IN THE SUPREME COURT OF THE STATE OF FLORIDA

DANIEL LOUIS MOORE,)
)
Appellant/Petitioner,)
) 5th DCA Case No. 5D05-441
)
) Supreme Court Case No.
STATE OF FLORIDA,) SC05-1779
)
Appellee/Respondent.)
___________________________)

APPEAL FROM THE DISTRICT COURT
OF APPEAL - FIFTH DISTRICT

PETITIONERS' REVISED BRIEF ON JURISDICTION

JAMES S. PURDY
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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In 1987 and 1993, the Appellant was convicted of several counts of gross sexual imposition in the State of Ohio. He was sentenced on those charges, served his time, and was released. He was not in custody in Florida on or before January 1, 1999, the effective date of the "Jimmy Ryce Act" (the Act).

In 2002, Appellant was arrested in Florida for failing to properly register as a sexual offender. He entered a plea of no contest, and was sentenced to a term of five years. Two years later, he moved to withdraw his plea based upon the decision in Giorgetti v. State, 868 So.2d 515 (Fla. 2004), and that relief was granted. He was then released from the Department of Corrections to the custody of the Putnam County Sheriff pending either bail or trial on that charge.

While in jail, Appellant re-negotiated a no contest plea to the charge in exchange for a sentence of time served in the exact amount of time, 1017 days, which he had served. Upon such sentence imposed on December 6, 2004, Appellant was discharged, but was held unlawfully at the county jail for three additional days pending "release paperwork". On December 8, 2004, Appellant was finally released and was under no restriction or supervision.

Appellant was then living at liberty in society, with his relatives, from December 8, until December 17, 2004, nine days later. This is a crucial fact to the

issues presented herein. On that date, Sheriff's Deputies went to the private home where Appellant was located, and took him back into custody using a ruse, and not displaying any warrant or indicating that they had one. Evidence at the hearing below indicated that DOC issued it's own warrant to arrest Appellant, also on the 17th, and directed it to the County Sheriff, to seize Appellant. The sole purpose of this seizure was to institute proceedings under the Act.

Appellant was immediately transferred from the Putnam County Jail to the Florida Civil Commitment Center in Arcadia (FCCC). On December 18, 2004 (the next day), Appellant was interviewed by two State psychologists, Drs. DeClue and Raymond, and declined to speak with them. The two doctors then made assessments based on written records, and recommended to the Multi-Disciplinary Team of the Department of Children and Families (DCF), that Appellant be subject to the Act. Based thereon, On December 20, 2004, DCF recommended to the Office of the State Attorney that the latter file a petition for involuntary commitment, which it did on that same day.

The State presented the Petition directly to Circuit Court Judge Edward Hedstrom in Putnam County, who thereupon issued an Order Determining Probable Cause and a Warrant for Custodial Detention against the Appellant herein, also on that same day, December 20, 2004. That Warrant now holds

Appellant, unlawfully he asserts, and he is still in custody at the FCCC.

On December 21, 2004, Appellant filed an "Emergent Motion to Vacate Warrant for Custodial Detention And to Recind Order Determining Probable Cause Due to Lack of Jurisdiction, And/or Petition for Writ of Habeas Corpus." That came for hearing before the Circuit Court on December 29, 2004, and as a result, the trial court issued a written order denying the motion on January 12, 2005.

On February 11, 2005, Appellant filed an "Emergent Petition for Writ of Certiorari, And/or Writ of Prohibition, to the Seventh Judicial Circuit Court" with the Fifth District Court of Appeal, seeking review of the denial of the motion. That Court issued its written opinion denying the relief sought on August 26, 2005, and this appeal followed.

SUMMARY OF ARGUMENT

Petitioner invokes the discretionary jurisdiction of this Court to review the decision of the Fifth District court of Appeal in the above-styled cause. Jurisdiction of the Florida Supreme Court is invoked pursuant to ***Fla. R. App. P. 9.030(a)(2)(A)(iv)***. The decision of the district court is in direct conflict with the decision of the Second District Court of Appeal in *Gordon v. Regier, 839 So.2d 715*

(Fla. 2nd DCA 2003), rev. denied, 890 So.2d 1115 (Fla. 2004). Specifically, the challenged opinion states:

> "For support, he [Appellant] relies primarily on the opinion of the Second District in Gordon v. Regier, 839 So.2d 715 (Fla. 2nd DCA 2003), rev. denied, 890 So.2d 1115 (Fla. 2004). For reasons set forth below, we disagree with that ruling.

Thereafter, the opinion goes on to state:

> Additionally, the ruing in Gordon cannot be reconciled with this court's opinion State v. Ducharme, 892 So.2d 1133 (Fla. 5th DCA 2004), rev. dismissed, 895 So.2d 405 (Fla. 2005) (Ducharme II), and the opinion of the Supreme Court of Florida in Tanguay v. State, 880 So.2d 533 (Fla.2004), upon which, in part, Ducharme II relies.

Furthermore, although argued in the briefing, the opinion below makes no mention of this Court's opinion in *Atkinson v. State, 831 So.2d 172 (Fla. 2002)*, the leading case defining the "custody" requirement for applicability of the Act. As the Appellant here had been properly released, was not "in custody", and was only unlawfully seized for the purpose of proceeding under the Act, the opinion below conflicts with *Atkinson, supra*.

Lastly, should jurisdiction be accepted, Appellant also seeks review of the second point argued and ruled upon below: The petition should have been dismissed because, by terms of the statute, the Act was inapplicable to him. Appellant argues that the court below misapplied the holding in *Hale v. State, 891 So.2d 517 (Fla. 2004)*, because the facts herein are significantly different from that

case, and *Hale* does not resolve the specific issue of applicability of the Act which this case raises as a matter of first impression before this Court.

The result of this conflict is a deprivation of due process and equal protection of the laws, where similarly situated individuals in other Districts go free, but this Appellant has been detained for trial for involuntary commitment.

ARGUMENT

THE OPINION OF THE FIFTH DISTRICT COURT IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE SECOND DISTRICT IN ***Gordon v. Regier, 839 So.2d 715 (Fla. 2nd DCA 2003)***, ***rev. denied, 890 So.2d 1115 (Fla. 2004)***, AND ALSO CONFLICTS WITH THE DECISION OF THIS COURT IN ***Atkinson v. State, 831 So.2d 172 (Fla. 2002),*** WHICH IT FAILS TO ADDRESS ALTHOUGH PRESENTED BELOW. THE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT MAY THEREFORE BE INVOKED UNDER ***Fla. R. App. Pro. 9.030(a)(2)(A)(iv)***.

This Court has the discretion to review the decision of the district court under ***Fla. R. App. P. 9.030(a)(2)(A)(iv)***; because the decision of the district court in this case is in express and direct conflict with the holding of the Second District in *Gordon, supra*., and further conflicts with the holding of this Court in *Atkinson, supra*.

Put simply, by it's holding below, the Fifth District has gone beyond the holdings of the authorities it cites, and extended applicability of the Jimmy Ryce Act to persons who are lawfully released from custody, living free in society, and has authorized their illegal seizure and detention purely for the purpose of prosecution under the Act. The cases upon which the Court below relied in its opinion all involve persons physically "in custody", even if there were questions of the legality of the "custody". Importantly, those cases reflect continuous custody, that is, individuals who were held past their release date, and directly transferred to civil detention pending the five day emergent provisions of Section 394.9135, Florida Statutes. None, except *Gordon*, present facts of individuals at liberty being seized for purposes of the Act. This is in obvious contravention of both the terms of the statue and this Court's holding in *Atkinson, supra*.

Appellant argues that the Fifth District ignored these crucial factual distinctions between *Gordon* and the other cases cited, in choosing to authorize the illegal seizure and detention of the Appellant for prosecution under this Act. That case held that the Act was not applicable to a person who was released on conditional release, put on a Greyhound bus, and sent to live in civilian society (Id. at 719). The court held (Id.):

> Thus, Mr. Gordon may have been under the supervision of the DOC, but he was not being held in total confinement by the DOC at the time

he was taken into custody pursuant to the DCF's warrant.

> There is no provision in the Act for commencing proceedings against a person under the Act where he or she is not in custody and is, in fact, living in society. Rather, the Act contemplates that pursuant to section 394.9135(1), when the release from total confinement becomes immediate, the person will be, at that time, transferred to the custody of the DCF to be held in a secure facility. Clearly, that person would be securely guarded during the transfer to the secure facility. Under section 394.9135(1), a person against whom involuntary civil commitment proceedings are appropriately commenced will always be in custody immediately prior to the commencement of the proceedings. Accordingly, we hold that section 394.925, which states that the Act applies to all persons "currently in custody" or "sentenced to total confinement in the future," in conjunction with the other provisions in the Act, provides that involuntary civil commitment proceedings may be brought only against those persons in custody at the moment the proceedings are commenced; there is no provision in the Act ***720** for proceeding against those persons who are on supervision but no longer in custody. *See* Siddal, 772 So.2d 555.

Here, Appellant was not even under supervision - he was completely free upon his no-contest/time-served plea, with no other liabilities for his alleged, non-qualifying offense. Otherwise, the facts are directly akin to those of *Gordon*, and that case should have been seen as controlling.

As set forth in the Summary, above, should jurisdiction be accepted, Appellant also seeks review of the second point argued and ruled upon below: the petition should have been dismissed because, by terms of the statute itself, the Act was inapplicable to him. Appellant argues that the court below misapplied the holding in *Hale v. State, 891 So.2d 517 (Fla. 2004)*, because the facts herein are

significantly different from that case, and *Hale* does not resolve the specific issue of applicability of the Act which this case raises as a matter of first impression before this Court.

The *Hale* opinion settled the question of whether an individual had to be serving a sentence for a qualifying sex offense at the time commitment proceedings are brought against him. This Court clearly said "no" - being in custody for any offense was sufficient, if the individual had prior, qualifying offenses. However, that decision hinged on the fact that Hale himself was in custody prior to January 1, 1999, the effective date of the Act, and therefore presented no *Atkinson* issue. Appellant argues that where a person with old, qualifying offenses was not in custody as of the effective date of the Act, and later goes into custody on a non-sexually related offense, then by its terms, the Act is not applicable to him.

Section 394.925, Florida Statutes reads:

> Applicability of act - This part applies to all persons currently in custody who have been convicted of a sexually violent offense, as that term is defined in s. 394.912(9), as well as to all persons convicted of a sexually violent offense and sentenced to total confinement in the future.

Previously, the second half of the section did not contain the phrase "and sentenced to total confinement". The legislature recognized that it was possible that

someone could be "convicted of a sexually violent offense" and sentenced to supervision instead of "total confinement". Therefore, the phrase "and sentenced to total confinement" was added as a revision. The Section previously read as follows:

> 916.46 Applicability of Act. - Sections 916.31 - 916.49 apply to all persons currently in custody who have been convicted of a sexually violent offense, as that term is defined in s. 916.32(8), as well as to all persons **convicted** of a sexually violent offense **in the future**. [Emphasis added]

This made it crystal clear that the legislature required a recent, sexually violent conviction, post-1/1/99, in order to commit an individual who was not in custody prior thereto.

This distinguishes this case from *Hale*, and causes the lower court's opinion here to come into conflict with *Atkinson, supra*., concerning applicability of the Act and being "currently in custody" as of the effective date of the Act. While the application of *Atkinson* has been narrowed in subsequent decisions, it remains law that the Act required lawful custody at the time the Act became effective.

The result of this conflict is a deprivation of due process and equal protection of the laws, where similarly situated individuals in other Districts go free, but this Appellant has been unlawfully detained for trial and for potential involuntary commitment for an indefinite period.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Appellant respectfully requests that the Florida Supreme Court accept jurisdiction to review the ruling of the district court in this case.

Respectfully submitted,
JAMES S. PURDY, PUBLIC DEFENDER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Charles J. Crist, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and was mailed to: Mr. Daniel L. Moore, Florida Civil Commitment Center, 13613 S.E. Highway 70, Arcadia, FL 34266 on this 7th day of October, 2005.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14 point Times New Roman.

____
JOHN M. SELDEN
ASSISTANT PUBLIC DEFENDER

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APPENDIX TO
PETITIONER'S REVISED BRIEF ON JURISDICTION

EXHIBIT A - Opinion of the Fifth District Court of Appeal, Moore v. State, Case No. 5D05-441, August 26, 2005.