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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 THE MERITS

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INTRODUCTION

The Petitioner, KENNY ALSTON, was the Defendant in the trial court and the appellant in the Third District Court of Appeals. The Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the appellee in the Third District Court of Appeals. The Respondent shall refer to the parties in the posture as they appear before this Court. The symbol "T" will be used designate the transcript of the trial court proceedings. The symbol "R" will be used to designate the record on appeal and the symbol "b" will be used to designate pages of the Petitioner's Brief on The Merits.

QUESTION PRESENTED

WHETHER PETITIONER'S TESTING POSITIVE FOR COCAINE USE WAS A VIOLATION OF THE CONDITION OF COMMUNITY CONTROL PROHIBITING THE USE OF INTOXICANTS TO EXCESS? (REPHRASED).

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, and in response to a rise in drug use, the legal community has broadened the legal definition of intoxicant(s) to include drugs. In accordance with this broadened definition, Florida case law has acknowledged that cocaine is an intoxicant for the purpose of probation revocation. As opposed to alcohol, cocaine use need not be excessive, as any use whatsoever is prohibited. In conclusion, the vast factual and legal distinctions between the instant case and Jones make it impossible for them to be deemed in direct and express conflict with each other.

ARGUMENT

PETITIONER'S TESTING POSITIVE FOR COCAINE USE VIOLATED THE CONDITION OF COMMUNITY CONTROL WHICH PROHIBITS THE USE OF INTOXICANTS TO EXCESS.

While on community control, the Petitioner tested positive for cocaine use. (T. 19-20, R. 74). Consequently, his community control was revoked, as the positive test result constituted proof of a 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.

(R. 65, 87-88). The Petitioner's community control was revoked for violating, inter alia, the portion which prohibits "use of intoxicants to excess." The Third District Court of Appeal affirmed the revocation based upon Petitioner's violation of the above condition. Alston v. State, 623 So. 2d 1226 (Fla. 3d DCA 1993).

In his brief on the merits, the Petitioner asserts that cocaine use can not constitute a violation of the subject condition because 1) "intoxicants" is limited to mean alcoholic beverages, and 2) there must be proof of excessive use. In short, the Petitioner alleges that the term "not use intoxicants

to excess" only prohibits one from getting drunk from alcohol and does not apply to drugs. Thus, the Petitioner asserts that an interpretation of "using intoxicant's to excess" which brings testing positive for cocaine within the proscribed conduct would render the condition vague, overbroad, and facially unconstitutional. Respondent maintains that the Petitioner's argument is without merit, as the term intoxicants subsumes cocaine, and the Petitioner's undisputed cocaine use constituted a violation of the subject condition.

The same district court of appeal which authored Jones v. State, 348 So. 2d 942 (Fla. 2d DCA 1977), the case with which conflict was asserted for the basis of jurisdiction, has recently held the subject condition to be sufficiently definite and specific to inform persons of reasonable intelligence what conduct is prohibited. Gregory v. State, 616 So. 2d 174 (Fla. 2nd DCA 1993). (Gregory was convicted for sale and possession of cannabis). Respondent maintains that the condition, on its face, clearly prohibits cocaine use and that if it were limited to alcohol, it would state so instead of using the term "intoxicants."

The definitions and authority which Petitioner relies on in support of his arguments are antiquated, as the current legal trend is to include cocaine and other drugs within the legal definition of intoxicant/intoxicated. For instance, the

Petitioner relies upon a 1968 edition of Black's Law Dictionary for the proposition that the popular use of intoxicant 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 in statutes, indictments, etc." (B. 11).[1] However, although only noted in a footnote, the Petitioner does acknowledge that the aforementioned definition has been deleted from the latest edition of Black's Law Dictionary.

In relying on such outdated definitions, the Petitioner is myopically ignoring the fact that during the 1960s, 1970s and 1980s drug use became more prevalent within a portion of the general population. This can be acknowledged without the need to cite to any sociological studies or statistics. Consequently, in response to this increased drug use, and its concomitant affects on the crime rate, it became necessary for the legal community to address the issue. Accordingly, a trend emerged amongst the legal community of categorizing drug use together with alcohol use. For instance, the latest edition of Black's Law Dictionary notes that under most state statutes dealing with driving while

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[1] Additional antiquated authorities include a definition from Webster's Third New International Dictionary 1185 (1966) which defines intoxicant as ...an intoxicating agent; esp: an alcoholic drink." Another is a citation to 45 Am. Jur. 2d Intoxicating Liquors section 21 (1969) for the proposition that "[a]s 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." (B. 11).

intoxicated, "intoxication" includes such by alcohol or drug. Black's Law Dictionary 882 (6th ed. 1990).

Likewise, this legal trend is illustrated in the contrast between Florida's former DUI statute, which restricted the focus of its prohibition to liquor and Florida's current DUI statute, which eliminated the term intoxication altogether.[2] Instead, it specifically states that its provisions apply to driving under the influence of controlled substances as well as alcohol. See Florida Statute Section 316.193(2)(a), Fla. Stat. (1993).

In an attempt to further support his position that as used in the subject condition, intoxicants is simply a synonym for alcohol, he quotes a form provided in Rule 3.986 of the Florida Rules of Criminal Procedure (1993) which includes a condition of probation or community control which states that:

> 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.

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[2] The former DWI statute 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 See former Florida Statute 860.01, repealed in 1986, Ch. 86-296, section 13, Laws of Fla.

The Petitioner relies on the above condition to illustrate the point that Rule 3.986's use of the phrase "or possess any drugs or narcotics" adds a prohibition against use of controlled substances which is not present in the subject condition. But the above quoted provision does not expressly prohibit the "use" of controlled substances, only the possession of controlled substances. Thus, in order to interpret the above provision as prohibiting drug use, it would likewise be necessary to define intoxicants as including controlled substances.

In addition to the provided legal support of the State's position that Petitioner's cocaine use did violate the subject condition, a plain reading of the condition lends further support to the position that the term intoxicants is not limited to alcohol. For one, the fact that intoxicant is pluralized in the condition clearly denotes more than one substance. Yet, alcohol as a general category would be referred to in the singular. Thus, the condition is intended to include more than just alcohol as an intoxicant. Moreover, if the condition is read as a whole, it is clear that its focus is to prohibit certain behavior. The first part prohibits the use of substances which intoxicate and the second part prohibits presence in the environment where such substances are sold, or used, unlawfully. As the second part clearly prohibits being in the presence of drugs, it is logical that the use of drugs would be equally prohibited. Once again, it is clear that the condition used intoxicants to mean drugs as well as alcohol, in accordance with the general legal trend.

The Petitioner's argument that the lower court's decision is in conflict with Jones v. State, 348 So. 2d 942 (Fla. 2d DCA 1977) 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 same condition.

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. However, the court's holding was somewhat equivocal as it concluded that "[t]he 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).

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 Third District Court of Appeal 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. Alston v. State, 623 So. 2d at 1226-1228.

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 Third District's decision 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 the Second District Court of Appeals in Jones.

As Respondent has established that the use of cocaine constitutes an intoxicant proscribed by the subject condition, it will now address the issue of excessive use.[3] The requirement of excessive use applies only when the intoxicant used is alcohol. This is so because our society acknowledges and accepts the indulgence in a "social drink." Accordingly, in connection with alcohol, it is logical and fair that the prohibition be limited to excessive use. However, when applied to drugs and other illegal substances, it is ludicrous to require proof that such use be excessive. It is a given that cocaine use in particular is against the law. Therefore, a fortiori, no amount whatsoever

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[3] As in its argument that the definition of intoxicant(s) is restricted to alcohol, the Petitioner also relies upon antiquated authority to support its argument that the use of any intoxicant in violation of the condition must be proved to be excessive. See Haneman v. State, 221 So. 2d 228 (Fla. 1st DCA 1969), Clowney v. State, 102 So. 2d 619 (Fla. 1958) and State v. Fitzpatrick, 294 So. 2d 708 (Fla. 4th DCA 1974). What makes the applicability of these authorities outdated as support for the issue sub judice is the fact that they predate the trend in broadening the legal definition of intoxicant(s), which is a crucial point in the analysis of the instant action.

could ever be acceptable. Thus, when drugs are the intoxicant used, there is no need for proof that such use was excessive.

In conclusion, in accordance with the modern trend of broadening the legal definition of intoxication, as applied by the courts of this state, Petitioner's testing positive for cocaine use constitutes conduct which is proscribed by the condition which he was charged with violating. Thus, it would be in derogation of the governing case law for the Court to accept the Petitioner's position and quash the decision of the Third District Court of Appeals and approve Jones v. State, 348 So. 2d 942 (Fla. 2d DCA 1977). Accordingly, the Respondent respectfully maintains that the Third District Court of Appeal's opinion should be affirmed by this Court.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the Third District Court of Appeal's decision should be affirmed.

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 16th day of May, 1994.

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