

IN THE SUPREME COURT OF FLORIDA

GENE ROBERT SIMS,

Petitioner,

v.

CASE NO. SC05-400

5TH DCA CASE NO. 5D02-2401

STATE OF FLORIDA,

5D02-2448

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Fifth District Court's opinion in Sims v. State, 869 So. 2d 45 (Fla. 5th DCA 2004), sets forth the following relevant facts:

Mr. Sims was driving his wife's truck when he struck and killed Bernell Williams (the "Victim"). For reasons not specified Mr. Sims left the scene of the accident without ever stopping the truck. He was charged with violating section 316.027(1)(b), Florida Statutes (2001), and found guilty as charged in the information.

Sheila Asbury, one of the passengers in the Sims vehicle, testified that the occupants of the truck were looking for drugs, having already smoked crack cocaine and drunk beer prior to the accident. She stated that before Mr. Sims hit the Victim, she saw the Victim laying on top of a bicycle in the middle of the road. She described the sounds made by the accident as a "loud dragging like metal . . . it was dragging bad." Because the Victim was laying in the middle of the road, Mr. Sims had only two choices. He could either hit the Victim or hit the guardrail on the side of the road. In any event, the trial court eventually determined that the accident was virtually unavoidable.

The medical examiner testified at trial that at the time of his death the Victim had a blood alcohol level of .196, and that he had been struck while he was lying in the street. He theorized that the Victim had fallen off of his bicycle and was lying in the middle of the road when he was struck. The medical examiner further testified that the victim's death was "instantaneous" upon impact, or certainly "within a second or

two." The autopsy revealed that the Victim had lacerations of the head, neck, and face; bruises and abrasions on the lower chest; skin rubbed off from large areas of his arms and from his lower back to the top of his shoulders; a torn scalp; crushing injuries to his entire chest and to the right side of his abdomen; a broken right pelvis; every rib fractured on both sides of his torso; a crushed and torn liver; a crushed and torn heart; extensive lung injuries; a broken back and neck; and a crushed skull with extensive injuries to the brain. The doctor concluded that the Victim's injuries were consistent with his being hit, dragged, and run over.

Prior to sentencing a pre-sentence investigation was prepared which reflected a minimum sentence of 8 months incarceration. At the sentencing hearing, however, the State argued in favor of adding 120 victim injury points to Mr. Sims' Criminal Punishment Code scoresheet. The trial judge agreed, and but for a downward departure, the result was a lowest permissible incarcerative sentence of eight years. Because the trial judge found, among other things, that the accident was "nearly unavoidable," he downwardly departed, and sentenced Mr. Sims to five years in the custody of the Department of Corrections, followed by five years of probation.

Id. at 45-46. At issue in the appeal was the assessment of the victim injury points. The appellate court noted that imposition of victim injury points was within the sound discretion of the trial court. Id. at 47. The court found the instant case to be factually similar to Mays v. State, 747 So. 2d 459 (Fla. 4th DCA

1999), and upheld the imposition of the points. Specifically, the court wrote, "we conclude that there was a sufficient causal connection between the leaving of the accident scene and the death to justify the imposition of victim injury points, and that the trial judge did not abuse his discretion in doing so." Id. at 48.

The court's opinion next addressed whether other district courts of appeal had held differently. It wrote:

Mr. Sims has brought to our attention two cases from the Second District Court of Appeal that he believes stand for the proposition that victim injury points should not be assessed for the crime of which he was convicted. An examination of these cases, Rodriguez v. State, 684 So. 2d 864 (Fla. 2d DCA 1996), and Geary v. State, 675 So. 2d 625 (Fla. 2d DCA), review denied, 680 So. 2d 422 (Fla. 1996), however, reflects that our sister court concluded that in those cases there was no causal connection between the crimes and the victim injury. In the present case, however, as we have indicated, there is a nexus between the death of the Victim and the crime. Cf., Schuetz v. State, 822 So. 2d 1275 (Fla. 2002); Triplett v. State, 709 So. 2d 107 (Fla. 5th DCA 1998).

Id.

The opinion of the Fifth District Court of Appeal issued March 5, 2004. Mandate issued on April 26, 2004, after the appellate court denied the defense's motion for rehearing or

clarification or certification. On February 25, 2005, Petitioner filed a *pro se* pleading he entitled "Petition to Invoke All Writs Jurisdiction." (Petition). On August 10, 2005, this Court entered an order *sua sponte* treating the Petition as a notice to invoke discretionary jurisdiction and dismissing the notice as being untimely filed. Petitioner filed a motion for reinstatement, and on September 29, 2005, this Court ordered appellate counsel for Petitioner and counsel for the State to file responses, and both sides complied. Additionally, Petitioner filed a reply to those responses.

On December 19, 2005, this Court entered an order reinstating the case and ordering each side to file jurisdictional briefs. Respondent's brief on jurisdiction follows.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in this case. Petitioner has failed to demonstrate that the decision of the court below conflicts with any decision of this Court or the other district courts of appeal.

ARGUMENT

SINCE THE DECISION BY THE DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH ANY OTHER CASE, JURISDICTION SHOULD NOT BE ACCEPTED.

This Court has jurisdiction to review the decision of a district court when that decision "expressly and directly conflicts" with a decision of either this Court or of another district court. Art. V, § 3(b)(3), Fla. Const. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). The Petitioner in this case has failed to show such a conflict.

Additionally, in Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

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.

Given that this case has taken an unusual path reaching this Court, some background facts would help. The opinion of the Fifth District Court of Appeal was issued on March 5, 2004. Sims v. State, 869 So. 2d 45 (Fla. 5th DCA 2004). Mandate issued on April 26, 2004, after the appellate court denied the defense's motion for rehearing or clarification or certification. Almost a year later, on February 25, 2005, Petitioner filed a *pro se* pleading he entitled "Petition to Invoke All Writs Jurisdiction." (Petition). This Court entered an order *sua sponte* treating the Petition as a notice to invoke discretionary jurisdiction and dismissing the notice as being untimely filed. Petitioner filed a motion for reinstatement, and on September 29, 2005, this Court ordered appellate counsel for Petitioner and counsel for the State to file responses, and both sides complied. Additionally, Petitioner filed a reply to those responses (Reply).

In Petitioner's Reply, he included a letter (he refers to letter as Exhibit A) he received from counsel which stated that Petitioner already had the opinion from the appellate court and that counsel now had the mandate from the appellate court. This letter was dated May 4, 2004, which was only a few days after mandate was issued. Exhibit B attached to Petitioner's Reply

was the mail log from prison which showed Petitioner receiving mail on May 7, 2004, from counsel. Petitioner waited until February 25, 2005, to file the notice to invoke jurisdiction. While aware this Court reviewed these points, the State respectfully resubmits that this notice should be found to be untimely filed.

As to the issue of jurisdiction, Petitioner asserts that the instant opinion conflicts with Rodriguez v. State, 684 So. 2d 864 (Fla. 2d DCA 1996), and Geary v. State, 675 So. 2d 625 (Fla. 2d DCA), review denied, 680 So. 2d 422 (Fla. 1996). The opinion of the lower court did acknowledge those cases; however, it noted that those cases held that there must be a causal connection between the crimes and the victim injury. The Fifth District Court of Appeal then distinguished those cases writing that in the instant case, "[t]here is a nexus between the death of the Victim and the crime." Sims, 869 So. 2d at 48.

Clearly, referencing cases, favorably setting out the law in those cases, and distinguishing the facts of the instant case should not be found to create express and direct conflict.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court does not accept jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished by U.S. mail to Gene Robert Sims, 140 Sweetgum Road, E. Palatka, FL 32131, this _____ day of March 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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