NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

IAN THOMAS GOKAY, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D18-4530

Opinion filed May 20, 2020.

Appeal from the Circuit Court for Polk County; Neil A. Roddenbery, Judge.

Howard L. Dimmig, II, Public Defender, and Carly J. Robbins-Gilbert, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Jonathan S. Tannen, Assistant Attorney General, Tampa, for Appellee.

KHOUZAM, Chief Judge.

Ian Gokay was convicted of possession of methamphetamine, cannabis, and drug paraphernalia, in addition to driving with a suspended license. He was sentenced to 270 days in county jail, followed by 48 months of probation. As a special

condition of probation, Gokay was required to submit to a test for sexually transmitted diseases. He now appeals, arguing ineffective assistance of counsel and challenging the test. We affirm without comment Gokay's ineffective assistance claim, but we must reverse in part because the STD test should not have been imposed as a special condition of probation.

"Although a sentencing court enjoys broad discretion in fashioning special conditions to probation, it is not unbounded." Williams v. State, 182 So. 3d 912, 913 (Fla. 2d DCA 2016). To be valid, a condition must be "reasonably related to rehabilitation." Id. (quoting Carty v. State, 79 So. 3d 239, 240 (Fla. 1st DCA 2012)). A condition is not reasonably related to rehabilitation if it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." Id. (quoting Rodriguez v. State, 378 So. 2d 7, 9 (Fla. 2d DCA 1979)); see Pulecio v. State, 160 So. 3d 556, 557 (Fla. 2d DCA 2015) (same). This rule, fashioned by our court in Rodriguez, was later approved by the Florida Supreme Court in Biller v. State, 618 So. 2d 734 (Fla. 1993). In that case, the supreme court rejected a special condition prohibiting a defendant's consumption of alcohol. Id. at 735. The defendant's crimes involved the carrying of concealed weapons, and the court applied Rodriguez to conclude that the alcohol restriction was not rationally related to the defendant's rehabilitation. Id. Alcohol consumption was not connected to the crimes of carrying concealed weapons, the defendant was legally allowed to consume alcohol as an adult, and nothing in the record suggested a propensity towards alcohol such that future criminality would be affected. Id.

Here, the STD test mandated by the trial judge similarly fails all three tests of relatedness. First, Gokay was convicted of driving with a suspended license and possession of drugs and paraphernalia, which are not sexual crimes that would be impacted by an STD test. Secondly, it is not a crime per se for someone with STDs to engage in sexual activity. Thirdly, it is not reasonable to believe based on this record that an STD test will have any effect on Gokay's future criminality. Even assuming a theoretical connection between being made aware of one's sexual health and illegally smoking methamphetamine, the record reflects that Gokay already knows about his personal sexual health. It is therefore unclear what purpose, if any, a court-required STD test might serve. In fact, our review of the record suggests that the trial court accidentally imposed the test as a standard condition of probation and listed it as an afterthought along with curfew, alcohol testing, and warrantless search requirements. In ruling on the subsequent motion to correct sentence, the trial court adopted the State's argument, finding that it had discretion to impose the test merely because Gokay had been smoking methamphetamine with someone he met on an LGBTQ dating website. The analysis abruptly ended there, with no application of the Rodriguez test. And while a trial court need not make explicit findings of relatedness, "a special condition of probation, when challenged on grounds of relevancy, will only be upheld if the record supports at least one of the circumstances outlined in Rodriguez." Biller, 618 So. 2d at 735. The trial court did not articulate any support in the record, and we do not see any either. Even assuming that some connection exists between smoking drugs and contracting an STD, the connection is no less speculative and tangential than that rejected in Biller and other cases from our own court. See Louis v. State, 201 So. 3d

190, 191 (Fla. 2d DCA 2016) (holding that requiring probationer to obtain a GED failed all three Rodriguez factors where probationer had been convicted of threatening a public officer); James v. State, 696 So. 2d 1268, 1269 (Fla. 2d DCA 1997) (holding that condition prohibiting probationer from having contact with his seventeen-year-old wife failed all three tests for relatedness where defendant was convicted of lewd acts in the presence of a child under sixteen years old based on his earlier contact with his now wife when she was fourteen and he was twenty-two); Godley v. State, 659 So. 2d 447, 447 (Fla. 2d DCA 1995) (reversing a prohibition on excessive use of alcohol where alcohol was not involved in probationer's aggravated battery conviction); Bourget v. State, 634 So. 2d 1109, 1110 (Fla. 2d DCA 1994) (reversing a prohibition on possessing firearms and using intoxicants excessively where probationer was convicted of insurance fraud). Indeed, the trial court's discretion is not unfettered. "Discretion . . . is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (quoting Delno v. Mkt. St. Rwy. Co., 124 F.2d 965, 967 (9th Cir. 1942)). A special condition of probation must therefore be reasonably related to rehabilitation, not merely related theoretically or speculatively. Here, "the absence of any evidentiary connection between [Gokay's] prior criminality and [Gokay's sexual activity] would seem to warrant some particularized evidence to show that, now, for whatever reason, his [sexual activity] could fuel future criminal behavior on his part. There was no such evidence to be found in this record." See Williams, 182 So. 3d at

914. We therefore reverse the special condition of Gokay's probation requiring that he take an STD test.

Affirmed in part, reversed in part, and remanded.

CASANUEVA, J., Concurs.
ATKINSON, J., Concurs in result only with opinion.

ATKINSON, Judge, Concurring.

I agree that the trial court committed reversible error, but I write separately because my perception of the trial court's rationale for imposition of the STD test as a special condition of probation differs from that of the majority. The majority contends that the trial court found it had discretion to impose the test "merely because Gokay had been smoking methamphetamine with someone he met on an LGBTQ dating website." However, the trial court's explanation mentioned nothing about the sexual orientation to which the "online dating site" catered. And the trial court's reasoning does not mention or necessarily rely on any likelihood that Gokay was or would be engaged in sexual activity. Rather, the trial court's order denying Gokay's motion to correct his sentence indicates that Gokay and the individual he met on the dating site were "us[ing] the same smoking device" to smoke the methamphetamine.

To the extent the trial court concluded that such activity is conducive to the transmission of disease, it would be difficult to deny that this is at least possible. But it cannot be any more so than sharing a drag from a cigarette, a bag of popcorn at a movie theater, or a goodnight kiss at the end of a date. These might very well be activities one should be cautious about undertaking with new acquaintances. However,

there was no explanation of what "relationship" the attendant health risk has to the crimes of drug and paraphernalia possession or driving with a suspended license or how testing for such risk is "reasonably related to future criminality." See Williams, 182 So. 3d at 913 ("In determining whether a condition of probation is reasonably related to rehabilitation, we believe that a condition is invalid if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." (quoting Rodriguez, 378 So. 2d at 9)).