IN THE SUPREME COURT OF FLORIDA

FRANKLIN W. NOOE,

Petitioner,

v. CASE NO. SC05-514

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form. It can be found at Nooe v. State, 892 So.2d 1135 (Fla. 5th DCA 2005).

With respect to the issue before the Court, Respondent (hereinafter the State) offers the following relevant additions to Petitioner's (hereinafter Nooe) statement of the case and facts.

Nooe raised the present claim, relying on State v. Diaz, 814 So.2d 466 (Fla. 3d DCA 2002), in his "Addendum to Renewed Motion for Judgment of Acquittal and/or Judgment Not Withstanding the Verdict." (R. Vol. II at pp. 365-66). In the Addendum, Nooe also raised a claim of fundamental error based on an alleged violation of the statute of limitations. (R. Vol. II at pp. 366).

At the hearing on post-trial motions, the State argued that, to the extent Nooe's arguments had not been raised prior to the State's close of evidence, those arguments had been waived. (Post-Trial Motions Transcript at p. 21). Nooe responded that the statute of limitations could only be knowingly waived, and that it had not been.[1] Nooe did not contest that the alleged

[1]The alleged violation of the statute of limitations was not argued on appeal. Nooe, 892 So.2d at 1141.

defect in the information had been waived. (Post-Trial Motions Transcript at p. 26).

SUMMARY OF ARGUMENT

In the instant case, Nooe did not timely raise the alleged failure by the State to charge Nooe with grand theft based on separate takings pursuant to one scheme or course of conduct, and the Fifth District did not address an alleged failure by the State to charge Nooe with grand theft based on separate takings pursuant to one scheme or course of conduct. Therefore, Nooe has not shown any express and direct conflict between the decision below and the decisions in State v. Diaz, 814 So.2d 466 (Fla. 3d DCA 2002); State v. Davis, 890 So.2d 1242 (Fla. 4th DCA 2005); or, with this Court's decision in Hearn v. State, 55 So.2d 559 (Fla. 1951).

ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS IN STATE V. DIAZ, 814 SO.2D 466 (FLA. 3D DCA 2002); STATE V. DAVIS, 890 SO.2D 1242 (FLA. 4TH DCA 2005); AND, HEARN V. STATE, 55 SO.2D 559 (FLA. 1951). (Restated).

Jurisdiction

The State maintains that Nooe has not shown any express and direct conflict between the decision below and the decisions in State v. Diaz, 814 So.2d 466 (Fla. 3d DCA 2002); State v. Davis, 890 So.2d 1242 (Fla. 4th DCA 2005); or, with this Court's decision in Hearn v. State, 55 So.2d 559 (Fla. 1951).

Standard of Review

"If the ruling consists of a pure question of law, the ruling is subject to de novo review. See, e.g., Philip J. Padovano, Florida Appellate Practice § 9.4 (2nd ed. 1997)." State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001). If the ruling consists of a mixed question of law and fact addressing other issues, the ruling must be sustained if the trial court applied the right rule of law and its ruling is supported by competent substantial evidence. Id.

Argument

Nooe argues that the Fifth District's decision permitting the State to proceed and obtain a conviction under a single

count of grand theft where the evidence showed that any such theft involved separate incidents of taking expressly and directly conflicts with Diaz, Davis, and Hearn. The State respectfully disagrees.

Initially, the State points out that the opinions in Diaz, Davis, and Hearn, each address alleged defects in charging documents that were timely raised. Nooe raised the present claim, relying on State v. Diaz, 814 So.2d 466 (Fla. 3d DCA 2002), in his "Addendum to Renewed Motion for Judgment of Acquittal and/or Judgment Not Withstanding the Verdict." (R. Vol. II at pp. 365-66). In the Addendum, Nooe also raised a claim of fundamental error based on an alleged violation of the statute of limitations. (R. Vol. II at pp. 366). At the hearing on post-trial motions, the State argued that, to the extent Nooe's arguments had not been raised prior to the State's close of evidence, those arguments had been waived. (Post-Trial Motions Transcript at p. 21). Nooe responded that the statute of limitations could only be knowingly waived, and that it had not been. Nooe did not contest that the alleged defect in the information had been waived. (Post-Trial Motions Transcript at p. 26). Therefore, Nooe did not timely raise the alleged failure by the State to charge Nooe with grand theft based on separate takings pursuant to one scheme or course of conduct. See, e.g.,

DuBoise v. State, 520 So.2d 260, 264-65 (Fla. 1988)(explaining the "reason for this provision [rule 3.610] is to discourage defendants from waiting until after a trial is over before contesting deficiencies in charging documents which could have easily been corrected if they had been pointed out before trial."). See also State v. Burnette, 881 So.2d 693, 694 (Fla. 1st DCA 2004)(reversing trial court's grant of a new trial where Burnette's newly appointed counsel filed an amended motion for new trial, alleging a defect in the charging document, a month after the verdict).

In State v. Diaz, Diaz successfully **moved to dismiss** theft charges in connection with 23 invoices for payment issued to the county between July 7, 1994, and May 22, 1995, because 22 of the invoices were beyond the five-year statute of limitations. Diaz, 814 So.2d at 466-67. The State relied on the language in section 812.012(9)(c), Florida Statutes, allowing the State to aggregate amounts taken pursuant to one scheme or course of conduct, to argue that the theft statute fell under the statute of limitations extender in section 775.15(4), Florida Statutes (1993). Id. at 469. Section 775.15(4) states "[a]n offense is committed either when every element has occurred or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the

defendant's complicity therein is terminated." Id. It was the State's position that Diaz's common scheme or plan to defraud the county was a "continuing offense" within the five-year statute of limitations. Id. at 467. The court disagreed. The court held that grand theft pursuant to one scheme or course of conduct was not a continuing offense that qualified for an extension of the statute of limitations under section 775.15(4), Florida Statutes (1993). Id. The court did not hold that thefts by separate invoices could not be aggregated as part of a common scheme or plan. Id.

In the decision below, the Fifth District recognized that the ruling in Diaz actually "involved a statute of limitations issue where the State attempted to piggyback conduct occurring outside the limitations period onto conduct within the period...." Nooe, 892 So.2d at 1141. The Fifth District decided that, as Nooe had not argued that any of the illegal conduct charged had occurred outside the statute of limitations period, the holding in Diaz did not apply. Id. Thus, there is no conflict, express or otherwise, between the decision below and the decision in Diaz.

In State v. Davis, Davis successfully **moved to dismiss** the charge of grand theft filed against him because the undisputed evidence showed two separate thefts, neither of which exceeded

$300. Davis, 890 So.2d at 1243. The State, in seeking reversal, relied on State v. Scarfo, 465 So.2d 1347 (Fla. 5th DCA 1985), to argue that several separate takings may be aggregated to constitute guilt of grand theft where they occur pursuant to one scheme of course of conduct. The court distinguished the holding in Scarfo by noting that Scarfo had been charged with grand theft based on separate takings "'pursuant to one scheme or course of conduct,'" but that the State had not similarly charged Davis with grand theft pursuant to one scheme or course of conduct. Id. at 1243-44.

Although the decision below noted that the amounts of value of separate properties taken in connection with "one scheme or course of conduct" can be aggregated,[2] the issue of whether Nooe should have been charged under "one scheme or course of conduct" was not addressed by the court as any defect in the information had been waived by Nooe. In short, the court did not decide that it was unnecessary to charge separate takings under "one scheme or course of conduct." Thus, there is no conflict, express or otherwise, between the instant decision and the decision in Davis.

In Hearn v. State, this Court reviewed a **pre-trial** plea of former jeopardy by the defendants, and a demurrer to the plea of

[2] Section 812.012(9)(c), Florida Statutes.

former jeopardy by the State, concerning separate charges of larceny that had occurred at the same time and place, but had involved property of different owners. Hearn, 55 So.2d at 560. In addition to the challenge in Hearn having been timely raised, Hearn was decided prior to the enactment of section 812.012(9)(c), Florida Statutes.[3]

In the instant case, Nooe did not timely raise the alleged failure by the State to charge Nooe with grand theft based on separate takings pursuant to one scheme or course of conduct, and the Fifth District did not address an alleged failure by the State to charge Nooe with grand theft based on separate takings pursuant to one scheme or course of conduct. Thus, there is no conflict, express or otherwise, between the decision below and the decision in Hearn.

CONCLUSION

As Nooe did not timely raise, and the Fifth District did not address, an alleged failure by the State to charge Nooe with grand theft based on separate takings pursuant to one scheme or course of conduct, all relief should be denied.

[3] "[812.012(9)(c)] itself refers to 'separate properties' and 'several persons' and 'thefts' in the plural. Thus it appears that the legislature intended that there be only one offense for one scheme or course of conduct and that the grade of the offense depends on the total amount taken." Scarfo, 465 So.2d at 1349.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by U.S. Mail to: Michael H. Lambert, Esquire, 629 N. Peninsula Drive, Daytona Beach, Florida 32118, on November ____, 2005.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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