IN THE SUPREME COURT OF FLORIDA

CLIFTON BROCK, :

Petitioner, :

v. : CASE NO. 87,529

STATE OF FLORIDA, :

Respondent. :

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INITIAL BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on certified conflict from the First District Court of Appeal. The issue is whether the trial court may require, as a condition of community control, submission to drug and alcohol testing when the condition is unrelated to past or future criminality and is not orally imposed.

In this brief, citations to the record on appeal appear as (R[page number]).

STATEMENT OF THE CASE AND FACTS

Petitioner, CLIFTON BROCK, pled no contest to grand theft, and was placed on two years probation. (R7-12, 18-19) Less than two years into the term, the state alleged that he violated probation by failing to submit monthly reports, failing to report his current address and location, and failing to report to the probation officer upon release from prison. (R22) Brock admitted the violations, and the court revoked probation and imposed a negotiated sanction of two years on community control. (R24-27, 40-42) The court imposed all previous conditions of probation, plus a new condition:

> (12) You will submit to urinalysis, breathalyzer or blood tests at any time requested by your Community Control Officer, or the professional staff of any treatment center where you are receiving treatment, to determine possible use of alcohol, drugs or controlled substances.

(R26)

On direct appeal, the district court approved the condition on the authority of Hayes v. State, 585 So. 2d 397 (Fla. 1st DCA), rev. denied, 593 So. 2d 1052 (Fla. 1991), but certified conflict with Nunez v. State, 633 So. 2d 1146 (Fla. 2d DCA 1994). Brock v. State, 21 Fla. L. Weekly D419 (First DCA Feb. 15, 1996).

Petitioner invoked the discretionary jurisdiction of this Court to resolve the certified conflict. This brief follows.

SUMMARY OF THE ARGUMENT

Contrary to precedent from this Court and other district courts, the First District Court of Appeal maintains that a trial court may impose any condition of probation or community control authorized by statute, regardless of whether the condition is orally pronounced or whether it is demonstrably related to criminal conduct. Here, the district court approved a condition requiring submission to drug and alcohol testing, first appearing in the probation order, despite the absence of any connection between use of intoxicants and past or future criminality.

This Court has held that trial courts may not impose a probation condition that is not related to the underlying criminal conduct, is not itself related to criminal conduct, and requires or forbids conduct not reasonably related to future criminality. Biller v. State, 618 So. 2d 734 (Fla. 1993). The district court decision runs afoul of Biller. The district relied on the fact that the condition is standard, i.e., published in Florida Statutes, and distinguished Biller and its progeny on this basis. Publication of a condition eliminates any defect of notice, but does not substitute for the requirement that a condition must relate to criminal conduct. Citing Biller, the Second DCA has struck down a requirement of testing for the legal drug of alcohol. Nunez v. State, 633 So. 2d 1146 (Fla. 2d DCA 1994). The condition requiring testing for alcohol, the use of which is not demonstrably related to criminal conduct in this case, is similarly invalid.

ARGUMENT

A CONDITION OF PROBATION OR COMMUNITY CONTROL REQUIRING SUBMISSION TO ALCOHOL TESTING IS INVALID WHEN NOT REASONABLY RELATED TO CRIMINAL CONDUCT OR ORALLY PRONOUNCED.

In its order imposing community control, the trial court included a condition requiring Brock to submit to random testing "to determine the possible use of alcohol, drugs or controlled substances." (R26) The district court approved the condition, though it was not orally pronounced, on the authority of Hayes v. State, 585 So. 2d 397 (Fla. 1st DCA), rev. denied, 593 So. 2d 1052 (Fla. 1991). The court distinguished Biller v. State, 618 So. 2d 734 (Fla. 1993), finding that, unlike Biller, this case involved a standard condition listed in section 948.03(1)(k)(l), Florida Statutes. The court certified conflict with Nunez v. State, 633 So. 2d 1146 (Fla. 2d DCA 1994), in which the court struck down a condition requiring testing for alcohol.

The district court's ruling is flawed. Conditions of probation or community control, whether specifically authorized by statute or not, are valid only if they relate to criminal conduct. The appearance of the condition in Florida Statutes is significant only in that it eliminate any defect of notice that may be raised as to those conditions. Both standard conditions -- those specifically authorized -- and special conditions -- those not in the statute -- must relate either to the underlying crime, concern conduct itself criminal, or be reasonably related to future criminality.

A condition of probation or community control must relate to the crime of which the offender is convicted, or to conduct in itself criminal, or to conduct reasonably related to future criminality. Biller v. State, supra. In Biller, the court struck down a probation condition

prohibiting the use or possession of alcoholic beverages, where nothing in the record connected the use of alcohol with the crimes at conviction and nothing suggested that the defendant had a propensity to abuse alcohol or that his judgment became impaired as a consequence of using it. Citing Biller, the district court in Nunez v. State, supra, struck down a portion of a condition requiring submission to testing for drug or alcohol consumption, finding it unrelated to his convictions of possession of cocaine or burglary. 633 So. 2d at 1147. See also, Jackson v. State, 654 So. 2d 234 (Fla. 4th DCA 1995) (condition prohibiting use of alcoholic beverages invalid because unrelated to underlying offense of unemployment compensation fraud).

Here, as in Biller and Nunez, nothing in the record suggests that use of alcohol contributed either to the underlying offense of grand theft or the circumstances of the violation of probation. Nor is there record evidence to suggest that such use would contribute to future criminality. In fact, moderate use of alcoholic beverages has been known to relieve tensions that, unchecked, might result in criminal conduct. As noted in Biller, the use of alcohol by adults is legal. 618 So. 2d at 734.

The district court drew an irrelevant distinction between the standard condition in this case and the special conditions in cases such as Biller. The fact that the condition struck down in Biller was not listed in Florida Statutes was irrelevant to whether it concerned past or future criminal conduct. Nor is it significant that a condition is "applicable to any probationer under section 948.03." Hayes, supra, 585 So. 2d at 398. Authorization to impose a condition on any probationer does not relieve the trial court from the obligation to impose only those conditions related to past or future criminal conduct. The Nunez court rejected the condition requiring alcohol testing despite its conclusion that the appellant had constructive notice of the condition in

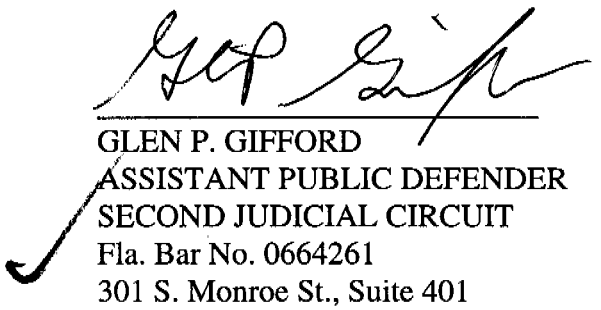
Florida Statutes. 633 So. 2d at 1147.

Finally, the district court in this case construed the term "drugs" in the phrase "alcohol, drugs or controlled substances" to mean controlled substances. 21 Fla. L. Weekly at D420. This construction renders the word redundant, contrary to the principle of statutory construction requiring that words be given independent content. See Thorp v. State, 555 So. 2d 362, 364 (Fla. 1990). Nicotine and many medications sold over the counter may be regarded as drugs, exposing petitioner to violation of community control for their use. Accordingly, this portion of the condition must be stricken as constitutionally overbroad and unrelated to criminal conduct. Cf. Zeigler v. State, 647 So. 2d 272 (Fla. 4th DCA 1994) (condition prohibiting use of "intoxicants" struck as overbroad and not tailored to prohibit criminal conduct.")

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, appellant requests that this Honorable Court quash the district court decision and remand with directions that submission to testing for drugs and alcohol be deleted as conditions of community control.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Daniel A. David, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 1st day of April, 1996.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

CLIFTON BROCK,	:	
	:	
Petitioner,	:	
	:	
vs.	:	CASE NO. 87,529
	:	
THE STATE OF FLORIDA,	:	
	:	
Respondent,	:	
	:	
	:	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CLIFTON BROCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 95-1481

Opinion filed February 15, 1996.

An appeal from the Circuit Court for Leon County.
John E. Crusoe, Judge.

Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Daniel A. David, Assistant Attorney General, Tallahassee, for Appellee.

MICKLE, J.

Clifton Brock, the appellant, appeals from an order placing him on community control. In Issue I, he claims that the trial court erred by ordering random drug and alcohol testing where, he alleges, drug and alcohol use were not demonstrably related to the appellant's past criminal conduct or future criminality. We affirm as to this issue, on the authority of section 948.03(1)(k)(1), Florida Statutes (Supp. 1994), and Hayes v. State, 585 So. 2d 397

(Fla. 1st DCA), rev. den., 593 So. 2d 1052 (Fla. 1991), but we certify conflict with Nunez v. State, 633 So. 2d 1146 (Fla. 2d DCA 1994). As to Issue II, we find reversible error in the imposition of a public defender's lien where the appellant was denied adequate notice and an opportunity to contest the amount thereof. § 27.56(7), Fla. Stat. (1993); Fla. R. Crim. P. 3.720(d)(1).

The appellant pled no contest to a charge of grand theft and was placed on probation. During his probationary period, the state filed an affidavit alleging multiple violations of probation, which the appellant admitted. His probation was revoked, and the trial court imposed a negotiated sanction of two years of community control. All the previous conditions of probation were reimposed, in addition to new Condition (12), which stated:

> You will submit to urinalysis, breathalyzer or blood tests at any time requested by your Community Control officer, or the professional staff of any treatment center where you are receiving treatment, to determine possible use of alcohol, drugs or controlled substances.

The appellant asserts on appeal that this condition is invalid, insofar as it proscribes the use of drugs (other than controlled substances) and alcohol, because it bears no relationship to past or future criminal conduct. His original offense is grand theft, and his violations of probation consist of 1) failure to submit written monthly reports, in violation of his Condition (1); 2) failure to report his current address and location, in violation of his Condition (3); and 3) failure to report to the Probation Office upon release from prison, in violation of his Condition (8).

Although new Condition (12) appears in the written final judgment imposing community control, it was not orally pronounced at the appellant's sentencing. In Hayes, 585 So. 2d at 397, the defendant challenged a written condition (requiring submission to blood, breathalyzer, and urinalysis examinations) on the basis that the trial court had not orally pronounced it. We concluded that Hayes had demonstrated no reversible error in that Florida defendants received constructive notice of this "random testing" condition in then section 948.03(1)(j), Florida Statutes, which is renumbered subsection (1)(k)(1) in the 1994 version of the statute applicable to the appellant. Given adequate notice and an opportunity to be heard and to raise objections at the sentencing hearing, Hayes presented no basis for relief. Id. at 398; State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991) (statutory publication of provision places all citizens on constructive notice of consequences of their actions and is adequate notice of a defendant's liability for costs in appropriate situations); Cumbie v. State, 597 So. 2d 946 (Fla. 1st DCA 1992). Likewise, the appellant received constructive notice of this statutory condition. Furthermore, because the "random testing" provision is a standard condition of probation that can be imposed on all defendants under section 948.03, we concluded in Hayes that it can be imposed irrespective of whether it directly relates to the circumstances of a defendant's offense. Id.; Ward v. State, 511 So. 2d 1109 (Fla. 1st DCA 1987). We find Hayes to be controlling.

The appellant urges us instead to reverse on the authority of Nunez, 633 So. 2d at 1146, in which the condition required the defendant to submit to tests to determine the use of alcohol or controlled substances. This condition was not orally pronounced at sentencing. Although our sister court concluded that section 948.03(1) provided Nunez with constructive notice of the condition, the court found the condition deficient in part:

> [W]e are unable to uphold the requirement of alcohol testing. The mere use of alcohol is not related to any of the appellant's offenses and nothing in his record indicates it would relate to future criminality. A condition of probation restricting the appellant's use of alcohol could not be legally imposed under the circumstances of this case, [citations omitted].

Id. at 1147. The objectionable portion of Nunez' condition was stricken. We decline the appellant's invitation to adopt the reasoning of our sister court.

The appellant concedes, as he must, that Hayes supports the challenged ruling. We find distinguishable a number of decisions cited by the appellant that involve a "special condition," rather than the "standard or general condition" set forth in Condition (12). See, e.g., Biller v. State, 618 So. 2d 734 (Fla. 1993); Grate v. State, 623 So. 2d 591 (Fla. 5th DCA 1993). As additional support for our ruling, we note that the legislature in section 948.03(1)(k)(1) expressly authorizes random testing "to determine the presence or use of *alcohol* or *controlled substances*." (Emphasis added). We construe the term "drugs" in the appellant's order to mean illegal drugs. Because we are unable to reconcile

our holdings with the Second District Court's holding in Nunez, we certify conflict. Fla. R. App. P. 9.030(a)(2)(A)(iv).

At the conclusion of the appellant's violation of probation hearing, the trial court imposed a $200.00 public defender's lien. § 27.56(2)(a), Fla. Stat. The record does not reflect that the appellant was given adequate prior notice and an opportunity to contest the amount of the lien. Accordingly, we must strike the lien, without prejudice to reimpose it as a condition of community control on remand after compliance with the statute. L.A.D. v. State, 616 So. 2d 106, 108 (Fla. 1st DCA) (in delinquency adjudication, assessment of attorney's fees and order authorizing public defender's lien against juvenile's mother were reversed and case remanded to allow opportunity to contest amount of lien), rev. den., 624 So. 2d 268 (Fla. 1993); Wright v. State, 654 So. 2d 252 (Fla. 1st DCA 1995); R.D.R. v. State, 653 So. 2d 498 (Fla. 5th DCA 1995).

AFFIRMED in part, REVERSED in part, and remanded.

WEBSTER and LAWRENCE, JJ., CONCUR.