IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC00-902
5 DCA Case No. 5D99-1264

DOMINA TRAVIS,

Respondent.

_____/

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

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar # 618550
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS 1

CERTIFICATE OF FONT 1

SUMMARY OF ARGUMENT 2

ARGUMENT:

THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *HAYES V. STATE* AND *OVERSTREET V. STATE* 3

CONCLUSION. 6

CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

CASES:

Hayes v. State,
24 Fla. L. Weekly S467 (Fla. October 7, 1999) . . . 1,2,3,4

Overstreet v. State,
629 So. 2d 125 (Fla. 1993) 2,3

Reaves v. State,
485 So. 2d 829 (Fla. 1986) 3

Travis v. State,
25 Fla. L. Weekly D503 (Fla. 5th DCA February 25, 2000) . 1

OTHER AUTHORITIES:

§893.135(1)(C)1, fLA. sTAT. (1997) 4,5

STATEMENT OF THE CASE AND FACTS

Travis appealed the denial of his motion to dismiss the information charging him with trafficking in Oxycodone, a controlled substance described in subsection 893.03(2), Florida Statutes (1997). *Travis v. State*, 25 Fla. L. Weekly D503 (Fla. 5th DCA February 25, 2000). The Oxycodone was contained in thirty Roxicet tablets that he obtained from a pharmacy by presenting a false prescription. *Id.*

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 trail 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.

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.

SUMMARY OF ARGUMENT

The decision of the district court expressly and directly conflicts with this Court's decisions in *Hayes, supra* and *Overstreet v. State*, 629 So.2d 125 (Fla. 1993). 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, he is subject to the drug trafficking statute.

ARGUMENT

THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *HAYES V. STATE* AND *OVERSTREET V. STATE*.

Under Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. In *Reaves v. State*, 485 So. 2d 829 (Fla. 1986), this Court held that the only facts relevant to the decision to accept or reject petitions for review are those facts contained within the four corners of the majority decision; neither the dissenting opinion nor the record may be used to establish jurisdiction. The State respectfully contends that the decision below conflicts with this Court's decisions in *Hayes v. State*, 24 Fla. L. Weekly S467 (Fla. October 7, 1999), and *Overstreet v. State*, 629 So.2d 125 (Fla. 1993).

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, supra*. 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.

In sum, section 893.13, Florida Statutes, prohibits the unlawful possession of any Schedule II drug or any **mixture containing a Schedule II drug.**

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. However, the district court then overlooked the plain language of the statute, which also prohibits the possession of four grams or more of **any mixture containing such substance,** and found that Travis could not be in violation of the drug trafficking statute, §893.135(1)(c)1, Fla. Stat. (1997). Contrary to the district court's holding, the fact that the "mixture" in this case, the Roxicet tablets, contain only .15 grams 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*.

This can best be illustrated by using this Court's language in

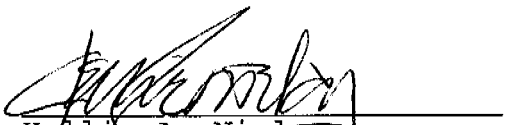
Hayes, and substituting the facts in this case. There, the Court stated "[i]f the Lorcet tablets that Hayes possessed are properly classified as Schedule II substances, Hayes would be subject to a minimum mandatory term of imprisonment of twenty-five years and a mandatory fine of $500,000." *Id.* Here, 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. 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 to accept jurisdiction in this case.

RESPECTFULLY SUBMITTED,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



Kellie ~~A. Nielan~~
Assistant Attorney General
FL Bar No. 618550
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

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 1 day of May, 2000.

Kellie ~~A. Nielan~~
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. _____
5 DCA Case No. 5D99-1264

DOMINA TRAVIS,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 618550
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ann M. Phillips, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) The sentence imposed pursuant to the Prison Release Reoffender Act ("PRRA"), 775.082(8), Florida Statutes (1997), is affirmed. *See Speed v. State*, 732 So. 2d 17 (Fla. 5th DCA 1999), *rev. granted*, 743 So. 2d 15 (Fla. 1999). We certify the question whether the act violates the constitutional principle of separation of powers.

AFFIRMED; QUESTION CERTIFIED. (PETERSON and THOMPSON, JJ., and ORFINGER, M., Senior Judge, concur.)

* * *

Workers' compensation—Retaliatory discharge—Plaintiff presented sufficient evidence that employer and supervisors knew that he was applying for workers' compensation when they fired him to merit submission to jury—Error to enter directed verdict in favor of employer—Evidence—Error to exclude evidence of similar firings of other employees under similar circumstances

CHARLES N. SILVERS, Appellant, v. TIMOTHY J. O'DONNELL CORP., a/k/a O'DONNELL CORP., etc., Appellee. 5th District. Case No. 5D99-1520. Opinion filed February 25, 2000. Appeal from the Circuit Court for Orange County, Lawrence R. Kirkwood, Judge. Counsel: Bernard H. Dempsey, Jr. and Brian D. Solomon, of Dempsey and Sasso, P.A., Orlando, for Appellant. Christopher C. Cathcart and Marc P. Ossinsky, of Ossinsky & Cathcart, P.A., Winter Park, for Appellee.

(SHARP, W. J.) Silvers appeals from a final judgment in favor of Timothy J. O'Donnell Corporation, based on a directed verdict entered at the close of the Silvers' case at trial. The trial court ruled that Silvers had "offered no evidence of O'Donnell's motivation or timing of the decision to terminate Plaintiff relative to his filing a workers compensation claim." Silvers brought suit against O'Donnell for violation of section 440.205, Fla. Stat., which provides:

> No employer shall discharge, threaten to discharge, intimidate or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under [this law].

We reverse.

We think that, although it was minimal and largely circumstantial, Silvers presented sufficient evidence to merit submission to the jury that his employer and supervisors knew that he was applying for workers compensation when they fired him. At the time he was terminated they were aware of his injury suffered on December 12th, for which he called in sick on December 13th. Because O'Donnell Corporation was a small business, the inference is available that Silvers' supervisor and the business owner were aware that on December 14th, when he came to their business office, he was referred to Central Care for medical care and was in the process of seeking compensation coverage. At noon, when he returned with a work release and showed it to his supervisor, he was fired, allegedly for being late on previous occasions. The reason for his discharge was disputed in the record.

In addition, it appears that at least three other employees of O'Donnell had allegedly been fired for bogus reasons after they filed claims for workers compensation. The substance of their testimonies is in the record in the form of affidavits, and they were listed as witnesses. However, the trial court ruled summarily that they would not be permitted to testify. We think this was error. Similar firings under similar circumstances would be extremely relevant to this case. *See Duckworth v. Ford*, 83 F. 3d 999 (8th Cir. 1996); *Hawkins v. Hennepin Technical Center*, 900 F. 2d 153 (8th Cir.), cert. denied 498 U.S. 854 (1990); *Kunzman v. Enron Corp.*, 941 F. Supp. 853 (N.D. Iowa 1996).

REVERSED AND REMANDED. (DAUKSCH and COBB, JJ., concur.)

* * *

Criminal law—Sentencing—Prison Release Reoffender Act—Constitutionality—Conflict certified

KIRK CANO, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 5D99-1305. Opinion filed February 25, 2000. Appeal from the Circuit Court for Seminole County, Kenneth R. Lester, Jr., Judge. Counsel: James B. Gibson, Public Defender, and George D. E. Burden, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) AFFIRMED. *See Speed v. State*, 732 So. 2d 17 (Fla. 5th DCA), *review granted*, 743 So. 2d 15 (Fla. 1999). We certify conflict with *State v. Wise*, 744 So. 2d 1035 (Fla. 4th DCA), *review granted*, 741 So. 2d 1137 (Fla. 1999), and *State v. Cotton*, 728 So. 2d 251 (Fla. 2d DCA 1998), *review granted*, 737 So. 2d 551 (Fla. 1999). (COBB, PETERSON and GRIFFIN, JJ., concur.)

* * *

Criminal law—Error to deny motion to dismiss charge of trafficking in Oxycodone where charge was based on possession of thirty Roxicet tablets which together contained only .15 gram of Oxycodone

DOMINA TRAVIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 5D99-1264. Opinion filed February 25, 2000. Appeal from the Circuit Court for Orange County, Margaret T. Waller, Judge. Counsel: James B. Gibson, Public Defender, and Thomas J. Lukashow, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Domina Travis appeals the denial of her motion to dismiss the information charging her with trafficking in Oxycodone, a controlled substance described in subsection 893.03(2), Florida Statutes (1997). The Oxycodone was contained in 30 Roxicet tablets that she obtained from a pharmacy by presenting a false prescription.

Oxycodone is a Schedule II substance, the possession of four or more grams of which subjects one to prosecution pursuant to subsection 893.135(1)(c)1, Florida Statutes. Each Roxicet tablet contains five milligrams of Oxycodone and 325 milligrams of Acetaminophen (Tylenol), a non-controlled substance. Because Travis' possession of 30 tablets of Roxicet contained only fifteen one-hundredths (.15) of a gram of Oxycodone, she could not have been in violation of the drug trafficking statute.

We note that the trial court was without the benefit of *Hayes v. State*, 24 Fla. L. Weekly S467 (Fla. Oct. 7, 1999). *Hayes* specifically overruled this court's decision in *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996), *rev. denied*, 694 So. 2d 737 (Fla. 1997), which the trial court relied on in denying Travis' motion to dismiss.

The denial of the motion to dismiss the count charging Travis with trafficking in Oxycodone is reversed.

REVERSED. (COBB and GRIFFIN, JJ., concur.)

* * *

Criminal law—Sentencing—Habitual violent felony offender—Predicate convictions—Out-of-state convictions—State sufficiently established that predicate Alabama conviction for robbery in the second degree was qualifying offense under habitual violent offender statute where it showed that elements and penalties for Alabama offense were substantially similar to Florida robbery offense—State not required to identify defendant through use of expert on fingerprint analysis, although state indicated that it would do so, where state provided court with copy of Alabama judgment which bore both defendant's name and social security number

CEDRIC GUION, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 5D99-467. Opinion Filed February 25, 2000. Appeal from the Circuit Court for Osceola County, Roger McDonald, Judge. Counsel: Eric J. Dirga, P.A., Orlando, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Cedric Guion appeals his sentences as an habitual violent offender pursuant to section 775.084, Florida Statutes (1997). Guion asserts that an Alabama conviction for second degree robbery does not qualify as a prior offense to habitualize and that the state failed to show that he was the subject of that conviction. We affirm.

Guion argues that the state never established that the predicate Alabama conviction used to classify him as an habitual violent felony offender was a "qualified" offense pursuant to section