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IN THE SUPREME COURT OF FLORIDA

BENJAMIN BILLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80, 613

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 3RD Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

ROBERT FRIEDMAN
Assistant Public Defender
Bar # 500674

Counsel for Petitioner

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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 charged by Information with carrying a concealed firearm in Count I and carrying a concealed weapon in Count IIs and III (R423).

The case proceeded to a jury trial. The trial court entered an order of acquittal as to Count III only (R430). The jury returned verdicts of guilty as charged in the Information as to Counts I and II (R426). Adjudication was withheld and Petitioner was placed on 18 months probation in Count I and a concurrent term of 6 months probation in Count II. As a condition of probation Petitioner was not to use or possess alcoholic beverages during his probationary term (R434-435).

On August 12, 1992, the Fourth District Court of Appeal affirmed the trial court's condition of probation imposed upon Petitioner that he not use or possess alcoholic beverages during his probationary term. In so holding, the district court concluded that the trial court did not abuse its discretion in imposing such a condition of probation even though there was nothing before them which specifically related Petitioner's crime or conduct to alcohol. Judge Anstead dissented without opinion. Biller v. State, 17 FLW D1873 (Fla. 4th DCA August 12, 1992).

Petitioner filed a notice to invoke this Court's discretionary jurisdiction. On January 5, 1993, this Court accepted jurisdiction of this case and ordered Briefs on the Merits. This Brief follows.

STATEMENT OF THE FACTS

Deputy Mentzer testified that he was traveling south on I-95 when an 1988 Mustang passed him at a high rate of speed. Deputy Mentzer paced the car at 70 mph. A traffic stop was made as the car exited west on Hallandale Beach Boulevard (R210-211). Petitioner was asked if he had any guns in the car to which he responded "yes." Underneath the driver's seat, there was a loaded Raven .25 caliber automatic pistol ready to fire (R213-214, 216). The gun was in a holster, however, there was not a snap on the holster (R217, 229). There was also a stun gun found under the seat (R217). After Petitioner was placed under arrest, a black handle switch blade knife was found in his right rear pocket (R221).

Benjamin Biller testified that he is the owner and operator of a ten unit family motel in Hallandale (R316). Mr. Biller was first introduced to guns at camp and in the Boy Scouts. He bought his first rifle at age 16 and still shoots at targets on the weekends (R321-322).

On the date of his arrest, Mr. Biller was coming home from his girlfriend's house in Sunrise. Mr. Biller testified that he keeps a gun in his car for protection because he goes to various warehouses for work purposes and he doesn't always know the area (R325-326). Mr. Biller was travelling south on I-95. He got off at Pembroke Road and was pulled over for speeding to which he admitted (R327-328).

The deputy asked him if he had any guns in the car to which

he responded "yes." Mr. Biller testified that the gun was between the seat and the console. The gun was in a holster with the barrel facing the floorboard. The butt of the gun was visible (R330-331). Mr. Biller also testified that the stungun was in the glovebox which he keeps for protection (R332). The pocketknife was given to him by a friend from high school (R336).

SUMMARY OF THE ARGUMENT

A condition of probation must be reasonably related to the offense for which a defendant is convicted and reasonably related to prevent future criminal conduct. Additionally, a trial court can not impose a condition of probation restricting non criminal conduct.

At bar, there is absolutely no evidence in the record that Petitioner was under the influence of alcohol at the time of his arrest for carrying a concealed firearm and carrying a concealed weapon nor is there any evidence in the record that Appellant had a problem with alcohol. Thus, the condition of probation that Petitioner not use or possess alcohol during his probationary term was not reasonably related to his offenses nor was it reasonably related to prevent future criminal conduct by Petitioner.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL WAS INCORRECT WHEN IT HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A CONDITION OF PROBATION THAT PETITIONER NOT USE OR POSSESS ALCOHOL WHEN THERE WAS NO EVIDENCE WHICH SPECIFICALLY RELATED PETITIONER'S CRIME OR CONDUCT TO ALCOHOL.

The purpose of probation is to rehabilitate the individual while at liberty under supervision. Bernhardt v. State, 288 So. 2d 490 (Fla. 1974). A trial court may impose any valid condition of probation which serves a useful rehabilitative purpose. Hines v. State, 358 So. 2d 183, 185 (Fla. 1978). In Rodriquez v. State, 378 So. 2d 7, 9 (Fla. 2d DCA 1979), the Second District Court of Appeal set forth the following test in determining whether a condition of probation is reasonably related to rehabilitation:

> In determining whether a condition of probation is reasonably related to rehabilitation, we believe that a condition is invalid if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. People v. Lent, 15 Cal. 3d 481, 124 Cal. Rptr. 905, 541 P. 2d 545 (1975); State v. Livingston, 53 Ohio App. 2d 195, 372 N. E. 2d 1335 (Ct. App. 1976); State v. Means, 257 N. W. 2d 595 (S.D.1977). See Russell v. State, 3342 So. 2d 96 (Fla. 3d DCA 1977).

Both the Fifth District Court of Appeal in Wilkinson v. State, 388 So. 2d 1322 (Fla. 5th DCA 1980) and the First District Court of Appeal in Cole v. State, 521 So. 2d 297 (Fla. 1st DCA 1988) have followed the test enunciated in Rodriquez, supra in determining whether a condition of probation is reasonably related to rehabilitation. In Cole, supra, the condition of probation that

the defendant not live with his mother was stricken on the grounds that such condition was unrelated to the crime of uttering a forgery and was not reasonably related to future criminality. In Wilkinson, supra, the condition of probation that the defendant not live with a female to whom he was not married or related was stricken on the ground that such condition was not reasonably related to the crime of carrying a concealed firearm.[1]

More specifically, in Stonebraker v. State, 594 So. 2d 351 (Fla. 2d DCA 1992), the condition of probation relating to alcohol use or visiting premises upon which alcohol or intoxicants are sold was stricken on the ground that such condition was unrelated to the crime of grand theft. See also, Ford v. State, 556 So. 2d 483 (Fla. 2d DCA 1990) (condition of probation that defendant not live with a member of the opposite sex who is not a relative without written permission stricken on the ground that condition was unrelated to drug conviction). In the instant case, the record fails to establish that the condition of probation that Petitioner not use or possess alcoholic beverages was reasonably related to the offenses of carrying a concealed firearm and weapon and reasonably related to prevent future criminal conduct by Petitioner. The consumption of alcohol is not in and of itself criminal.

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[1] Oddly enough, in Wiggins v. State, 386 So. 2d 46 (Fla. 4th DCA 1980), a different panel of the Fourth District Court of Appeal followed the test enunciated in Rodriquez by striking a condition of probation which prohibited the defendant from sexual intercourse with someone other than his lawfully married spouse following his conviction for forgery.

There is absolutely no evidence in the record that Petitioner was under the influence of alcohol at the time of his arrest for carrying a concealed firearm and weapon nor is there any evidence in the record that Appellant had a problem with or history of alcohol abuse. At bar, Judge Stone, writing for the Fourth District, applied an incorrect legal standard, i.e. "that the ends of justice are best served by affirming the trial court's exercise of discretion." In so many words, the lower court's decision implies that Mr. Biller should be happy that he was not sentenced to a year in jail for his offenses even though there was nothing in the record before them which related Petitioner's crime or conduct to alcohol. Contrary to the Fourth District's opinion, the ends of justice are not best served by affirming the trial court's exercise of its discretion.

From a legal standpoint as well as a policy standpoint this Court should quash the opinion of the Fourth District, adopt the test set forth in Rodriguez, supra, and strike Petitioner's challenged condition of probation.

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Petitioner respectfully requests this Court to quash the opinion of the Fourth District Court of Appeal and reverse this cause.

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building/6th Floor
421 3RD Street
West Palm Beach, Florida 33401
(407) 355-7600

ROBERT FRIEDMAN
Assistant Public Defender
Florida Bar No.: 500674

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL COBOURN ASBURY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by courier this 15 day of JANUARY, 1993.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

BENJAMIN BILLER,
Appellant
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 80,613

APPENDIX

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.

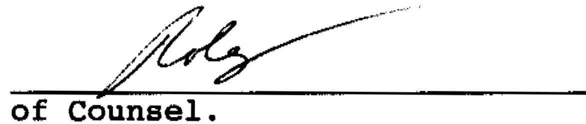
In that case, the court recognized that maintaining employment was an effective tool in rehabilitation. We can discern no reason why a trial court could not similarly conclude the same as to the abstinence from the use or possession of alcohol.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Appendix has been furnished by courier to CAROL COBOURN ASBURY, Assistant Attorney General, Elisha Newton Dimick Building, Suite, 204 111 Georgia Avenue, West Palm Beach, Florida 33401 this 15 day of JANUARY, 1993.



of Counsel.