IN THE SUPREME COURT OF FLORIDA

JUSTIN RANDOLPH DEMOTT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO.: SC15-868
5TH DCA CASE NO.: 5D14-1342

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

Petitioner was charged by information with two counts of aggravated child abuse and one count of simple child abuse. (R 8-9).[1] On January 13, 2014, Petitioner entered a plea of nolo contendere as to aggravated child abuse (a first degree felony) and two counts of simple child abuse (which are third degree felonies). In the factual basis to support the plea, the State asserted that Petitioner 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). Petitioner 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). At the sentence hearing, Petitioner offered that the punishment of the young girls was for their actions that injured their brother and stated that he gave the young boy prescription medication to relieve his pain. (S 36-44).

Petitioner was sentenced to one hundred and forty-four months incarceration to be followed by five (5) years of drug offender probation for the aggravated child abuse and two

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[1]For sake of consistency, the State will use the same citations used by Petitioner: "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.

concurrent five (5) year sentences on the other two offenses. (R 135-145, 160-166, S 71-72).

While the direct appeal was pending, Petitioner filed two Florida Rule of Criminal Procedure 3.800(b)(2) motions which challenged the drug offender probation as well as two of the special conditions. (M 1-6, 7-8). The trial court granted the motion which contested the drug offender probation and imposed regular probation with special conditions. (M 10-54). As to the challenge of the special conditions, the trial court granted the motion and struck any conditions involving alcohol and amended the condition related to illegal drugs to read as follows: "You will abstain entirely from the use of illegal drugs, and will not associate with anyone who is illegally using drugs." (M 7-8).

With these background facts, the issue before this Court was set out in the opinion of the Fifth District Court of Appeal as follows:

> 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).

Demott v. State, 160 So. 3d 520, 520-521 (Fla. 5th DCA 2015).

The Fifth District Court of Appeal recognized that the Second District Court of Appeal had reached a contrary conclusion finding the condition to be "too vague and capable of unintentional violation" in Callaway v. State, 658 So. 2d 593 (Fla. 2d DCA 1995). Given this split in authority and the fact the Fifth District certified conflict, Petitioner invoked this Court's jurisdiction, this Court has accepted jurisdiction, and ordered briefs on the merits of the claim.

SUMMARY OF ARGUMENT

The issue before this Court is whether the condition of probation that requires him not to associate with anyone who is illegally using drugs is a valid condition. The State submits that it is.

ARGUMENT

POINT OF LAW

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE STATUTORILY SUPPORTED CONDITION THAT A DEFENDANT ABSTAIN FROM THE USE OF ILLEGAL DRUGS AND NOT ASSOCIATE WITH ANYONE WHO IS ILLEGALLY USING DRUGS IS A VALID ONE.

As a condition of probation, the trial court ordered Petitioner as follows: You will abstain entirely from the use of illegal drugs, and will not associate with anyone who is illegally using drugs. Petitioner submits that this condition of probation is vague. The Fifth District Court of Appeal rejected this argument and upheld the condition; however, it did acknowledge contrary law from the Second District Court of Appeal. The State asserts that the condition is clearly valid and not vague.

Specifically, the Fifth District 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.
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Petitioner submits the condition is vague. First, he submits there is no knowing element and that someone could place a drug into his food or drink. Secondly, Petitioner submits that the definition of "use" would lead to violation of this condition even if he associated with someone who used drugs "months, days, hours or minutes" before. Petitioner expands that argument asserting that he must abstain from associating from anyone who is using illegal drugs - even if he did not know they were using or had used in the past.

In response, the State would point out that probation is a matter of grace rather than right. See Bernhardt v. State, 288 So. 2d 490, 494 (Fla. 1974); accord State ex rel. Roberts v. Cochran, 140 So. 2d 597, 599 (Fla. 1962). Additionally, a trial court has broad discretion on whether to impose probation, and it has broad discretion on whether to revoke it. See Lawson v.

State, 969 So. 2d 222, 229 (Fla. 2007). The evidence for revocation of probation need only be sufficient to satisfy the conscience of the court that the violation occurred. Rock v. State, 749 So. 2d 566, 567 (Fla. 3d DCA 2000). Before a trial court can revoke a defendant's probation, the state must prove by a preponderance of the evidence that the defendant willfully violated a substantial condition of his probation. State v. Carter, 835 So. 2d 259 (Fla. 2002); Thomas v. State, 760 So. 2d 1138 (Fla. 5th DCA 2000). The review of whether a defendant's violation of probation was willful and substantial is a question of fact and will not be reversed on appeal unless an abuse of discretion is shown. Carter, 835 So. 2d at 262)(citing Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

Returning to Petitioner's argument that the condition is vague; obviously, a defendant is entitled to due process as to any alleged violation of probation. In Lawson, this Court wrote:

> The due process protection of adequate notice is not only found in the constitution, see art. I, § 9, Fla. Const., but also in the Florida Statutes. See, e.g., § 948.06(1)(a), Fla. Stat. (2005) (setting forth the process for assessment and resolution of probation violations). For instance, section 948.06(1)(a) authorizes the arrest of a probationer and subsequent revocation of probation upon adequate proof if "there are reasonable grounds to believe that a probationer or offender in community control has violated his or her probation or community control in a material respect." Id. (emphasis supplied). Although the Legislature failed to define "material" violation, this Court has stated that "a violation must always be willful and substantial to produce a revocation." State v. Meeks, 789 So. 2d 982, 987 (Fla. 2001);

> accord Carter, 835 So. 2d at 261. In essence, the right to receive adequate notice of the conditions of probation is in part realized through the requirement that a violation be substantial and willful to justify revocation. Indeed, a defendant could not willfully violate a condition of probation without being on adequate notice of the conduct that is prohibited. See Rothery v. State, 757 So. 2d 1256, 1259 (Fla. 5th DCA 2000) (holding that a violation of probation could not be willful if the probationer "had neither notice nor knowledge of the substance of the rule").

Id. at 230. The State would submit that this is exactly applicable to the instant case. For a violation of probation to be material, it has to be willful. Crossing paths with someone who a probationer did not know had illegally used drugs would not be a willful violation. See Arciniega v. Freeman, 404 U.S. 4, 5 (1971) (The Unites States Supreme Court recognized that incidental contacts, such as through occupational association, would not provide a basis for finding a violation of associational restrictions such as the ones included among the standard conditions of supervision recommended by the federal sentencing guidelines.)

Obviously, a condition of probation should "provide reasonable individuals of common intelligence the basis to know and understand its meaning." Id. at 235; (quoting Lawson v. State, 941 So. 2d 485, 489 (Fla. 5th DCA 2006). The instant condition requires Petitioner not to use illegal drugs. The State's position is that this directive is quite clear and reasonable people would understand its meaning. It is not a

willful and knowing violation if someone places a drug into a probationer's food or drink. The second part of the condition is that Petitioner will not associate with anyone who is illegally using drugs. Again, the State would submit that this is a clear prohibition that reasonable people would understand. It is not barring someone from knowing another people's past or future. It is barring them from associating with someone who is engaged in an illegal activity - using illegal drugs. See United States v. Hendricks, 143 Fed. Appx. 168, 170 (11th Cir. 2005) (The Eleventh Circuit upheld the district court's finding of a violation of the standard condition of federal probation that Hendricks "not associate with any persons engaged in criminal activity, and not associate with any person convicted of a felony unless granted permission to do so by a probation officer.")

The Second District Court of Appeal does have a line of cases which disagree with the State's position. In Huff v. State, 554 So. 2d 616 (Fla. 2d DCA 1989), the district court found the condition that a defendant not live with a member of the opposite sex to be invalid because it prohibited noncriminal conduct; furthermore, the court struck the condition that a defendant not live within three blocks of a "high drug area." Id. at 617. This was found to be too vague although the court stated that the validity of this condition could depend on

whether his probation officer specifically told the defendant which areas were prohibited.

The Second District, then, expanded this holding in Alvarez v. State, 593 So. 2d 289, 290 (Fla. 2d DCA 1992), and invalidated the condition that a defendant not associate with someone who used illegal drugs as too vague and capable of unintentional violation. This holding was then applied in a series of cases - Calloway v. State, 658 So. 2d 593 (Fla. 2d DCA 1995); Flor v. State, 658 So. 2d 1176 (Fla. 2d DCA 1995); and Wilson v. State, 857 So. 2d 223 (Fla. 2d DCA 2003). Interestingly, the Second District did uphold the condition that a defendant would not "visit places where [intoxicants][2], drugs or other dangerous substances are unlawfully sold, dispensed, or used." Tomlinson v. State, 645 So. 2d 1 (Fla. 2d DCA 1994). The court found it was a more precise defining of the general condition that a defendant not associate with someone engaged in criminal activities. The court stated the condition validly required a defendant not to associate with someone who was engaged in the illegal activity of unlawfully selling or using certain substances. Id.

Petitioner submits various examples stretching the application of the words "use", "using", and "associating"

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[2]The intoxicants portion was found to be a special condition that needed to be orally pronounced in order to be valid.

arguing that a defendant could be talking to someone the law enforcement officer knows previously used illegal drugs but the defendant does not. The State would submit that this would not be a material violation given that it is not willful.

Petitioner also adds an argument related to the constitutional right of association. The State would assert that it can clearly prohibit a defendant on probation from associating with persons engaged in criminal activities. As stated above, probation is imposed as a matter of grace. Requiring a defendant not to associate with persons engaged in criminal activities is a standard, general condition of probation in most jurisdictions. See LoFranco v. United States Parole Commission, 986 F. Supp. 796 (N.Y.S.D. 1997), affirmed, 175 F.3d 1008 (2d Cir.), cert. denied, 526 U.S. 1160 (1999) (Recognizing that the government can restrict the actions of a parolee including depriving him of his freedom of association.); South Carolina v. Allen, 634 S.E. 2d 653 (S.C. 2006) (Court recognized that the probationer could be prohibited from knowingly associating with someone with a criminal record.); California v. Robinson, 199 Cal. App. 3d 816 (Cal Ct. App. 1988) (Court rejected a constitutional challenge to the condition of that a defendant not associate with anyone with a known criminal record given that it is inherent in the criminal process that a convicted defendant can be so restricted.) Adding clarity to

that goal and prohibiting a defendant from using illegal drugs and from associating with someone who is illegally using drugs is not a vague, invalid condition of probation.

CONCLUSION

Based on the argument and authorities presented herein, the State requests this Honorable Court to find that the State can prohibit a defendant on probation from using illegal drugs and from associating with anyone who is illegally using drugs.

DESIGNATION OF E-MAIL ADDRESS

The State designates crimappdab@myfloridalegal.com as its primary e-mail address and wesley.heidt@myfloridalegal.com as its secondary address.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by electronic service to Kevin R. Holtz, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118, at holtz.kevin@pd7.org and appellate.efile@pd7.org; this 14th day of December 2015.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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