IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,613

BENJAMIN BILLER,

Appellant/Petitioner

vs.

STATE OF FLORIDA,

Appellee/Respondent

****

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT
CRIMINAL DIVISION

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Benjamin Biller, the criminal defendant and appellant below in the appended Biller v. State, 17 Fla.L. Weekly 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 e referred to as the "State" or "Respondent."

The following symbols will be used:

"R"	Record on Appeal
"AB"	Petitioner's Brief

STATEMENT OF THE CASE AND FACTS

The State accepts the Appellant's statement of the case and facts, as it appears in the initial brief, to the extent that the statement represents an accurate, non-argumentative recitation of the proceedings below, and only to the extent necessary for the resolution of the issues raised on appeal. The State accepts the statement subject to the following emphasis and clarifications:

1. It was about 4 A.M. when Deputy Mentzer stopped the petitioner for traveling 70 mph on I-95. (R 210,251). The officer asked the petitioner if he had any "weapons" in the automobile. (R 251). Petitioner only told him about the gun under the driver's seat. (R 251). Petitioner did not tell him about the stun gun or the switchblade knife he carried on his person. (R 251). The fully loaded gun was found underneath the driver's seat and was not securely encased. (R 214-215,229). The stun gun was found next to the .25 Raven automatic pistol. (R 219). The switchblade, that operated by a button, was found in petitioner's right rear pocket. (R 218). A Fraternal Order of Police badge was found in the petitioner's vehicle. (R 218,225). A scanner as also found in the vehicle, along with a policeman's hat. (R 224,414). The badge, scanner and policeman's hat was not introduced into evidence.

Petitioner's drivers license was expired. (R 220).

2. Petitioner testified that he owns four to five rifles, four shotguns, and a half a dozen pistols. (R 335).

He owns these firearms for self defense. (R 325,346). If he sees a gun that he likes he buys it. (R 347). In fact he does his own reloading and produces his own bullets. (R 352). He testified that he had just recently bought another gun because he likes guns. (R 324).

Petitioner admitted that he was speeding and that he was driving on an expired drivers license. (R 328,335).

3. After sentencing the petitioner, the weapons were forfeited as well as the Fraternal Order of Police Badge and the police officer's hat. The police badge and police officer hat was to be returned to the true owner. (R 414).

SUMMARY OF THE ARGUMENT

The condition that the petitioner not use or possess alcoholic beverages is appropriate where it may be related to past or future criminality of petitioner or where it is used as a tool for rehabilitation. Petitioner was found guilty of carrying concealed weapons. The use of alcoholic beverages and concealed weapons is reasonably related to future criminal activity.

ARGUMENT

POINT ON APPEAL

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT 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 IT WAS REASONABLY RELATED TO FUTURE CRIMINAL ACTIVITY

Petitioner was convicted and sentence for carrying a concealed firearm and weapon. The trial court imposed a condition of probation that petitioner not use or possess alcoholic beverages. Petitioner alleges that this condition was not reasonably related to the crime which the petitioner was convicted -- carrying concealed weapons -- therefore, the trial court erred in imposing this condition. Respondent disagrees.

As the Fourth District Court of Appeals points out a condition of probation is appropriate if it may be related to the past or future criminality of the defendant or where it is used as a tool for rehabilitation. Biller v. State, 17 Fla.L. Weekly D1873 (Fla. 4th DCA 1992). Petitioner also agrees that a condition of probation may be appropriate if it is reasonably related to past or future criminality. Petitioner cites to Rodriguez v. State, 378 So. 2d 183, 185 (Fla. 1978) wherein the court held that a condition is invalid if it "(3) requires or forbids conduct which is not reasonably related to future criminality." (AB 6). Respondent maintains that the use of alcohol as it relates

to the use of guns is reasonably related to future criminal conduct.

In the instant case, the petitioner was speeding down I-95 early in the morning. He did not have a driver's license. He admitted to the police officer that he had a concealed firearm under the driver's seat. However, he did not admit that he had a stun gun and a switchblade knife which were also concealed. The switchblade was on his person. He admitted to keeping these weapons for protection. In addition, he admitted that he liked to buy guns and owned at least half a dozen additional hand guns. In fact, he had just purchased another hand gun because he likes guns. (R 324). He even made his own bullets. Found in the vehicle driven by petitioner was a police badge and policeman's hat which belonged to another person. A scanner was also found in his vehicle.

When the defense counsel objected to the condition regarding the non-use or non-possession of alcohol the trial court stated:

> **Defense counsel:** Your, Honor, I wanted to make an objection to the condition of no alcohol. If I recall, there was some case law that says that's not a legitimate special condition unless in some fashion the offense was alcohol related, and my recollection there was not.
>
> **Trial court:** You are not quite right. 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 circumstance.

(R 419-420). The Fourth District Court observed that the petitioner did not have the presentencing investigative report included in the record on appeal. The Fourth District Court did note that a trial court has broad discretion in designing conditions of probation to effectuate a successful probation. However, the Fourth District Court also pointed out that a condition that is so punitive as to be unrelated to rehabilitation must be stricken. Biller, quoting Kominsky v. State, 330 So. 2d 800 (Fla. 1st DCA 1976).

Petitioner is incorrect when he states that "... the Fourth District, applied an incorrect legal standard, i.e. 'that the ends of justice are best served by affirming the trial court's excercise of discretion.'" (AB 8). Petitioner also borders on hysteria when he says, "In so many words, the lower ocurt'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." (AB 8). There is nothing in the record to support such a comment.

Nevertheless, there are some "peculiar circumstances" surrounding this case. Petitioner had three concealed weapons on him when he was stopped. Found in the vehicle was a police badge and policeman's hat which belonged to another person and a scanner. Petitioner admitted that he had just "acquired" another gun because he "just like[s] them." (R 324). If he sees a gun he likes he buys it. (R 324,347). He admits to owning four to five rifles, four shotguns and at least half a dozen hand guns. (R 335). He is so into guns that he loads his own bullets. (R 352). All these guns he says are owned for protection and sports. (R 325). This particular loaded hand gun was located, according to the Petitioner, between the driver's seat and console for easy access. The butt of the gun was sticking out. (R 330-331). The police officer who searched the vehicle testified that the gun was under the driver's seat next to the stun gun. Neither were secured. It is uncontested that the gun and stun gun and switchblade knife were concealed and that the gun was unsecured.

It is apparent that Petitioner's loss of the hand gun in question does not bother him since he has numerous other hand guns to use for protection. In light of the direct correlation between the use of hand guns and alcohol and the Petitioners love of firearms -- particularly the concealed kind of firearm -- the trial court's ruling was reasonably related to Petitioner's successful completion of his probation.

Petitioner reliance on Stonebraker v. State, 594 So. 2d 351 (Fla. 2nd 1992) is not persuasive. In Stonebraker the trial court only states that the condition was not related to the crime of grand theft for which the defendant was convicted. The case is devoid of the facts which supports the conclusion made in Stonebraker.

In the instant case, the trial court noted that the condition was reasonably related to petitioner's future criminality -- "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." Guns and alcohol do not mix. Petitioner admits to having many more guns at his disposal. Under the circumstances of this case, the Fourth District Court was correct in concluding that "the ends of justice are best served by affirming the court's exercise of discretion."

From a legal standpoint as well as a public policy standpoint this Court should affirm the opinion of the Fourth District Court of Appeal.

CONCLUSION

Based on the foregoing Arugment and the authorities cited therein, Respondent respectfully request this Court to affirm the opinion of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been funished by mail/courier to ROBERT FRIEDMAN, Assistant Public Defender, 15th Judicial Circuit of Florida, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beaach, Florida 33401 this 4th day of February, 1993.

CAROL COBOURN ASBURY, OF COUNSEL

IN THE SUPREME COURT OF FLORIDA

BENJAMIN BILLER,

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STATE OF FLORIDA,

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APPENDIX

Volume 17, Number 33
August 21, 1992

DISTRICT COURTS OF APPEAL

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

[redacted]RYN ISABLE ALEXANDER, Appellant, v. STATE OF FLORIDA, [redacted]ee. 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.

[redacted]NE, 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 gen[redacted]eman 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 I. 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 has been funished by mail/courier to ROBERT FRIEDMAN, Assistant Public Defender, 15th Judicial Circuit of Florida, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beaach, Florida 33401 this 4th day of February, 1993.

CAROL COBOURN ASBURY, OF COUNSEL