

IN THE SUPREME COURT OF FLORIDA

JASON DEMOTT,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

Supreme Court Case No. SC15-868

5th DCA Case No. 5D14-1342

**ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL**

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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RECEIVED, 10/19/2015 12:23:30 PM, Clerk, Supreme Court

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Felony Division of the Circuit Court, Seventh Judicial Circuit, in and for St. Johns County, Florida. In the Brief, the appellee will be referred to as “the State,” and appellant will be referred to as he appears before this court.

In the brief, the following symbols will be used:

“R” - Refers to Court records in Volume I;

“S” - Refers to the March 4, 2014, sentence transcripts in Volume II;

“P” - Refers to the January 13, 2014, plea transcripts in Volume IV;

“M”- Refers to the 3.800(b)(2) motions and orders entered in
Volumes V and VI.

STATEMENT OF THE CASE

Justin Demott, Appellant, was charged by an Information in the Circuit Court of St. Johns County, Florida, with two counts of aggravated child abuse and one count of simple child abuse. (R 8-9, Vol. I.) On January 13, 2014, Demott, entered a nolo contendere, best interest plea to aggravated child abuse , a first degree felony, and two counts¹ of simple child abuse, both third degree felonies. The plea was entered with assistance of counsel and no agreed upon sentence. (R 107, Vol. I; P 8-9, Vol. IV.) Circuit Judge J. Michael Traynor accepted the plea. (R 107- 108, Vol. I; P 6-11, Vol. IV.)

Demott was adjudicated guilty of aggravated child abuse and sentenced to one-hundred and forty four months prison, followed by five years drug offender probation. The court imposed concurrent five year prison sentences in the two third degree felonies. (R 135-145, 160-166, Vol. I; S 71-72, Vol. II.) Demott filed a timely notice of appeal. (R 167, 180, Vol. I.)

Before filing an initial brief, Appellate counsel filed two 3.800(b)(2) motions. (M 1-5, Vol. V; M 1-6, Vol. VI.) The first motion challenged the drug offender probation. The Circuit Judge granted the motion, and converted drug

¹ The prosecutor agreed in count two to a reduced charge from aggravated child abuse to simple child abuse. There was no agreed or recommended sentence. (P 4-6 , Vol. IV.)

offender probation to sixty months regular probation with special conditions. (M 1-5, 6-9, 10-54, Vol. V).

Appellate counsel challenged two special conditions that were not rationally related to the offense or vague and capable of an unintentional violation. (M 1-6, Vol. VI). The trial court granted the motion and struck any conditions involving alcohol, but amended special condition 1.d. to read, “You will abstain entirely from the use of illegal drugs, and will not associate with anyone who is illegally using drugs.” (M 7-8, Vol. VI.)

Citing [Callaway v. State, 658 So. 2d 593 \(Fla. 2d DCA 1995\)](#), Demott filed an Anders² brief on Appeal, and asserted a minor sentence issue. Demott claimed the special condition for Demott to abstain entirely from association with anyone illegally using drugs was vague and capable of an unintentional violation.

The Fifth District Court affirmed the judgment and sentence, finding the special condition legal. [Demott v. State, 160 So. 3d 520 \(Fla. 5th DCA 2015\)](#). The Fifth District certified conflict with the Second District Courts holding in [Callaway v. State, 658 So. 2d 593 \(Fla. 2d DCA 1995\)](#), wherein the Second District struck an identical special condition of probation, concluding that prohibiting the defendant from associating with persons who use illegal drugs was

² [Anders v. California, 386 U.S. 738 \(1967\)](#).

“too vague and capable of unintentional violation.” The Fifth reasoned that the special condition was permitted by a statute, [section 948.03\(1\)\(k\)](#), that authorized a general probation condition requiring a person on probation to not associate with persons engaged in criminal activities, and that a person illegally using drugs was engaged in criminal activities.

A timely notice to invoke this Court’s discretionary jurisdiction was filed on June 20, 2000.

STATEMENT OF THE FACTS

In the factual basis to support the plea, the State asserted that Demott intentionally struck and excessively paddled his girlfriend's two minor children with a wooden board and injected her seven year old son with oxycodone. (P 9-10, Vol. IV.) Demott did not object to the factual basis, but denied giving the child an injection and stated the child was administered an oral medication. (P 10, Vol. IV.) In the sentence hearing, Demott detailed the punishment of the young girls was for their actions that injured their brother and stated that he gave the young boy a lortab to relieve the seven year old's pain. (S 36-44, Vol. II)

SUMMARY OF THE ARGUMENT

Because a motion to correct a sentencing error involves a pure issue of law, the standard of review is de novo.” [State v. Flynn, 95 So. 3d 436, 437 \(Fla. 4TH DCA 2012\)](#). The special condition of probation lacks a knowledge element that leads to an unintentional violation and the definition of “using” creates a vague, unenforceable condition. The term using fails to define a precise point of the illegal use of drugs and fails to provide notice of the type of associations prohibited. The Appellate Court opinion fails to recognize the different terms and definitions in the general and the special probation conditions.

ARGUMENT

THE VAGUE, SPECIAL CONDITION IMPOSED
DOES NOT SPECIFY WHAT ASSOCIATIONS OR
CONDUCT IS PROHIBITED AND ITS TERMS ARE
DISTINGUISHABLE FROM THE GENERAL
PROBATION CONDITION.

The issue is whether the special condition of probation that Demott abstain entirely from the use of illegal drugs, and not associate with anyone who is illegally using drugs is a valid, legal condition. Demott respectfully submits that it is not. Here, the Fifth District ruled otherwise in [Demott](#). The Fifth held the special condition was not more vague than a condition approved in [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 fining of conduct prohibited under [section 948.03](#)) or the condition specifically authorized by [section 948.03, Florida Statutes](#). The Fifth certified conflict with [Callaway v. State, 658 So. 2d 593 \(Fla. 2d DCA 1995\)](#), but reasoned the special condition is statutorily permitted as a more specific condition of the general probation condition, which prohibits a probationer from associating with persons engaged in criminal activities.

The special condition imposed is capable of an unintentional violation and

vague for two reasons. First, the special condition requires Demott to abstain entirely from certain conduct or associations, but fails to include a knowing element. The requirement to abstain entirely, without any knowledge, results in an automatic violation of the first half of the condition, based on actions of another by inserting a drug into Demott's food or drink.

Next, the different definitions of the word using creates a vague special condition. Demott disagrees that a person illegally using drugs, as defined below, is engaged in criminal activities and that the special probationary condition is expressly authorized by statute. Webster's³ gives multiple definitions for the word "use" and one definition is "repeated or habitual conduct." Examples of this definition can be seen in the following statements : "I always use that dish"; "The players were using drugs during the season and suspended". To abstain entirely prohibits Demott from an association with anyone who has been illegally using a drug, outside Demott's presence, in the previous months, days, hours or minutes. This definition and lack of knowledge creates the possibility of an unintentional violation of this special condition without a defense.

The special condition of probation requires Demott to abstain entirely from

³ <http://www.merriam-webster.com/dictionary/use>

association with anyone who is not known by him to be a user of illegal drugs.

This condition and its requirement for Demott to abstain entirely from association with persons who, unbeknownst to Demott, regularly use or have recently used narcotics, is invalid. Use is also defined by the Merriam-Webster's online dictionary as the act of using something or the state of being used. This definition of using accomplishes the intended result to prohibit Demott from being present when anyone is in his presence and engaged in the act of using illegal drugs.

However, the definition of use as a habitual or customary usage includes a continued or repeated practice. Anyone's "using" of drugs as a regular habit or repeated conduct for a period of time creates uncertainty in the interpretation and application of this special condition by both Demott and Police Officers as to what associations are prohibited. This definition, which does not define a specific point in time, results in a vague, special condition. The use in privacy of an illegal drug by anyone that is with Demott for the evening but consumes drugs outside his presence, can be interpreted by police to be illegal use and association.

Upon Demott's release from prison, both police officers and Demott must interpret this unclear special condition and make quick determinations with whom Demott can or cannot associate. Will Demott's speaking in public with a person known by an Officer to be a past user or seller of illegal drugs amount to a

violation of this special condition? The term “using” will be open to interpretation by Officers whether anyone Demott associates with illegally used drugs, whether it be in the past month, week, or on the same day and outside Demott’s presence. Without some requirement that Demott is aware or knows that the person is illegally using drugs at that moment, the unintended, unintentional violation always exists.

Because the alternative, common definition of using that means repeated or habitual conduct and does not refer to a specific temporal point in time, the terms using and engaged are distinguishable. Using may refer to a period of time in the past: “I use those dishes everyday” or “he was using illegal drugs in the past and until last week” This may create a violation to associate with anyone who is, unknown to Demott, a user of illegal drugs or has used recently and remains under the influence of drugs. Illegal drugs can be taken in multiple forms, from pills and tablets to licking a paper or nasal inhalation and needles. The ease of a quick ingestion allow the illegal use of drugs to occur in both public and private locations that are virtually undetectable to an associate. The condition that requires Demott to abstain entirely from the association coupled with the potential inability to know whether anyone is “using” drugs or has ingested drugs out of Demott’s sight creates a vague, unenforceable condition.

The Fifth District’s opinion held that the special condition is permitted by statute, [Section 948.03\(1\)\(k\), Florida Statutes \(2012\)](#), which 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.

The Fifth District reasoned that since a person illegally using drugs is engaged in criminal activities, the defendant’s probationary condition is expressly authorized by the statute. The Fifth District cited to the condition in [Tomlinson v. State, 645 So. 2d 1 \(Fla. 2d DCA 1994\)](#), as an equal condition to the present case before this court. [Tomlinson](#) preceded the holding in [Callaway](#), involved a different special condition and the condition in [Tomlinson](#) is now an approved general condition included in [subsection \(1\)\(n\), of Section 948.03, Florida Statutes \(2015\)](#).

There are differences in the general and special conditions in this case, both in the language used and meanings between using and engaged. Engaged is

defined by the Merriam- Webster’s dictionary⁴ as, “busy with some activity”, “involved in activity” or “greatly interested in”. By this very definition, prohibiting an association with one “engaged” in criminal activity is reasonable as the general condition identifies a specific, point in time that an association is not permitted, when the criminal activity is being committed. Also, the special condition not only prohibits an association, but requires Demott to abstain entirely from an association, whether or not he is aware or knows of another’s illegal, habitual drug use in the past or outside his presence. This Fifth’s opinion in this case ignores the different meanings between using and engaged. This general condition is more precise as to when an association is prohibited than the vague, special condition.

RIGHT OF ASSOCIATION

As pointed out above, the special condition opens Demott up to an unknown violation by any association with another who illegal used drugs previously. In the context of articulable suspicion or probable cause for arrest, the Supreme Court has rejected the notion of guilt by association. In [Sibron v. New York, 392 U.S. 40, 62-63, \(1968\)](#), the Officer saw Sibron talking to a number of known

⁴ <http://www.merriam-webster.com/dictionary/engaged>

narcotics addicts over a period of eight hours, but did not know the content of these conversations, and saw nothing pass between Sibron and the addicts. The Court held the inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.

This principle was reinforced in [Ybarra v. Illinois, 444 U.S. 85, \(1979\)](#), a case involving the illegal search of a man present at a tavern in which the police were executing a search warrant of the premises, and of the bartender who was suspected of distributing heroin. The Court, cited [Sibron](#), and reiterated that “a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.”

[Smith v. United States, 558 A.2d 312, 314-15 \(D.C. 1989\)](#)

A Fourth Amendment issue is not before this court, but the same rationale employed is applicable in the condition that requires Demott to abstain entirely from an unknown association and the vague, special condition should be stricken from Demott's probation.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the undersigned counsel respectfully asks this Court to reverse the decision of the Fifth District Court of Appeal in this cause, and remand the matter to the Circuit Court in and for St. Johns County with directions to strike the special condition of probation.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered to the Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118; and mailed to Justin Demott, DC#V44957, Wakulla Correctional Institution, 110 Melaleuca Drive, Crawfordville, FL 32327, on this 19th day of October, 2015.

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