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

JURISDICTIONAL BRIEF OF RESPONDENT

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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 raised in the instant petition, Respondent offers the following relevant additions to Petitioner's statement of the case and facts.

Petitioner 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, Petitioner 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 Petitioner'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). Petitioner responded that the statute of limitations could only be knowingly waived, and that it had not been. Petitioner did not contest that the alleged defect in the information had been waived. (Post-Trial Motions Transcript at p. 26).

SUMMARY OF ARGUMENT

In the instant case, Petitioner did not timely raise the alleged failure by the State to charge Petitioner 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 Petitioner with grand theft based on separate takings pursuant to one scheme or course of conduct. Therefore, Petitioner 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).

Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the

"conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins, 385 So.2d at 1359.

In Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the decision below reached a result opposite the decisions in State v. Atkinson, 831 So.2d 172 (Fla. 2002); State v. Goode, 830 So.2d 817 (Fla. 2002); and, State v. Kobel, 757 So.2d 556 (Fla. 4th DCA 2000).

The decision below is not in "express and direct" conflict with 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).

Petitioner 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. (Petitioner's Jurisdictional Brief at p. 5). The opinions in Diaz, Davis, and Hearn, each address alleged defects in charging documents that were timely raised.

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 Petitioner 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,[1] 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 Petitioner. 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 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 the instant case, Petitioner did not timely raise the alleged failure by the State to charge Petitioner with grand theft based on separate takings pursuant to one scheme or course of conduct,[2] and the Fifth District did not address an alleged failure by the State to charge Petitioner 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.

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

[2] See State v. Burnette, 881 So.2d 693, 694 (Fla. 1st DCA 2004)(recognizing the "general rule that a defect in an information is waived if no objection is timely made so long as the information does not wholly fail to state a crime.").

CONCLUSION

There is no direct and express conflict and no constitutional basis for discretionary review.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by U.S. Mail to: Steven J. Guardiano, Esquire, 412 N. Wild Olive Avenue, Daytona Beach, Florida 32118, and Michael H. Lambert, Esquire, 629 N. Peninsula Drive, Daytona Beach, Florida 32118, on April ____, 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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