

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC00-902

DOMINA TRAVIS,

Respondent.

_____ /

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

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Travis was charged with trafficking in fourteen grams or more of oxycodone (R 36). The oxycodone was contained in thirty Roxicet tablets that she obtained from a pharmacy by presenting a false prescription (T 10). She moved to dismiss the charge, claiming that the total amount of oxycodone in the Roxicet tablets was only .15 gram, so she could not be charged with trafficking (R 47-49). The trial court denied the motion to dismiss, and Travis entered a plea, reserving her right to appeal the denial of the motion to dismiss (R 51-52).

Travis appealed to the Fifth District Court of Appeal, which reversed the order of the trial court. *Travis v. State*, 754 So. 2d 59 (Fla. 5th DCA 2000). The district court first found that oxycodone is a Schedule II substance, the possession of four or more grams of which subjects one to prosecution pursuant to the trafficking statute. *Id.* The court then went on to find that because the Roxicet tablets contained only .15 gram of oxycodone, Travis could not have been in violation of the trafficking statute. *Id.* The district court noted that the trial court had been without the benefit of *Hayes v. State*, 24 Fla. L. Weekly S467 (Fla. October 7, 1999), and reversed the denial of the motion to dismiss the trafficking charge.

The state timely sought discretionary review by this court, and this court accepted jurisdiction on October 20, 2000.

SUMMARY OF ARGUMENT

The district court erred in holding that Travis could not have been in violation of the drug trafficking statute. Travis was charged with trafficking in oxycodone, which is a Schedule II substance. The drug trafficking statute prohibits the possession of four grams or more of any Schedule II drug, **or four grams or more of any mixture containing such substance.** Since Travis was in possession of four grams or more of a mixture containing a Schedule II substance, she is subject to the drug trafficking statute.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT TRAVIS COULD NOT HAVE BEEN IN VIOLATION OF THE DRUG TRAFFICKING STATUTE WHERE SHE POSSESSED A MIXTURE CONTAINING FOUR OR MORE GRAMS OF OXYCODONE, A SCHEDULE II SUBSTANCE.

In its opinion, the district court found that oxycodone is a Schedule II substance, the possession of four or more grams of which subjects one to prosecution under the trafficking statute, section 893.135(1)(c)1, Florida Statutes. The court then determined that because Travis' possession of 30 tablets of Roxicet contained only fifteen one-hundredths (.15) gram of oxycodone, she could not have been in violation of the drug trafficking statute. Petitioner contends that in reaching this conclusion for a Schedule II drug, the district court overlooked the plain language of section 893.135(1)(c)1 and misapprehended this Court's holding in *Hayes v. State*, 750 So. 2d 1 (Fla. 1999).

In *Hayes*, this Court conducted an exhaustive analysis of Florida's drug trafficking statute in conjunction with the statute describing which schedules various controlled substances fall under. §§ 893.03 and 893.135, Fla. Stat. (Supp. 1996). The Court's analysis involved a determination of legislative intent, which it ascertained from the language of the statute, pursuant to *Overstreet v. State*, 629 So. 2d 125 (Fla. 1993). The Court found that, by its plain language, the drug trafficking statute prohibits the possession of four grams or more of any Schedule I or Schedule II drug or four or more grams of any mixture containing such

substance. It then concluded:

that the statute must be read strictly with the focus on the term '*such*,' which restricts the phrase '*any mixture*,' by referring back to the restrictive phrase '*as described in s. 893.03(b) [Schedule I] or (2)(a) [Schedule II]*.' Thus, a close reading of the statutory language reveals that '*such mixture*' applies only to mixtures containing Schedule I or II substances.

Hayes, supra.

The *Hayes* case did not turn solely on the amount of controlled substance contained in the mixture. Rather, it turned on the fact that certain mixtures containing hydrocodone fall under Schedule III, and thus are not subject to prosecution for trafficking. This case does not involve hydrocodone. Travis was charged with trafficking in oxycodone. It is undisputed, and the district court specifically found, that oxycodone is a Schedule II substance, the possession of four or more grams of which subjects one to punishment pursuant to the trafficking statute. Contrary to the district court's holding in this case, the trafficking statute still prohibits the unlawful possession of **any Schedule II drug or any mixture containing a Schedule II drug.** §893.135(1)(c)1, Fla. Stat. (1997); *Hayes, supra.* The fact that the "mixture" in this case, the Roxicet tablets, contains only .15 gram of oxycodone, does not and cannot convert this Schedule II substance into a Schedule III substance, as was the case with the hydrocodone in *Hayes, supra.* See, *Eagle v. State*, 25 Fla. L. Weekly D1638 (Fla. 2d DCA July 7, 2000) (we interpret *Hayes* to mean that prescription

drugs containing a mixture of oxycodone and a noncontrolled substance are to be measured by the aggregate weight, expressly disagreeing with *Travis* court).

This can best be illustrated by using this Court's language from *Hayes*, and substituting the facts in this case. There, the Court stated "[i]f the Lorcet tablets that Hayes possessed are properly classified as Schedule II substances, Hayes would be subject to a minimum mandatory term of imprisonment of twenty-five years and a mandatory fine of \$500,000." *Id.* Here, if the Roxicet tablets that Travis possessed are Schedule II substances, Travis would be subject to a mandatory minimum term of imprisonment of twenty-five years and a mandatory fine of \$500,000. The Roxicet tablets contain oxycodone, a Schedule II substance. § 893.03(2)(a)1.n, Fla. Stat. (1997). Because section 893.135(1)(c)1 prohibits the unlawful possession of any mixture containing a Schedule II drug, *Hayes, supra*, that section applies to Travis' case, and Travis is subject to prosecution under the trafficking statute.

CONCLUSION

Based upon the foregoing argument and authority, petitioner respectfully requests this Honorable Court quash the opinion of the Fifth District Court of Appeal, and remand this case for further proceedings.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF FONT

The undersigned hereby certifies that this brief is submitted in Courier New, 12 point font, a font that is not proportionally spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief has been furnished by delivery via the mail box of the Office of the Public Defender at the Fifth District Court of Appeals, this ____ day of November, 2000.

Kellie A. Nielan

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