IN THE SUPREME COURT OF FLORIDA

FRANKLIN W. NOOE.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

FSC CASE NO. _____

FIFTH DCA Case No. 5D03-2658

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

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, Franklin W. Nooe (hereinafter referred to as Mr. Nooe) was convicted for grand theft of over $100,000.00, a first-degree felony, and sentenced to 35 months imprisonment followed by 25 years probation (App. A 1). The charges arose out of financial irregularities which occurred at the Rape Crisis Center of Volusia County, Inc. while Mr. Nooe served as its director. Mr. Nooe appealed to the Fifth District Court of Appeal. On January 7, 2005, the Fifth District issued a written opinion reversing Mr. Nooe's conviction for grand theft, a felony of the first degree, and remanding it to the trial court with directions to reduce the conviction to grand theft, a felony of the second degree, and to re-sentence Mr. Nooe (App. A 1-12).

In its opinion, the Fifth District noted that Mr. Nooe was charge by amended information with only one count of grand theft over $100,000, a first degree felony, against the Florida Department of Health ("Department") and/or the Rape Crisis Center of Volusia County, Inc. ("Center") over a four (4) year period (App. A 2). The Fifth District generously included within its opinion the single count of grand theft as relayed in the information. The single count does not indicate that the theft was done pursuant to one scheme or course of conduct, and does not reflect that the money was allegedly taken at different times or places or as a result of a series of acts separated in time place or circumstance.

The Fifth District's opinion notes that the Department's representative, Nancy Linehan, "testified that the Department disbursed $70,125.65, during the time period alleged in the information to the Center based on [separate] invoices submitted by the Center through the defendant, its executive director…." (App. A 4-5).

The Fifth District also noted that "the State did not adduce evidence directly tracing the entire $70,125.65 into the defendant's own pockets….." (App. A 6). The Fifth District acknowledged Mr. Nooe's legal argument relying on State v. Diaz, 814 So. 2d 466 (Fla. 3d DCA 2002): "that the annual contracts between the Center and the Department, whereby grants were disbursed to the Center, were separate and distinct and that the thefts during each annual contract period could not be aggregated." (App. A 7-8).

The Fifth District acknowledged the holding of the Third District in Diaz, that the 23 individual invoices Mr. Diaz had submitted to Dade County over 11 months for landscaping work could not be aggregated and rejecting:

> the State's claim that all 23 invoices were part of a common scheme to defraud the County and should be treated as a continuing offense within the five year statute of limitations. The majority explained that the theft statute 'is silent on the issue of continuing offenses, with no suggestion that the legislature intended to make grand theft a continuing offense.

(App. A 8).

The Fifth District attempted to distinguish Diaz on the basis that it involved a statute of limitations question and also opined that Diaz was limited to its facts (App. A 8). The Fifth District then went on to boldly state "The monies taken from the Department could properly be aggregated so that a theft of $70,125.65 was established." (App. A 9). There was no legal authority cited in support of this legal ruling, especially in light of the failure of the charging document to indicate a common scheme or course of conduct.

The Court then went on to summarize that the State adduced evidence of 11 checks totaling $3,535.94 for insurances and 18 checks totaling $5,830 to pay another employee's husband's IRS debt, as well as the alleged fraudulent invoices (49) over a four-year period obtained from the Department, totaled $86,491.59 (App. A 9). The Fifth District acknowledged that the invoices were paid by way of [6] separate grants (App. A 10).

SUMMARY OF ARGUMENT

The Fifth District's decision expressly and directly conflicts with the Third District's decision in State v. Diaz, 814 So. 2d 466 (Fla. 3d DCA 2002), the Fourth District's decision in State v. Davis, 890 So. 2d 1242 (Fla. 4th DCA 2005), as well as this Court's decision in Hearn v. State, 55 So. 2d 559 (Fla. 1951). These cases clearly hold that the State must charge separate counts of grand theft when the property is stolen at different times or places or as a result of a series of acts, separated in time, place, or circumstance.

ARGUMENT:

THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH 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).

This Court has discretionary jurisdiction to review a district court decision that expressly and directly conflicts with a decision of another district court of appeal or of this Court. Art. V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The Fifth District's decision permitting the State of Florida 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 over a four (4) year period expressly and directly conflicts with the Third District's decision in State v. Diaz, 814 So. 2d 466 (Fla. 3d DCA 2002), the Fourth District's decision in State v. Davis, 890 So. 2d 1242 (Fla. 4h DCA 2005), as well as the Florida Supreme Court's opinion in Hearn v. State, 55 So. 2d 559 (Fla. 1951).

In Hearn, this Court reiterated the well-established rule "that where property is stolen from the same owner or from different owners at different times or places or as a result of a series of acts, separated in either time, place or circumstance, one from the other, each taking is a separate and distinct offense…." Hearn, 55 So. 2d at 560. This means that the State is required to separately charge for each incident of taking when it is established that the takings are separated by time, place or

circumstance. The Fifth District's decision expressly and directly conflicts with the rule of law in Hearn, in that it expressly permitted a conviction for grand theft (between 20,000. and $100,000) to stand based on a single charge of grand theft, notwithstanding that the evidence of the takings were separated by time, place or circumstance, to wit: there were allegedly individual fraudulent invoices (49) separated by over four years in time totaling $70,165.25; 11 checks totaling $3,535.94 for insurance; 18 checks totaling $5,830 to pay another employee's husband's IRS debt; and personal expenses on a credit card totaling $2,500.

In Diaz, the Third District explained:

> Section 812.014 provides that a person is guilty of grand theft if he knowingly obtains or uses the property of another with intent to temporarily of permanently deprive the other person of that right. The statute is silent on the issue of continuing offenses, with no suggestion that the legislature intended to make grand theft a continuing offense. See State v. King, 282 So. 2d 162 (Fla. 1973), See also O'Malley v. Mounts, 590 So. 2d 437 (Fla. 4th DCA 1991)(noting language of current Section 812.014 is the same as the pre-amended version). Each invoice was a separate taking, concluding the specific work requested in each County purchase order.

Diaz, 814 So. 2d at 847.

Accordingly, the Fifth District's decision expressly and directly conflicts with case law requiring the State to individually charge Mr. Nooe with separate counts for each alleged taking. See also Reyes v. State, 888 So. 2d 95 (Fla. 3d DCA 2004)("There was no error in charging Reyes with multiple counts of grand theft.").

In its decision, the Fifth District also erroneously attempted to distinguish Diaz by relying on section 812.012(9)(c), Fla. Stat. (1999) for the proposition that the theft statute allows the State to aggregate the charges under a single count. However, this subsection clearly does not allow the State to aggregate separate charges under a single count; rather it merely indicates that the value may be aggregated to determine the degree of the offense.

The State's information charging the single count of grand theft is reproduced in the appellate court's decision. The single count clearly lacks any allegation whatsoever that the thefts occurred as part of a scheme or course of conduct. Therefore, they cannot aggregate the values of the alleged separate takings. This expressly and directly conflicts with the Fourth DCA's opinion in State v. Davis, 890 So. 2d 1242 (Fla. 4th DCA 2005)("Absent an allegation in the charging document that both thefts occurred as part of the same scheme or course of conduct, the undisputed facts do not constitute a prima facie case of grand theft."); State v. Diaz, 814 So. 2d 466 (Fla. 3d DCA 2002)(holding that grand theft cannot be based on a continuing offense and denying state's contention that submission of 23 invoices over a period of 11 months was part of common scheme or plan).

There can be no dispute that the Fifth District's decision expressly and directly conflicts with decisions from the Third, and Fourth Districts, as well as this Court. Based on the well-established case law regarding the proper charging of

multiple counts of grand theft, the legal issues as summarized above transcend the rights of the immediate parties and are deserving of resolution by this Court.

CONCLUSION

WHEREFORE, based on the foregoing argument and authority, Mr. Nooe respectfully requests this Honorable Court to grant discretionary review of the Fifth District's decision dated January 7, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Petitioner's Jurisdictional Brief and Appendix has been furnished to counsel for appellee, Douglas T. Squire, assistant Attorney General, 444 Seabreeze Blvd., 5th Flr., Daytona Beach, FL 32118, by U.S. Mail on March ___, 2005.

Steven J. Guardiano, Esquire

Michael H. Lambert, Esquire

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the Petitioner's Jurisdictional Brief is Times New Roman (14 point).

Steven J. Guardiano, Esquire

Michael H. Lambert, Esquire