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IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

DOMINA TRAVIS,

Respondent.

5th DCA Case No. 5D99-1264

Supreme Court Case No. SC00-902

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

THOMAS J. LUKASHOW
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COUNSEL FOR RESPONDENT

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	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

Respondent appealed the denial of his motion to dimiss 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 in possession of the Respondent.

The court found that because the Roxicet tablets contained only .15 grams of Oxycodone, Travis could not have been in violation of the trafficking statute. 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.

SUMMARY OF ARGUMENT

The decision of the district court does not conflict with this court's decision in Hayes, supra. The controlled substance in Hayes was found to be a Schedule II and Schedule III controlled drug. The decision of the district court involved a controlled substance which is not a Schedule II and Schedule III drug.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT.

This Court has jurisdiction under Article V, Section (3)(b)(3) of the Florida Constitution only where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. Additionally, this Court has held that such conflict must be express and direct and "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)

The Petitioner argues in its Brief on Jurisdiction that the decision of the Fifth District Court conflicts with this Court's decision in Hayes v. State, 750 So. 2d 1 (Fla. 1999).

The Respondent respectfully disagrees. In Hayes, this Court held that because the hydrocodone contained in Lorcet tablets is both a schedule II and Schedule III substance it was not subject to Section 893.135(1)(c)1, Fla. Statutes (1997) (the drug trafficking statute) However, the decision of the Fifth District did not address Lorcet tablets but rather Roxicet tablets containing Oxycodone which is not a Schedule II and III substance. Thus, this Court's decision does not expressly and directly conflict with the opinion of the Fifth District. Moreover, Petitioner's

Motion for Rehearing / Motion for Rehearing Em Banc which asserted that the Fifth District Court misapprehended Hayes was denied. (Appendix A and B) Clearly, no express and direct conflict exists between this Court's decision in Hayes and the decision of the Fifth District Court.

In Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958), this Court held:

> We have heretofore pointed out that under the constitutional plan the powers of this Court to review decision of the district courts of appeal are limited and strictly prescribed... It was never intended that the district courts of appeal should be intermediate courts... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Because the Fifth District Court is a court of final appellate jurisdiction and given the very limited and restricted basis for this Court's exercise of its discretionary jurisdiction based upon conflict, it cannot be said that Petitioner has established good cause for the exercise of that jurisdiction.

respectfully requests this Court to decline jurisdiction in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Ms. Domina Travis, Jail # 00-007172, Orange County Jail, P.O. Box 4970, Orlando, Florida 32802, on this 22 day of May, 2000.

THOMAS J. LUKASHOW
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

THOMAS J. LUKASHOW
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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STATE OF FLORIDA ,	)	
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vs.	)	
	)	Supreme Court Case No. SC00-902
DOMINA TRAVIS,	)	
	)	
Respondent.	)	
_____	)	

APPENDIX

Appendix A -- Order denying Motion For Rehearing/Motion for Rehearing En Banc

Appendix B -- Motion for Rehearing/Motion For Rehearing En Banc

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

99-579
TC

DOMINA TRAVIS,
Appellant,

v. CASE NO. 5D99-1264

STATE OF FLORIDA,
Appellee.

APR 13 2000

PUBLIC DEFENDER'S OFFICE
7TH C.R. APP. DIV.

_____/

DATE: April 13, 2000

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR REHEARING/MOTION FOR REHEARING EN BANC, filed February 28, 2000, is denied.

I hereby certify that the foregoing is (a true copy of) the original Court order.

FRANK J. HABERSHAW, CLERK

cc: Office of the Attorney General, Daytona Beach
Office of the Public Defender, 7th JC

PD

99-579

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

DOMINA TRAVIS,

Appellant,

v. CASE NO. 5D99-1264

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING/MOTION FOR REHEARING EN BANC

Appellee, State of Florida, moves this court pursuant to Florida Rules of Appellate Procedure 9.300, 9.330, and 9.331 to rehear its February 25, 2000 opinion in this case, wherein it reversed the order of the trial court dismissing trafficking charges against Travis, and as grounds therefor states:

1. In its opinion, this 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) grams of Oxycodone, she could not have been in violation of the drug trafficking statute. In reaching this conclusion for a Schedule II drug, appellee submits that this court overlooked the plain language of section 893.135(1)(c)1 and misapprehended the Florida Supreme Court's holding in *Hayes v. State,* 24 Fla. L. Weekly S467 (Fla. October 7, 1999.

2. Section 893.135(1)(c)1 states:

> Any person who knowingly sells, purchases, manufactures delivers or brings into this state, or who is knowingly in actual or constructive possession of 4 grams or more of any morphine, opium, **oxycodone**, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroine, as described in s. 893.03(1)(b) or (2)(a), **or 4 grams or more of any mixture containing any such substance or mixture**, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs."

(Emphasis supplied). The *Hayes* case did not turn solely on the amount of illegal 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. The *Hayes* Court specifically stated:

> If 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 25 years and a mandatory fine of $500,000. *See,* 893.134(1)(c)1. On the other hand, if the Lorcet tablets Hayes possessed constitute a Schedule III substance, then Hayes could not be prosecuted under the trafficking statute.

Id. The *Hayes* Court went on to hold:

> We hold that because the Lorcet tablets in this case contain less than fifteen milligrams of **hydrocodone** per dosage unit, **the Lorcet tablets Hayes possessed are Schedule III substances.** Because section 893.135(1)(c)1 prohibits the unlawful possession **of any Schedule I or Schedule II drug, or any**

> **mixture containing a Schedule I or Schedule II drug,** that section does not apply to Hayes actions in this case.

Id. (Emphasis supplied).

3. As this court found, **Oxycodone** is a Schedule II substance. Unlike **Hydrocodone,** there is no provision in Schedule III for certain mixtures containing a limited amount of it. §893.03(3), Fla. Stat. (1999). The fact that the Roxicet tablets in this case contain only .15 gram of **Oxycodone** does not and cannot convert them from a Schedule II substance into a Schedule III substance, as was the case with the **Hydrocodone** in *Hayes.* Thus, "because section 893.135(1)(c)1 prohibits the unlawful possession of any Schedule I or **Schedule II drug,** or **any mixture containing a** Schedule I or **Schedule II drug,**" that section clearly applies to Travis' case. Consequently, her possession of four or more grams of a mixture containing Oxycodone, a Schedule II drug, clearly puts her in violation of the drug trafficking statute.

4. Pursuant to the reasoning and holding in the instant case, it is irrelevant what statutory schedule a controlled substance falls into. The only thing that is relevant is the amount of the controlled substance in the mixture. Thus, a person charged with trafficking in heroin could have the substance analyzed, and escape trafficking charges based on the fact that it contained only a small amount of heroin compared to the substance the heroin had been cut with. This is contrary to section 893.135(1)(c)1, Florida Statutes, and a misapprehension of *Hayes, supra.* The same would be

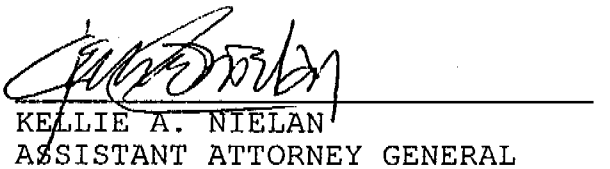
true of all other controlled substances set forth in section 893.135(1)(c)1 that are contained only in Schedule I or Schedule II, thus rendering the language "any mixture containing a Schedule I or Schedule II drug" without meaning or effect.

5. Based on the foregoing, I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

WHEREFORE, the state respectfully requests that this court grant rehearing or rehearing en banc, withdraw its February 25, 2000 opinion in the instant case, and issue a new opinion affirming the order of the trial court denying Travis' motion to dismiss the trafficking charges.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing/Motion for Rehearing en banc has been furnished by delivery to Thomas J. Lukashow, via the mail box of the Office of the Public Defender at the Fifth District Court of Appeal, this 28 day of February, 2000.

Kellie A. Nielan
Of Counsel