imposition of this condition reasonably related to the future criminal conduct of the Petitioner.

Whereas, Stonebraker related to number 1) above (the activity restrict does not relate to the crime the defendant is convicted), Biller relates to number 2) above (the activity restrict does relate to the future criminality of the defendant). Consequently, the Fourth District's decision in Biller is legally consistent with, rather than in conflict with, the Stonebraker case. That is why the Fourth District Court of Appeal denied the Petitioner's motion for rehearing and/or express certification of conflict on September 10, 1992. The decision sub judice does not expressly and directly conflict with Stonebraker. The cases are distinguishable. Hence, this Court may not exercise its conflict certiorari jurisdiction to reveiw Biller. See

Jenkins v. State, supra. The fact that the Petitioner disagrees with the Fourth District's resolution of his case does not change matters.

CONCLUSION

WHREFORE Respondent, the Stte of Florida, respectfully submits that this Honorable Court must summarily DENY the petition for writ of conflict certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

CASE NO.

Fourth DCA CASE NO. 91-3446

BENJAMIN BILLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON CERTIORARI FROM THE DISTRICT COURT OF THE STATE OF FLORIDA FOURTH DISTRICT

****

RESPONDENT'S APPENDIX

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DISTRICT COURTS OF APPEAL

Criminal law—Sentencing—Correction of illegal sentence—Excessive community control term

KATHRYN ISABLE ALEXANDER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 92-0609. Opinion filed August 12, 1992. Appeal of order denying rule 3.800(a) motion from the Circuit Court for Palm Beach County; James R. Stewart, Jr., Judge. Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant seeks review of the trial court's order denying her rule 3.800(a) motion to correct illegal sentence. We find merit in appellant's contentions. Accordingly, we reverse and remand with directions to vacate that portion of appellant's five-year term of community control which exceeds two years. *See* §948.001, Fla. Stat. (1987); §948.03(2)(b), Fla. Stat. (1987); *Yourn v. State*, 579 So.2d 309 (Fla. 2d DCA 1991); *Crawford v. State*, 567 So.2d 428 (Fla. 1990). (DOWNEY, LETTS and GUNTHER, JJ., concur.)

* * *

Criminal law—Probation—No abuse of discretion in restricting use or possession of alcoholic beverages as condition of probation imposed for offense of carrying concealed firearm and weapon—Condition that defendant not use or possess alcoholic beverages is appropriate where it may be related to past or future criminality of defendant or where it is used as tool for rehabilitation—Possible conflict noted

BENJAMIN BILLER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-3446. 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.)

* * *

Criminal law—Post conviction relief—Remand for attachment of portions of record relied on by trial court for summary denial

BOBBY JACKSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 92-1889. Opinion filed August 12, 1992. Appeal of order denying rule 3.850 motion from the Circuit Court for Palm Beach County; Richard J. Wennet, Judge. Bobby Jackson, Raiford, pro se appellant. Robert A. Butterworth, Attorney General, Tallahassee, and John Tiedemann, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We reverse and remand for the attachment to the order of denial of post-conviction relief those portions of the record relied on by the trial court for summary denial. *McGrady v. State*, 591 So.2d 308 (Fla. 4th DCA 1991). We decline to revisit *McGrady*, as appellee suggests, as we view the attachment of portions of the record to the order of denial as essential for us to perform our review function under Florida Rule of Appellate Procedure 9.140(g).

Reversed and remanded. (DOWNEY, HERSEY and WARNER, JJ., concur.)

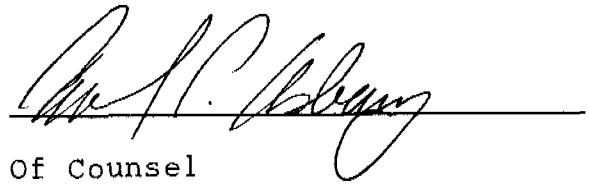
* * *

Criminal law—Trafficking in oxycodone does not fall within statutory restriction of statute proscribing trafficking in illegal drugs

MELVIN E. CHAMBERS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-3017. Opinion filed August 12, 1992. Appeal from the Circuit Court for Broward County; Robert B. Carney, Judge. Richard L.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing APPENDIX has been furnished by mail/courier to ROBERT FRIEDMAN, Assistant Public Defender, Fifteenth Judicial Circuit, Office of the Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 21st day of October, 1992.



Of Counsel