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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,571

DCA NO. 92-2556

KENNY ALSTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Respondent, THE STATE OF FLORIDA, shall refer to the parties in the posture as they appear in before this Court. The symbol "A" will be used to refer to portions of the appendix attached to the Petitioner's brief.

QUESTION PRESENTED

WHETHER 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)?

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's rendition of the case and facts, as set forth in his brief, as a substantially accurate account of the proceedings below.

SUMMARY OF THE ARGUMENT

The instant case does not expressly and directly conflict with Jones v. State, 348 So. 2d 942 (Fla. 2d DCA 1977). Aside from the fact that the Petitioner and Jones were both charged with violating the same condition of probation/community control, the cases are factually and legally distinguishable. The most glaring distinction is the fact that the decision in the instant case is founded upon the Petitioner's violation of the first portion of the condition, based upon use of an intoxicant, whereas Jones involves a violation of the second portion of the condition involving the defendant's presence in a place where intoxicants, drugs or dangerous substances are unlawfully used. Moreover, subsequent to Jones, the case law has acknowledged that cocaine is an intoxicant for the purpose of probation revocation. Accordingly, the vast factual and legal distinctions between these cases make it impossible for them to be deemed in direct and express conflict with each other.

ARGUMENT

THE MAJORITY DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN JONES v. STATE, 348 So. 2d 942 (Fla. 2d DCA 1977).

The Petitioner argues that the lower court's decision is in conflict with Jones v. State, 348 So. 2d 942 (Fla. 2d DCA 1977). The Petitioner's argument is without merit, as the instant case is factually and legally distinguishable from Jones. The one similarity, however, is that both cases involve a probation/community control revocation for violation of the following condition:

> 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.

Jones involved the revocation of defendant's probation based upon proof of the defendant's admission to smoking marijuana. In Jones, the State argued that the alleged violation was of the second part of the condition which prohibits one to visit places where intoxicants, drugs or dangerous substances are unlawfully used. The appellate court found the state's argument to be unconvincing and ultimately reversed the trial court's order revoking probation.

As opposed to Jones, the opinion in the instant action was based on the legal principle that cocaine is an intoxicant and that the test results indicating the Petitioner's use of cocaine constituted a violation of the subject condition. As authority for its decision, the court cited to Scott v. State, 524 So. 2d 1148 (Fla. 3d DCA 1988). Moreover, the court addressed the dissent, which the Petitioner cites as support for his position, and stated that its reliance on a definition of intoxicants which is limited to alcohol is misplaced.

Although Jones has not been reversed, its application to the instant action is limited, as subsequent case law has clearly considered cocaine to be an intoxicant for the purpose of violation of the subject condition in probation cases. Hogan v. State, 583 So. 2d 426 (Fla. 1st DCA 1991) and Harrington v. State, 570 So. 2d 1140 (Fla. 4th DCA 1990).

The Petitioner has stated that neither of the two aforementioned cases contain an express decision as to whether cocaine is an intoxicant. Although they do not expressly make such a finding, a plain reading of the cases provides little doubt that cocaine is considered an intoxicant for the purpose of probation violation. Hogan involved an allegation of a violation of the subject condition based upon a lab report of the defendant's urine samples. The defendant challenged the testing and reporting procedure.

The Hogan opinion dealt with the principle that hearsay is admissible in probation revocation, but cannot be the sole basis for revocation. However, the business records exception may apply to lab results if they are kept in the course of a regularly conducted business activity and the making of the reports must be a regular practice of that business activity. The samples were held to be inadmissible hearsay because they state could not testify as to the making of the report. Therefore, because there was no other direct evidence that the condition was violated, and hearsay cannot be the sole basis of revocation, the community control could not be revoked based on said violation. Hogan at 427. However, it is clearly inferred that if the samples met the definition as to the hearsay exception, they no doubt could have been the basis for revocation. If this was not so, the court would not have devoted such a lengthy discourse to the issue of the lab samples.

The court in Harrington reversed a revocation order because the trial court's written order was at variance with its oral pronouncements and because the affidavit charging the defendant with using intoxicants specified that the intoxicant was cocaine, but the defendant admitted to smoking marijuana. Nevertheless, like Hogan, the opinion contains a clear inference that cocaine is considered an intoxicant and that but for the technical deficiencies, proof of use of same would constitute a violation of the subject condition. Harrington at 142.

The facts contained in the Third District's decision reflect that the case was decided upon the fact that the violation involved the use of intoxicants, as opposed to Jones, which alleged a violation for being someplace where drugs were unlawfully used. Moreover, the case law subsequent to Jones considered cocaine an intoxicant for purposes of probation violations. Accordingly, it must be concluded that the decision of the lower court does not expressly and directly conflict with the decision of this Second District Court of Appeals in Jones.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the lower court's decision does not expressly and directly conflict with any decision of this Court or of another District Court of Appeal. Thus, this Court lacks jurisdiction for any proceedings and the petition to invoke discretionary jurisdiction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **VALERIE JONAS**, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 19th day of November, 1993.

LINDA S. KATZ
Assistant Attorney General

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