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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,571

KENNY ALSTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

PAGE(s)

TABLE OF CITATIONS i

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

QUESTION PRESENTED 4

SUMMARY OF ARGUMENT 5

ARGUMENT

A CONDITION OF PROBATION OR COMMUNITY CONTROL THAT PROHIBITS THE USE OF INTOXICANTS TO EXCESS IS NOT VIOLATED BY USE OF SUBSTANCES OTHER THAN ALCOHOLIC BEVERAGES, OR BY USE WHICH DOES NOT CAUSE INTOXICATION OR IMPAIRMENT 7

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF CITATIONS

PAGE(s)

Butler v. State
450 So. 2d 1283 (Fla. 2d DCA 1984) 10

Clark v. State
442 So. 2d 1076 (Fla. 3d DCA 1983) 10

Clowney v. State
102 So. 2d 619 (Fla. 1958) 8, 12

Crum v. State
286 So. 2d 268 (Fla. 4th DCA 1973) 10

Gregory v. State
616 So. 2d 174 (Fla. 2d DCA 1993) 14

Haneman v. State
221 So. 2d 228 (Fla. 1st DCA 1969) 8, 12

Harrington v. State
570 So. 2d 1140 (Fla. 4th DCA 1990) 10, 14

Harris v. State
495 So. 2d 243 (Fla. 2d DCA 1986) 10

Hogan v. State
583 So. 2d 426 (Fla. 1st DCA 1991) 14

Hooks v. State
207 So. 2d 459 (Fla. 2d DCA 1968) 10

Jones v. State
348 So. 2d 942 (Fla. 2d DCA 1977) 7, 9, 16

Joseph v. State
615 So. 2d 833 (Fla. 4th DCA 1993) 10

Linville v. State
359 So. 2d 450 (Fla. 1978) 15

Mordica v. State
618 So. 2d 301 (Fla. 1st DCA 1993) 10

Moser v. State
523 So. 2d 783 (Fla. 5th DCA 1988) 10

Peterson v. State
623 So. 2d 637 (Fla. 5th DCA 1993) 16

Rowland v. State
548 So. 2d 812 (Fla. 1st DCA 1989) 8

Scott v. State
524 So. 2d 1148 (Fla. 3d DCA 1988) 8, 14

State v. Fitzpatrick
294 So. 2d 708 (Fla. 4th DCA 1974) 8, 12

OTHER AUTHORITIES

Florida Statutes (1993)
Section 316.193(2)(a) 11, 12
Section 877.111 . . . . 11, 15
Chapter 893 15

Florida Statutes (1981)
Section 860.01 11

Laws of Florida
Ch. 82-155, § 1 11
Ch. 86-296, § 13 11

Florida Rules of Criminal Procedure
Rule 3.986 13

United States Code
18 U.S.C. § 3563(b)(8) 13

45 Am. Jur. 2d *Intoxicating Liquors* § 1 (1969) 10
45 Am. Jur. 2d *Intoxicating Liguors* § 4 (1969) 10
45 Am. Jur. 2d *Intoxicating Liquors* § 21 (1969) 11

Black's Law Dictionary 957 (Rev. 4th ed. 1968) 11

Black's Law Dictionary 822 (6th ed. 1990) 10, 11

Webster's Third New International Dictionary 1185 (1966) 10

American Heritage Dictionary 945 (3rd ed. 1992) 10, 15

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INTRODUCTION

The petitioner, Kenny Alston, was the defendant in the trial court and the appellant in the district court of appeal. The respondent, the State of Florida, was the prosecution in the trial court and the appellee in the district court of appeal. In this brief, the parties will be referred to as the "defendant" and the "state." The symbol "T." denotes the transcript of the proceedings in the trial court. Because the transcripts are not consecutively paginated, the date of each proceeding will be noted. The symbol "R." denotes the remainder of the record on appeal.

STATEMENT OF THE CASE AND FACTS

Pursuant to plea negotiations with the state, Mr. Alston pled nolo contendere to lewd and lascivious conduct towards a child under sixteen years of age (R. 52-53), and was sentenced to serve two years of community control. (R. 69-70, 87-88). Two weeks later, Mr. Alston's probation officer observed him standing on a street corner at ten o'clock in the morning. (10/15/91 T. 5). The officer instructed him to report to the probation office. (10/15/91 T. 5). There, he complied with the officer's order to produce a urine sample. (9/16/91 T. 6-7). The sample tested positive for cocaine. (9/16/91 T. 7, 20).

An affidavit of violation was filed charging Mr. Alston with violating the condition that he "not use intoxicants to excess." (R. 74).[1] The condition stated:

> 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.

(R. 87). The affidavit alleged that Mr. Alston violated this condition "by using drugs to excess, in that, on 6/19/92, the community controlee tested positive for cocaine usage, which was confirmed by Eagle Forensic laboratory on 7/7/92." (R. 76).

At the hearing, the only evidence presented to establish a violation of this condition was testimony that Mr. Alston's urine had tested positive for cocaine. (9/16/91 T. 6-8, 20). There was no testimony or other evidence to suggest that he was intoxicated, or even noticeably under the influence of any intoxicating

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[1]The affidavit also charged two violations of the condition to work diligently, alleging that Mr. Alston had been standing on a street corner without permission, and a violation of the condition requiring him to remain confined to his residence except during work hours. (R. 72). Mr. Alston's job required him to run errands and pick up supplies. (10/15/91 T. 10-13). His presence in the street during work hours was explained at the hearing by both Mr. Alston and his employer. (10/15/91 T. 20-24, 27-29). The trial court found that there was insufficient evidence to support two of these charges, but found him guilty of one of the charges of failing to work diligently. (10/15/91 T. 32). The district court of appeal held that the evidence presented did not establish a violation of that condition. (A. 2-3).

substance. The trial court found that he had violated the condition prohibiting excessive use of intoxicants, revoked his community control, and sentenced him to serve five years in prison. (10/15/91 T. 32; 11/23/91 T. 13).

On appeal, Mr. Alston argued, citing *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977), that a positive cocaine test does not prove the type of conduct that the condition prohibiting the excessive use of intoxicants is intended to proscribe. A majority of the panel disagreed, holding that cocaine is considered an "intoxicant" in probation violation cases, and that testing positive for cocaine is sufficient to establish a violation of the condition. In support of its decision, the majority cited to *Scott v. State*, 524 So. 2d 1148 (Fla. 3d DCA 1988), which held that 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. (A. 2).

Judge Ferguson dissented, pointing out 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 in *Scott*, 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).

This Court accepted discretionary jurisdiction to review the decision based on asserted conflict with *Jones*. This brief follows.

QUESTION PRESENTED

WHETHER A CONDITION OF PROBATION OR COMMUNITY CONTROL THAT PROHIBITS THE USE OF INTOXICANTS TO EXCESS IS VIOLATED BY USE OF SUBSTANCES OTHER THAN ALCOHOLIC BEVERAGES, OR BY USE WHICH DOES NOT CAUSE INTOXICATION OR IMPAIRMENT.

SUMMARY OF ARGUMENT

Mr. Alston was charged with violating a condition of his community control that required that he "not use intoxicants to excess." He was not charged with violating any law. The only evidence to support the allegation was testimony that his urine tested positive for cocaine. There was no evidence that he was intoxicated or impaired. The Third District Court of Appeal held that this was sufficient to establish a violation of this condition.

The Third District's decision is contrary to the language of the condition, which plainly states that what is proscribed is the use of intoxicants "to excess." There must be a showing of excessive use, that is, of impairment of the defendant's normal faculties. Merely showing that an intoxicant was ingested is not enough.

The decision is also contrary to the usual legal meaning of "intoxicant," which, unless otherwise specified, refers only to alcoholic beverages. The condition of community control at issue here does not specify that the term "intoxicants" is intended to include drugs or narcotics. To the contrary, the condition's second clause specifically distinguishes between "intoxicants" and "drugs," and the condition does not include "drugs" within the prohibition against excess use. This condition prohibits the excessive consumption of alcoholic beverages. It is not intended to apply to drugs at all.

The consumption of controlled substances is not addressed by this condition, but by a separate requirement that the defendant "live and remain at liberty without violating the law." As correctly held in *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977), the fact that ingesting the substance is a crime does not suffice to prove the use of intoxicants to excess. Mr. Alston was not charged with violating any law. It is a fundamental requirement of due process that probation or community control cannot be revoked based on a violation that was not charged in

the affidavit.

Interpreting the condition to apply to substances other than alcohol may avoid that due process problem, but it creates another. If the term "intoxicants" includes not only alcoholic beverages, but also such things as cocaine and transmission fluid, it includes any substance which might come within the general definition of the term. A prohibition against the use (or excessive use) of any substance that can stupefy, stimulate, or excite, is vague, overbroad, and facially unconstitutional.

The due process violation presented by this case is unavoidable: either the revocation of community control was based on a charge not made, or on a charge not proved, or on a condition which is facially unconstitutional. There is no reason to seek to excuse that denial of due process. It is not a great burden to file proper charges, and, in any event, it is the only constitutionally permissible course.

This Court should quash the decision of the Third District Court of Appeal, and approve *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977).

ARGUMENT

A CONDITION OF PROBATION OR COMMUNITY CONTROL THAT PROHIBITS THE USE OF INTOXICANTS TO EXCESS IS NOT VIOLATED BY USE OF SUBSTANCES OTHER THAN ALCOHOLIC BEVERAGES, OR BY USE WHICH DOES NOT CAUSE INTOXICATION OR IMPAIRMENT.

Mr. Alston was charged with violating a condition of his community control that required that he "not use intoxicants to excess." (R. 74). He was not charged with violating any law. The only evidence to support the allegation was testimony that his urine tested positive for cocaine. (9/16/91 T. 6-8, 20). There was no evidence that he was intoxicated or impaired. The Third District Court of Appeal affirmed the order of revocation, holding that the term "intoxicants" is not limited to alcoholic beverages and that the evidence was sufficient to establish that Mr. Alston used intoxicants to excess. (A. 2). The decision is before this Court based on conflict with *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977), which held that smoking marijuana, although criminal, is not the conduct intended to be proscribed by this condition.

Mr. Alston's community control was revoked based on a violation that was not charged. To bring testing positive for cocaine within the proscribed conduct of using intoxicants to excess, requires an interpretation that would render the condition vague, overbroad, and facially unconstitutional. It also requires ignoring the plain language of the condition, which requires proof that the "intoxicant" was used "to excess," and the usual legal meaning of "intoxicant," which, unless otherwise specified, is restricted to alcoholic beverages. This condition prohibits the excessive consumption of alcohol. It does not apply to drugs. The use of cocaine is a crime, but Mr. Alston was not charged with committing a crime. To revoke his community control based on a charge not made in the affidavit of violation was a denial of due process of law.

A. TO ESTABLISH A VIOLATION OF THE CONDITION THAT THE DEFENDANT "NOT USE INTOXICANTS TO EXCESS," PROOF THAT SUCH A SUBSTANCE WAS INGESTED IS NOT ENOUGH; THERE MUST BE EVIDENCE THAT THE USE WAS EXCESSIVE, THAT IS, THAT THE DEFENDANT'S NORMAL FACULTIES WERE IMPAIRED.

The plain language of the condition requires that a violation cannot be established without proof that the substance was used "to excess." As observed by Judge Ferguson, the phrase "presupposes that there is some permissible level of indulgence." (A. 5). The condition does not prohibit all use of intoxicants, only their excessive use. *See Rowland v. State*, 548 So. 2d 812, 814 (Fla. 1st DCA 1989) (agreeing with state's argument that the condition prohibiting use of intoxicants in excess is reasonable because it does <u>not</u> require that probationer <u>completely</u> refrain from drinking alcohol).

This condition does not require complete abstinence, it requires that the defendant not become intoxicated, a term which in Florida has a well-established meaning. To be intoxicated is not merely to be under the influence of an intoxicating substance, it is to be under the influence to the extent that the normal faculties are impaired. *See Haneman v. State*, 221 So. 2d 228, 230 (Fla. 1st DCA 1969) ("Intoxication is defined as being under the influence of intoxicating liquor to such an extent as to deprive one of the normal control of one's bodily or mental faculties, or both."), *citing Clowney v. State*, 102 So. 2d 619 (Fla. 1958); *accord State v. Fitzpatrick*, 294 So. 2d 708, 709 (Fla. 4th DCA 1974).

Accordingly, to establish that the defendant used intoxicants "to excess," there must be proof of impairment. Merely presenting evidence that he had ingested an intoxicant is not enough. *See Rowland*; *cf. Scott v. State*, 524 So. 2d 1148 (Fla. 3d DCA 1988) (evidence that the defendant was "*staggering* down the street in an *intoxicated state* inhaling automobile transmission fluid" was sufficient to establish a violation of this condition) (emphasis added).

Here, even assuming for the sake of argument that this condition of community control applies to the use of cocaine, there was no evidence of use "to excess." There was no evidence whatever that Mr. Alston's faculties were impaired even in the slightest degree. The only evidence presented by the state was the fact that Mr. Alston's urine had tested positive for cocaine.

A positive test result for alcohol would surely not be enough to establish a violation of this condition. *Rowland*. To hold such evidence to be sufficient when the substance consumed is not alcohol is to rewrite the condition, or to permit revocation based on conduct that was not charged. The illegality of the defendant's conduct is not addressed by this condition, but by a separate requirement that the defendant "live and remain at liberty without violating the law." (R. 87).

In *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977), the defendant's probation was revoked for violating the same condition, based on his admission that he had smoked marijuana. The Second District Court of Appeal reversed, explaining that the conduct proved, though criminal, was not the conduct intended to be proscribed by this condition:

> 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 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.

Jones, 348 So. 2d at 943 (emphasis added).

The fact that ingesting the substance is a crime does not suffice to prove the

use of intoxicants to excess. *See Jones*. The defendant was not charged with violating any law. Fundamental due process requires that probation or community control cannot be revoked based on a violation that was not charged in the affidavit. *Joseph v. State*, 615 So. 2d 833, 834 (Fla. 4th DCA 1993) (revocation of community control cannot be based upon a violation not charged in the affidavit); *accord Mordica v. State*, 618 So. 2d 301, 305 (Fla. 1st DCA 1993); *Moser v. State*, 523 So. 2d 783, 785 (Fla. 5th DCA 1988); *Harrington v. State*, 570 So. 2d 1140, 1142 (Fla. 4th DCA 1990); *Harris v. State*, 495 So. 2d 243, 244 (Fla. 2d DCA 1986); *Butler v. State*, 450 So. 2d 1283, 1285 (Fla. 2d DCA 1984); *Clark v. State*, 442 So. 2d 1076 (Fla. 3d DCA 1983); *Crum v. State*, 286 So. 2d 268, 269 (Fla. 4th DCA 1973); *Hooks v. State*, 207 So. 2d 459, 463 (Fla. 2d DCA 1968).

B. THE CONDITION, AS WRITTEN, ONLY PROHIBITS THE EXCESSIVE USE OF ALCOHOLIC BEVERAGES, IT DOES NOT ADDRESS THE USE OF CONTROLLED SUBSTANCES.

While the term "intoxicant" can refer to any poison, or to any substance that stupefies, stimulates, or excites, its usual meaning is that of an alcoholic beverage. *Webster's Third New International Dictionary* 1185 (1966) ("intoxicant" means "something that intoxicates : an intoxicating agent; *esp* : an alcoholic drink"); *American Heritage Dictionary* 945 (3rd ed. 1992) ("intoxicant" means "[a]n agent that intoxicates, especially an alcoholic beverage") (to "intoxicate" means "[t]o stupefy or excite, as by the action a chemical substance such as alcohol," or "[t]o stimulate or excite," or "[t]o poison"); *Black's Law Dictionary* 822 (6th ed. 1990) (defining "intoxicated" as "[a]ffected by an intoxicant, under the influence of an intoxicating liquor," which is in turn defined as an alcoholic beverage); *see also* 45 Am. Jur. 2d *Intoxicating Liquors* §§ 1, 4 (1969) (using the terms "intoxicant" and "intoxicating liquor" interchangeably, and defining "intoxicating liquor" as an alcoholic beverage).

The term's legal use is restricted to its ordinary meaning of an alcoholic beverage, unless otherwise specifically indicated. As a general rule, "unless otherwise specified by the statute in which the term is used, the word 'intoxication' applies only to the excessive use of intoxicating liquors, and does not include the condition produced by the habitual and excessive use of opiates or other narcotic drugs." 45 Am. Jur. 2d *Intoxicating Liquors* § 21 (1969). As stated in Black's Law Dictionary 957 (Rev. 4th ed. 1968), "intoxication" means:

> The state of being poisoned; the condition produced by the administration or introduction into the human system of a poison. But in its popular use this term is restricted to *alcoholic* intoxication, that is, drunkenness or inebriety, or the mental and physical condition induced by drinking excessive quantities of alcoholic liquors, and this is its meaning as used in statutes, indictments, etc. * * *.

Id. at 957 (emphasis in original) (citations omitted).[2]

This is the meaning given to the term under the former Florida statute dealing with the offense of driving while intoxicated[3]: "Intoxication is defined as being

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[2]It appears that legislatures have exercised their authority to broaden the application of the terms "intoxication" and "intoxicant." The latest edition of Black's Law Dictionary does not contain the quoted definition, and notes that under most state statutes dealing with driving while intoxicated, "intoxication" includes such by alcohol or by drug. Black's Law Dictionary 822 (6th ed. 1990). In Florida, the current DUI statute uses neither of those terms; instead, it specifically states that its provisions apply to driving under the influence of controlled substances as well as alcohol. *See* § 316.193(2)(a), Fla. Stat. (1993). The term "intoxication" is more broadly defined in the context of the defense of voluntary intoxication, which does not present the same due process problems of vagueness or overbreadth that arise in the context of restrictions upon conduct.

[3]Section 860.01, Florida Statutes, made it "unlawful for any person, while in an intoxicated condition or under the influence of intoxicating liquor to such extent as to deprive him of full possession of his normal faculties, to drive or operate" an automobile. The statute was renumbered in 1982, Ch. 82-155, § 1, Laws of Fla., and repealed in 1986, Ch. 86-296, § 13, Laws of Fla.

Florida's current DUI statute does not use the term "intoxication;" instead, it requires that the person be "under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893," and be "affected to the extent that his normal faculties are impaired." § 316.193(2)(a), Fla. Stat. (1993).

under the influence of *intoxicating liquor* to such an extent as to deprive one of the normal control of one's bodily or mental faculties, or both." *Haneman v. State*, 221 So. 2d 228, 230 (Fla. 1st DCA 1969) (emphasis added), *citing Clowney v. State*, 102 So. 2d 619 (Fla. 1958); *accord State v. Fitzpatrick*, 294 So. 2d 708, 709 (Fla. 4th DCA 1974).

Accordingly, unless the statute, rule, or order in which it appears specifies otherwise, the phrase "use intoxicants to excess" means to consume alcoholic beverages to the extent that intoxication results. In other words, it means to get drunk. The condition of community control at issue here does not specify that the term "intoxicants" includes drugs or narcotics. To the contrary, it specifically distinguishes between "intoxicants" and "drugs" (including both under the category of "dangerous substances") yet does not include "drugs" within the prohibition against excess use. The condition that Mr. Alston was charged with violating states,

> 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.

(R. 87). From the wording of the condition, it is clear that "intoxicants" are not "drugs" and that the prohibition against excess use is not intended to apply to drugs. This is consistent with the normal legal use of the terms "intoxicant" and "intoxication." The term "intoxicant" is simply being used as a synonym for alcoholic beverage, and the phrase "not use intoxicants to excess" does not apply to the use of other substances at all.

That this is the appropriate interpretation also appears from a comparison with the similarly worded, but significantly different, conditions found in the uniform sentencing forms of Florida Rule of Criminal Procedure 3.986, and in the federal statutes. Unlike the condition at issue here, the comparable conditions of Rule

3.986 and of the federal probation statute not only prohibit excess use of intoxicants/alcohol, they also add a prohibition against the use or possession of drugs and narcotics, which is conspicuously absent in the condition of community control that Mr. Alston was charged with violating.

The forms provided in Rule 3.986 include the following condition of probation or community control:

> You will not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician. Nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used.

Fla. R. Crim. P. 3.986 (emphasis added).

> The federal courts may require a probationer to,
>
> refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

18 U.S.C. § 3563(b)(8) (emphasis added).

The phrase "or possess any drugs or narcotics" in Rule 3.986, and the phrase "or any use of a narcotic drug or other controlled substance" in the federal statute, cannot be assumed to be superfluous. They impose an additional restriction that is not present in the prohibition against "use of intoxicants to excess." Without that additional restriction, the condition simply does not include any prohibition against the use of controlled substances. The possession of such substances is addressed by the separate requirement that the defendant "live and remain at liberty without violating the law" (R. 87). While the possession of cocaine is a crime, and could be the basis for revoking probation or community control, it is not the conduct which this particular condition is intended to address, and which Mr. Alston was charged with violating. *See Jones*, 348 So. 2d at 943. That condition only prohibits the

excessive use of alcoholic beverages.[4]

C. THE THIRD DISTRICT'S DECISION REQUIRES AN EXTENSION OF THE PROHIBITION AGAINST USE OF INTOXICANTS TO EXCESS WHICH RENDERS THAT CONDITION VAGUE AND OVERBROAD.

The meaning of the condition that the defendant "not use intoxicants to excess" is clear enough from its wording and from the normal legal meaning of its terms. It means that the defendant should not use alcoholic beverages to excess; he should not get drunk. That prohibition may not be overbroad.[5]

On the other hand, there is no principled way to expand that limited meaning of the phrase to include such substances as cocaine and transmission fluid, without making the condition vague and overbroad. The phrase itself contains no limiting language, other than the legal use of "intoxicant" as a synonym for alcohol. If that limitation is disregarded, the condition must apply to the use of any substance within the general definition of an "intoxicant." The condition would apply to any substance that can stupefy, stimulate, or excite. *E.g.*, *American Heritage Dictionary*

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[4]In support of its holding that the condition is not restricted to the excessive use of alcholic beverages, and also applies to the use of cocaine, the *Alston* majority relied upon *Scott v. State*, 524 So. 2d 1148 (Fla. 3d DCA 1988), *Hogan v. State*, 583 So. 2d 426 (Fla. 1st DCA 1991), and *Harrington v. State*, 570 So. 2d 1140 (Fla. 4th DCA 1990).

In *Scott*, the Third District held that evidence that the defendant was "staggering down the street in an intoxicated state inhaling automobile transmission fluid" was sufficient to establish a violation of this condition. To the extent that it holds that automobile transmission fluid is included within the term "intoxicant," the case is wrongly decided under the analysis set forth above.

Neither *Harrington* nor *Hogan* hold that cocaine is an intoxicant. In *Harrington*, the court held that it was error to violate the defendant based on her admission that she had smoked marijuana, because she was not charged with smoking marijuana but rather with using cocaine. In *Hogan*, the court reversed the revocation of community control because the only evidence that the defendant used cocaine was inadmissible hearsay. Accordingly, although those opinions do seem to assume that both cocaine and marijuana are intoxicants, the courts were not presented with that issue and did not reach it in their decisions.

[5]In *Gregory v. State*, 616 So. 2d 174 (Fla. 2d DCA 1993), this same condition was held not to be too vague, although without giving any explanation of its meaning. *Gregory*, 616 So. 2d at 175.

945 (3rd ed. 1992). That is too broad. An order that proscribes such a wide range of conduct is unconstitutional on its face.

In *Linville v. State*, 359 So. 2d 450 (Fla. 1978), this Court struck down as facially unconstitutional a statute that prohibited the inhalation of "any natural, artificial, or pharmaceutical substance" for the purpose of producing intoxication. This language was vague and overbroad because it "d[id] not convey sufficiently definite warnings of the proscribed conduct when measured by common understanding and practice." *Id.* at 451-52. It could apply to the inhalation of tobacco or perfume, as well as "self-prescribed nose and lung inhalation products." *Id.* at 452.

Under the Third District's interpretation, the condition proscribing excessive use of intoxicants would be at least as broad and vague as the statute held invalid in *Linville*, since it would apply to all of the substances to which that statute applied, and more. It would apply not only to alcohol, to the hundreds of substances controlled under chapter 893, Florida Statutes, and to all the substances whose consumption is proscribed by section 877.111, Florida Statutes (1993)[6], but also to coffee, tea, tobacco, cough syrup, nonprescription drugs such as sleeping pills, and

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[6]Section 877.111 was enacted in response to *Linville*. Subsection (1) provides,

> It is unlawful for any person to inhale or ingest, or to possess with intent to breathe, inhale, or drink, any compound, liquid, or chemical containing toluol, hexane, tricholorethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, ethylene glycol monomethyl ether acetate, cyclohexanone, nitrous oxide, diethyl ether, alkyl nitrites (butyl nitrite), or any similar substance for the purpose of inducing a condition of intoxication or which distorts or disturbs the auditory, visual, or mental processes. This section does not apply to the possession and use of these substances as part of the care or treatment of a disease or injury by a practitioner licensed under chapter 458, chapter 459, chapter 464, or chapter 466 or to beverages controlled by the provisions of chapter 561, chapter 562, chapter 563, chapter 564, or chapter 565.

innumerable other substances, natural and artificial, which can affect the nervous system. And, under the Third District's interpretation, all it would take to prove a violation is evidence that any of these substances was ingested, without regard to the level of consumption or to whether there was any impairment of the defendant's faculties. If that is the condition's meaning, it is vague, overbroad, and facially unconstitutional. *Linville*; *see also Peterson v. State*, 623 So. 2d 637 (Fla. 5th DCA 1993) (condition of probation prohibiting use of "dangerous substances" was vague).

Whether the violation of due process took the form of revoking community control based on a charge for which no evidence was adduced (using intoxicants to excess), or that of a revocation based on a charge that was not made (committing a crime), or that of a revocation based on a facially invalid condition, Mr. Alston's right to due process of law was denied all the same. There is no good reason for the courts to labor to excuse that denial of due process. To require the filing of proper charges imposes no great burden.

This Court should quash the decision of the Third District Court of Appeal, and approve *Jones v. State*, 348 So. 2d 942 (Fla. 2d DCA 1977).

CONCLUSION

Based on the foregoing argument and authorities, the petitioner requests that this Court quash the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, LINDA S. KATZ, 401 N.W. Second Avenue, Post Office Box 013241, Miami, Florida 33101 this 21st day of March, 1994.

LOUIS CAMPBELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,571

KENNY ALSTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

APPENDIX

INDEX

DOCUMENT	PAGES
Opinion of the Third District Court of Appeal filed September 14, 1993	1-5

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]

[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.