

IN THE SUPREME COURT OF FLORIDA

JUSTIN RANDOLPH DEMOTT,

Petitioner,

v.

Case No.: SC15-868

Fifth DCA Case No.: 5D14-1342

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 773026
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)
crimappdab@myfloridalegal.com

COUNSEL FOR RESPONDENT

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STATEMENT OF CASE AND FACTS

All relevant facts were included in the Fifth District Court's opinion in Demott v. State, 160 So. 3d 520 (Fla. 5th DCA 2015). Relevant to this jurisdictional brief, the district court wrote the following:

Justin Randolph Demott (the defendant) appeals his judgment and sentence. Because the defendant knowingly and voluntarily entered a guilty plea and his sentence is legal, we affirm.

The defendant argues that a special condition of his probation requiring him to abstain entirely from associating with anyone who is illegally using drugs was improper. We disagree.

Section 948.03(1)(k), Florida Statutes (2012) provides, in pertinent part:

948.03. Terms and conditions of probation

(1) The court shall determine the terms and conditions of probation....These conditions may include among them the following, that the probationer or offender in community control shall:

...

(k) Not associate with persons engaged in criminal activities.

Since a person illegally using drugs is engaged in criminal activities, the defendant's probationary condition is expressly authorized by the statute. See *Jaworski v. State*, 650 So.2d 172, 173 (Fla. 4th DCA 1995); *Waters v. State*, 520 So.2d 678, 679-80 (Fla. 1st DCA 1988).

We recognize that the Second District reached the opposite conclusion in *Callaway v. State*, 658 So.2d 593 (Fla. 2nd DCA 1995), wherein the court struck an identical special condition of probation,

concluding that prohibiting the defendant from associating with persons who use illegal drugs was "too vague and capable of unintentional violation." *Id.* Accord *Flor v. State*, 658 So.2d 1176, 1176 (Fla. 2d DCA 1995). In *Wilson v. State*, 857 So.2d 223 (Fla. 2d DCA 2003), the Second District revisited the issue. There, as in the instant case, the defendant filed a rule 3.800(b)(2) motion challenging the probationary condition prohibiting him from associating with persons who use illegal drugs. *Id.* at 224. In denying the motion, the trial court held that the condition was permissible because section 948.03 "precluded probationers from associating with persons engaged in criminal activities, and because persons using illegal drugs are engaging in criminal activities, Ms. Wilson may be precluded from associating with them." *Id.* Although the Second District "appreciated" the trial court's reasoning, the court ultimately struck the probationary condition because "the trial court is bound by our prior decisional law, as expressed in *Flor* and *Callaway* finding this condition unenforceable." *Id.* Notably, the Second District has approved a probationary condition similar to the one imposed in the instant case. See *Tomlinson v. State*, 645 So.2d 1 (Fla. 2d DCA 1994) (holding that prohibiting appellant from visiting places where certain substances are unlawfully sold, dispensed, or used is valid as a more precise defining of conduct prohibited under section 948.03).

The probationary condition in this case is not more vague than the condition approved in *Tomlinson* or the condition specifically authorized by section 948.03, Florida Statutes. Also, the defendant has not challenged the validity of section 948.03. If the statute is not invalid then the instant condition of probation, which is simply a more precise defining of conduct prohibited by the statute, is not invalid.

Accordingly, we affirm the defendant's sentence, but certify conflict with *Callaway*.

AFFIRMED; CONFLICT CERTIFIED.

SUMMARY OF ARGUMENT

Given that the court in the instant case certified conflict and the conditions of probation are the same, the Court has jurisdiction.

ARGUMENT

GIVEN THAT THE COURT IN THE INSTANT CASE
CERTIFIED CONFLICT WITH ANOTHER DISTRICT
COURT, THIS COURT HAS JURISDICTION.

This Court should not accept jurisdiction in this case because the decision below does not expressly and directly conflict with a decision from this Court or any district court of appeal.

In Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980), this Court quoted from its earlier decision in Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed..It was never intended that the district courts of appeal should be intermediate courts..To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

While this Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court, this Court has also repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Given that the Fifth District certified conflict with Callaway

v. State, 658 So. 2d 593 (Fla. 2d DCA 1995), the State admits that this Court has jurisdiction. Specifically, the court in Callaway wrote:

Probation condition (18) states: "You shall not (consume any alcohol/illegal drugs) (be in possession of alcohol or illegal drugs) (associate with persons who use alcohol or illegal drugs) (frequent places where alcohol is the main source of business or illegal drugs are used)." Those portions of condition (18) which provide that the appellant shall not consume alcohol, possess alcohol, associate with persons who use alcohol, or frequent places where alcohol is the main source of business, are special conditions of probation which must be orally pronounced at sentencing. *Williams*. Since they were not orally pronounced they must be stricken. We also strike that portion of condition (18) which prohibits the appellant from associating with persons who use illegal drugs since it is too vague and capable of unintentional violation. *Alvarez v. State*, 593 So.2d 289 (Fla. 2d DCA 1992). Furthermore, we strike that portion of the condition which prohibits the appellant from frequenting places where illegal drugs are used since the places the appellant is to avoid are not specifically defined. *Alvarez*, 593 So.2d at 290. However, we affirm pursuant to *Alvarez* those portions of the condition which prohibit the appellant from consuming and possessing illegal drugs.

Id. at 595 (Emphasis added). This, of course, is the same condition that was upheld in the instant case.

Interesting, the case cited in support of its ruling by the Second District is Huff v. State, 554 So. 2d 616 (Fla. 2d DCA 1989). The Second District cited Huff for the general proposition that the condition in Huff was too vague and capable of unintentional violation. However, the exact condition that was

stricken was that the defendant not be within three blocks of a "high drug area." Huff, 554 So. 2d at 617. Huff cited Almond v. State, 350 So. 2d 810 (Fla. 4th DCA 1977), to support its ruling, and the condition that had been stricken in Almond barred a defendant from living in "central Florida." "High drug area" and "central Florida" are substantially different than prohibiting someone from associating with anyone who is illegally using drugs. The Second District even appeared to recognize in Wilson v. State, 857 So. 2d 223 (Fla. 2d DCA 2003), the weakness of its holding in Calloway; however, it found that the trial court was bound by the holding in Calloway.

CONCLUSION

Based on the foregoing argument and authorities, the State recognizes that there is conflict between two districts, and this Court has jurisdiction.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/Wesley Heidt
WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 773026
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been served by electronic service on Kevin Holtz, counsel for Petitioner, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118 at holtz.kevin@pd7.org, this 26th day of May 2015.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

/s/ Wesley Heidt
WESLEY HEIDT
COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

JUSTIN RANDOLPH DEMOTT,

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STATE OF FLORIDA,

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APPENDIX

PAMELA JO BONDI
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 773026
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)

COUNSEL FOR RESPONDENT

Westlaw

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160 So.3d 520, 40 Fla. L. Weekly D759
(Cite as: 160 So.3d 520)

H
District Court of Appeal of Florida,
Fifth District.
Justin Randolph DEMOTT, Appellant,
v.
STATE of Florida, Appellee.

No. 5D14-1342.
March 27, 2015.

Background: Defendant was convicted pursuant to a guilty plea in the Circuit Court, St. Johns County, J. Michael Traynor, J., and was sentenced. Defendant appealed.

Holding: The District Court of Appeal held that condition of probation requiring defendant to avoid association with persons illegally using drugs was statutorily permitted.

Affirmed; conflict certified.

West Headnotes

Sentencing and Punishment 350H 
1971(2)

350H Sentencing and Punishment
350HIX Probation and Related Dispositions

350HIX(G) Conditions of Probation
350Hk1964 Particular Terms and Conditions

350Hk1971 Residence, Association, and Communication

350Hk1971(2) k. Validity.
Most Cited Cases

Special condition of probation that required defendant to abstain from associating with anyone illegally using drugs was permitted by statute that permitted probation condition requiring probation to not

associate with persons engaged in criminal activities, where a person illegally using drugs was engaged in criminal activities. West's F.S.A. § 948.03(1)(k).

***520** James S. Purdy, Public Defender, and Michael S. Becker and Kevin R. Holtz, Assistant Public Defenders, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Samuel Perrone, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Justin Randolph Demott (the defendant) appeals his judgment and sentence. Because the defendant knowingly and voluntarily entered a guilty plea and his sentence is legal, we affirm.

The defendant argues that a special condition of his probation requiring him to abstain entirely from associating with anyone who is illegally using drugs was improper. We disagree.

Section 948.03(1)(k), Florida Statutes (2012) provides, in pertinent part:

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(1) The court shall determine the terms and conditions of probation....These conditions may include among them the following, that the probationer or offender in community control shall:

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160 So.3d 520, 40 Fla. L. Weekly D759
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Accordingly, we affirm the defendant's sentence, but certify conflict with *Callaway*.

AFFIRMED; CONFLICT CERTIFIED.

PALMER, LAWSON and EVANDER, JJ.,
concur.

Fla.App. 5 Dist., 2015.
Demott v. State
160 So.3d 520, 40 Fla. L. Weekly D759

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