

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANKLIN CECIL MARKLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52805

FILED

APR 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

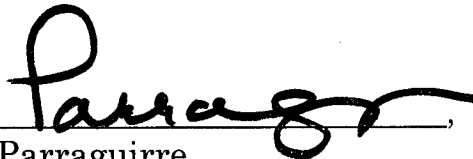
This is an appeal from a judgment of conviction, entered pursuant to a plea of no contest, of one count of assault with a deadly weapon. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court sentenced appellant Franklin Cecil Markley to a prison term of 12 to 36 months, suspended execution of the sentence, and placed Markley on probation for a period of not more than 60 months.

Markley's sole contention on appeal is that the district court abused its discretion by requiring him to "abstain from the use, possession and control of any alcoholic beverages" as a condition of probation. Markley asserts that alcohol did not play a part in his crime, he has not had past problems with alcohol, and neither the State nor the Division of Parole and Probation sought this special condition of probation. Markley argues that because this condition was not "individualized and based on the nature and circumstances of the offense and the history and character of the defendant," it must be vacated. Markley cites to U.S. v. Betts, a Ninth Circuit Court of Appeals decision construing the federal statutory scheme governing the U.S. District Court's discretion to impose conditions of supervised release. 511 F.3d 872, 878 (9th Cir. 2007).


In Nevada, when authorized by the legislature, a district court enjoys wide discretion to impose conditions of probation. Igbinovia v. State, 111 Nev. 699, 707, 895 P.2d 1304, 1309 (1995). NRS 176A.400(1)(c)(4) provides that the district court may fix the conditions of probation, including “[p]rohibiting the probationer from engaging in specific conduct that may be harmful to his own health, safety or welfare, or the health, safety or welfare of another person.” However, “[i]f the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence.” Himmagine v. State, 88 Nev. 296, 299, 496 P.2d 763, 765 (1972) (quoting People v. Mason, 488 P.2d 630, 632 (Cal. 1971)).

Here, Markley chose to accept probation. By accepting probation, he accepted the condition “that he abstain from the use, possession and control of any alcoholic beverages during his term of probation.” Under these circumstances, we conclude that Markley is not entitled to relief, and we

ORDER the judgment of conviction AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk