IN THE SUPREME COURT OF FLORIDA

TYRONE HOWARD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,995

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the Appellant in the Fourth District Court of Appeal for the State of Florida. Respondent was the Prosecution in the trial court and the Appellee in the appellate court. In this brief the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will denote the Appendix to Petitioner's Brief on Jurisdiction. The symbol "R" will denote the record on appeal. All emphasis in this brief is supplied by Respondent, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and his Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial court, with the following additions and clarifications:

Mr. Marvin, the probation officer, testified that he told Petitioner, during his initial interview on Friday, that he would be required to either work or get a medical certification indicating his unfitness to work (R. 6). Mr. Marvin did receive records from the County Jail indicating that Petitioner had been treated for a back injury, however he did not receive anything indicating that Petitioner was disabled (R. 8).

Petitioner refused to participate in the restitution center's work program, complaining of a bad back (R. 5). However, when given an opportunity to receive medical attention, Petitioner failed to take a short walk to the county clinic. Petitioner refused to go to the clinic on Friday afternoon, Monday, and Tuesday, even though he claimed that his back was hurting him "real bad" (R. 10). Petitioner made no attempt, over a four day period, to see a doctor, and Petitioner admitted that he never even tried to do any work (R. 10-17).

The duties Mr. Marvin requested Petitioner perform included washing dishes, sweeping floors, and making his bed.

The trial court found Petitioner had violated his probation by violating the terms and conditions of his obligations at the restitution center (R. 17).

On the above facts, the Fourth District Court of Appeal held that Petitioner failed to demonstrate that his probation violation was not willful and substantive (A. 1).

SUMMARY OF THE ARGUMENT

Petitioner's cited case of Hudson v. State, infra, contains an opinion not based upon factual elements sufficiently similar to those of the case at bar to create a conflicting rule of law.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT DOES NOT CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT IN THE CASE OF HUDSON V. STATE, 425 So.2d 1166 (Fla. 2nd DCA 1983).

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same point of law. Fla.R. App.P. 9.030(a)(2)(A)(iv) (1981). For purposes of establishing jurisdiction, conflict may appear as the announcement of a rule of law which conflicts with the rule previously announced, or by the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960). Further, jurisdiction may be assumed upon the ground that the decision at issue creates a conflict by expressly accepting an earlier decision of this Court as controlling precedent in a situation materially at variance with the case relied on, that is, that the decision at issue misapplied precedent. McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962).

Respondent maintains that of the three thresholds to discretionary jurisdiction, the misapplication of precedent is not involved here. Further, Respondent maintains that the decision of the Fourth District Court of Appeal is not

based upon factual elements sufficiently similar to those of the Hudson, infra, case to create a rule of law which conflicts with that presented by the Second District Court in Hudson v. State, 425 So.2d 1166, 1167 (Fla. 2nd DCA 1983). In Hudson, the Appellant was charged with violating the instruction of his probation officer that he not telephone relatives of the victim of the crime. A telephone trace revealed only that a telephone call had been placed from Appellant's parent's home to the victim's home at 5:45 a.m. Appellant's mother, however, testified that she may have inadvertently placed the call. Since the caller hung up the telephone immediately after it was answered, the victim was unable to identify the caller, and thus the district court held:

> The facts underlying the immediate proceeding, however, fail to support a finding that the state satisfied its burden of proof. The record does not demonstrate that appellant placed the call to the Thompson residence.

425 So.2d at 1167.

In the instant case there was testimony by probation officer, Jon Marvin, to the effect that Petitioner refused to participate in the restitution center's work program, complaining of a bad back (R. 5). However, when given an opportunity to receive medical attention, Petitioner failed to take a short walk to the county clinic. Petitioner refused to go to the clinic on Friday afternoon, Monday, and Tuesday,

even though he claimed that his back was hurting him "real bad" (R. 10). Petitioner was told by Mr. Marvin, in his initial interview, that he would be required to work unless he obtained a medical certification indicating that he was not fit for work (R. 5). Still Petitioner made no attempt, over a four day period, to see a doctor, and Petitioner admitted that he never even tried to do any work (R. 10-17).

Respondent therefore maintains that the factual scenario of the two cases is dissimilar, the rules of law presented by both are not conflicting, and thus Petitioner has not presented this Court with a decisional conflict which is the necessary predicate to its exercise of discretionary jurisdiction.

CONCLUSION

Based on the foregoing Argument, Respondent respectfully maintains that no decisional conflict has been presented, and respectfully requests that this Court decline to exercise its discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail/courier to: GARY CALDWELL, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida this 3rd day of June, 1985.

Lee Rosenthal

Of Counsel