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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,571
DCA NO. 92-2558

KENNY ALSTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY JURISDICTION

PETITIONER'S BRIEF ON JURISDICTION

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ON APPLICATION FOR DISCRETIONARY REVIEW

INTRODUCTION

The Petitioner herein requests that this Court grant discretionary review based on an express and direct conflict between the majority decision of the Third District Court of Appeal and the decision of the Second District Court of Appeal in *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977), written by then-Judge Grimes for the Court, on the same question of law. The symbol "A" will be used to refer to portions of the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

Mr. Alston was charged with violating the condition of community control that he not use intoxicants to excess.[1],[2] (A. 1). To establish this violation, the state presented evidence that Mr. Alston tested positive for cocaine use. (A. 2). The trial court revoked Mr. Alston's community control on the basis of this evidence.

In *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977), the defendant's probation was revoked for violating the same provision, upon proof of his admission to ingesting marijuana. In reversing the revocation, then-Judge Grimes noted that the conduct proved, though criminal, was *not* the conduct charged:

> The proof of appellant's violation of the other condition consisted of the supervisor testifying that appellant had told him that he had smoked marijuana shortly before his arrest. While smoking marijuana is a crime and testimony of appellant's admission would not constitute hearsay; the fact remains that appellant was charged with violating the condition that he should not use intoxicants to excess and should not visit places where intoxicants, drugs or dangerous substances are unlawfully used. The evidence failed to show

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[1] The violation alleged in full:

> You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed or used unlawfully.

(A. 4, fn. 1).

[2] He was also charged with failing to work diligently, a basis upon which the trial court relied in revoking his community control. (A. 1-2). The district court of appeal held that the evidence presented did not establish a violation of this condition, and struck the finding of this violation. (A. 2-3).

> that appellant violated this condition. The suggestion that appellant had to be some place when he smoked the marijuana and, therefore, this was a place where drugs were being unlawfully used is unconvincing. The conduct established by appellant's admission does not appear to be that which is intended to be proscribed by the condition which he was charged with violating.

348 So. 2d at 943.

On appeal, Mr. Alston argued, citing *Jones*, that a positive cocaine test "does not prove the type of conduct the 'excessive use of intoxicants' condition is intended to proscribe." (A. 2). A majority of the district court of appeal disagreed, concluding that evidence of Mr. Alston's cocaine use was sufficient to establish a violation of that condition, citing *Scott v. State*, 524 So. 2d 1148 (Fla. 3d DCA 1988), in which evidence that the defendant was "*staggering* down the street in an *intoxicated state* inhaling automobile transmission fluid" was sufficient to establish a violation of the same condition. *Scott*, 524 So. 2d at 1148 (emphasis supplied). (A. 2).

Judge Ferguson dissented, noting that "[t]his case is practically on all fours with *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977), where it was held, in an opinion by Judge Grimes, that evidence that the probationer had smoked marijuana was insufficient to show a violation" of this condition; and that, unlike the *Scott* case relied upon by the majority, here "[t]here was no evidence that Alston used any substance 'to excess', a phrase which presupposes that there is some permissible level of indulgence." (A. 5).

QUESTION PRESENTED

WHETHER THE MAJORITY DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *JONES V. STATE*, 348 So. 2d 942 (Fla. 2d DCA 1977)?

SUMMARY OF ARGUMENT

The majority decision of the Third District Court of Appeal expressly and directly conflicts with the decision of the Second District Court of Appeal in *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977), because the former decided that bare evidence of the use of an illegal substance was sufficient to establish a violation of the condition that a probationer "not use intoxicants to excess," and the latter decided that such evidence alone does not suffice to establish a violation of this condition.

ARGUMENT

THE MAJORITY DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *JONES V. STATE*, 348 So. 2d 942 (Fla. 2d DCA 1977).

The majority decision of the Third District Court of Appeal expressly and directly conflicts with the decision of the Second District Court of Appeal in *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977). In *Jones*, then-Judge Grimes, for the Court, wrote that proof that a probationer has used an illegal substance, although this is a crime,[3] is not a violation of the condition proscribing the use of intoxicants to excess. In this case, the majority decided that proof of Mr. Alston's use of an illegal substance established a violation of the same condition. As Judge Ferguson noted in dissent, *Jones* is "practically on all fours" with the subject case.

The *Alston* majority does not purport to distinguish *Jones*, and relies instead on *Scott v. State*, 524 So. 2d 1148 (Fla. 3d DCA 1988), in which evidence that the defendant was "*staggering* down the street in an *intoxicated state* inhaling automobile transmission fluid" was deemed sufficient to establish a violation of this condition. 524 So. 2d at 1148 (emphasis supplied). In contrast, in the subject case, as in *Jones*, there was no evidence that the substance ingested by the probationer, either in its nature or

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[3] This proof may be sufficient to prove a different violation, e.g. of the condition that the probationer remain at liberty without violating the law. But probation cannot of course be revoked for an uncharged violation. *Moser v. State*, 523 So. 2d 783 (Fla. 5th DCA 1988).

quantity or effect, was excessive, or caused him to become intoxicated.[4]

Because the *Jones* decision is indistinguishable from that at issue, and directly and expressly conflicts with it, this case falls squarely within this Court's conflict jurisdiction, see Fla. R. App. P. 9.030(a)(2)(iv).

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[4] The majority also relied upon *Hogan v. State*, 583 So. 2d 426 (Fla. 1st DCA 1991), and *Harrington v. State*, 570 So. 2d 1140 (Fla. 4th DCA 1990), for the proposition that, contrary to Judge Ferguson's dissenting opinion, cocaine is an intoxicant. In neither case does the court expressly decide whether cocaine is an intoxicant; in neither case was the court apparently asked to do so.

CONCLUSION

Based on the foregoing, the petitioner respectfully requests this Court to grant discretionary review in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101, this 25 day of October, 1993.

VALERIE JONAS
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,571
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KENNY ALSTON,

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APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

KENNY ALSTON, **

Appellant, **

vs. ** CASE NO. 92-2558

THE STATE OF FLORIDA, **

Appellee, **

Opinion filed September 14, 1993.

An Appeal from the Circuit Court for Monroe County, Richard Fowler, Judge.

Bennett H. Brummer, Public Defender, and Valerie Jonas and Joseph Durant, Assistant Public Defenders, for appellant.

Robert A. Butterworth, Attorney General, and Linda S. Katz and Leslie Schreiber, Assistant Attorneys General, for appellee.

Before NESBITT, BASKIN and FERGUSON, JJ.

PER CURIAM.

Kenny Alston appeals an order revoking community control. We affirm, as modified.

The trial court revoked defendant's community control, finding that he violated two community control conditions: 1) using intoxicants to excess and 2) failing to work diligently.

As to the first condition, the state presented evidence that defendant tested positive for cocaine use. To demonstrate a violation of the second condition, the community control officer testified that on one occasion he observed defendant standing at a street corner on a day when his log sheet indicated he should have been at work. Defendant testified that he stopped and spoke to acquaintances for a brief time when he was attempting to find his employer on the day the community control officer saw him. Defendant's employer, a contractor, testified that defendant has been performing satisfactory work for 1 1/2 years.

Regarding the first condition, defendant asserts that the positive cocaine test does not prove the type of conduct the "excessive use of intoxicants" condition is intended to proscribe. We disagree. The evidence of defendant's cocaine use was sufficient to satisfy the conscience of the court that defendant violated the first condition.[1] See Scott v. State, 524 So. 2d 1148 (Fla. 3d DCA 1988).

As to the second condition, however, the greater weight of the evidence fails to establish that defendant wilfully violated the condition requiring him to work diligently. The evidence

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[1] Cocaine is considered an intoxicant in probation violation cases. See Hogan v. State, 583 So. 2d 426 (Fla. 1st DCA 1991); Harrington v. State, 570 So. 2d 1140 (Fla. 4th DCA 1990). The dissent's reliance on the limited definition of "intoxication" in Black's Law Dictionary 957 (rev. 4th ed. 1968) is misplaced. That definition has been deleted from the latest edition of Black's Law Dictionary 822 (6th ed. 1990). In any event, this court has not limited its definition of intoxicant use to alcohol ingestion. E.g. Scott, 524 So. 2d at 1148 (evidence sufficient to revoke defendant's probation for excessive intoxicant use where officer observed defendant staggering down street inhaling automobile transmission fluid).

that, on one occasion, the community control officer observed him standing at a street corner for a few minutes during work hours does not support a finding that defendant wilfully failed to go to work that day. There was no evidence that defendant's unsuccessful attempts to locate his employer on that date did not occur. Chatman v. State, 365 So. 2d 789, 790 (Fla. 4th DCA 1978)(Schwartz, A.J.)("While Chatman's work record may not have been bee-like, the state, . . . did not, as was required, establish that the probationer had willfully and not 'without fault' failed to maintain employment."); cf. Bass v. State, 473 So. 2d 1367 (Fla. 1st DCA 1985).

Accordingly, we affirm the order as to the first condition and strike the finding that defendant violated the second condition. Scherer v. State, 366 So. 2d 840 (Fla. 2d DCA 1979).

Affirmed, as modified.

NESBITT and BASKIN, JJ., concur.

FERGUSON, Judge (dissenting in part).

This appeal is brought from an order revoking probation and a judgment imposing a five-year prison sentence.

Alston entered a plea to lewd and lascivious conduct and was placed in a community-control program subject to the same conditions as a probationer. While standing on a street corner talking to acquaintances, he was seen by his probation supervisor and ordered to report to the probation office. Nothing was apparently amiss except that Alston should have been at work at the time. At the probation office he complied with an order to produce a urine sample. The sample allegedly tested positive for cocaine.

A form probation violation report was filed listing four specific acts of violation. One of the charges, which the majority finds supported by the evidence, alleged that "[Y]ou will not use intoxicants to excess. . . ." In legal usage cocaine is not considered an intoxicant. See Black's Law Dictionary 957 (4th ed. 1968)(term intoxication in its popular use is restricted to alcoholic intoxication). Indeed, the allegation itself contemplates a difference between intoxicants, such as alcohol, and drugs, use of which is prohibited or controlled by statute.[1]

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[1] The violation alleged in full:

> You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed or used unlawfully.

See Florida Comprehensive Drug Abuse Prevention and Control Act, chapter 893, Florida Statutes (1991).

The consumption of intoxicants is not prohibited by law; ordinarily it is only in cases of excessive use of intoxicants, in combination with some act which poses a public danger or nuisance, where the law will intervene. There was no evidence that Alston used any substance "to excess", a phrase which presupposes that there is some permissible level of indulgence.

This case is practically on all fours with Jones v. State, 348 So. 2d 942 (Fla. 2d DCA 1977), where it was held, in an opinion by Judge Grimes, that evidence that the probationer had smoked marijuana was insufficient to show a violation of the probation condition that he should not use intoxicants to excess and should not visit places where intoxicants, drugs or dangerous substances are unlawfully used.

Nothing prevents the State from refiling a new charge of a probation violation which makes allegations consistent with the evidence. I cannot subscribe to this rough justice, typical in low-level drug-use cases, which embarrasses the accused in the preparation of a defense.