IN THE SUPREME COURT OF FLORIDA

FRANKLIN W. NOOE, CASE NO. SC05-514

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEAL
REPLY BRIEF OF PETITIONER

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PREFACE

Throughout this Reply Brief statements, opinions, decisions made by the Fifth District Court of Appeal, State of Florida in Nooe v. State, 892 So.2d 1135 (Fla. 5th DCA 2005) will be referred to as the Fifth District. Again, the Volusia County Rape Crisis Center will be referred to as "Center", and the Florida Department of Health will be referred to as the "Department".

SUMMARY OF ARGUMENT

Based upon the factual determinations made by the Fifth District, upon which it based its holdings, the aggregation of 49 false invoices, combined with the misappropriation of funds from the Center, authorized the prosecution of Nooe, on a single count of Grand Theft, without proof of, and an allegation of, those thefts being the product of a scheme or course of conduct as a result, there exists a conflict in the law among the Third and Fourth District Courts of Appeal, and the Supreme Court of Florida on one side, and the Fifth District Court of Appeal on the other.

ISSUE

THE AMENDED INFORMATION FILED HEREIN DID NOT CONTAIN ANY LANGUAGE ALLEGING A SCHEME TO DEFRAUD OR A CONTINUING COURSE OF CONDUCT THAT INCORPORATED THE FOUR PLUS SEPARATE CONTRACT YEARS AND FORTY-NINE PLUS "FALSE" SEPARATE INVOICES SUBMITTED.

THE OPINION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, STATE OF FLORIDA IS IN DIRECT CONFLICT WITH THE WELL ESTABLISHED LAW OF STATE V. HEARN, 55 SO.2D 559 (FLA. 1951); STATE V. DIAZ, 814 SO.2D 466 (FLA. 3RD DCA 2002) AND STATE V. DAVIS, 890 SO.2D 1242 (FLA. 4TH DCA 2005), AND AS SUCH MUST BE REVERSED.

Though not artfully annunciated, Nooe's counsel at the trial level did argue that there were no facts presented to support a prima facia case of guilt as to the offense of Grand Theft of the First Degree, all the way down to Grand Theft of the Third Degree. (ROA Vol.VI,A Supplement, pg. 113-118) More importantly though, this case is before this court on discretionary review because based upon the following findings of fact, by the Fifth District:

1. Over a 44 month time frame Nooe submitted false invoices for payment of 49 Rape Prevention Seminars that did not occur. The payment for those invoices was calculated based upon that fiscal year's contract price per attendee, negotiated with

the Department. During the 44 month period, there were 5 separate contracts between the Department and the Center.

2. The total aggregated sum of the fraudulent invoices was $70,125.65, paid by the Department into the Center's account.

3. While at the Center, Michelle Jones became an assistant executive director, had a multitude of responsibilities, one of which was to write checks out of the Center's account, which Nooe would sign, and sometimes they would be cosigned by a member of the board of directors for the Center.

4. Eleven checks were written out of the Center's account for health insurance, payable to Nooe's wife. Those 11 checks totaled $3,535.94.(Nooe supra at 1141) Ironically, Nooe's benefit package included his family's health insurance but he was never told it could not come out of the Center's account.

5. Nooe authorized a raise for Jones, which she took by writing checks out of the Center's account payable to the Internal Revenue Service for her husband's back taxes. Those 18 checks totaled $5,830.00.(Nooe supra at 1141)

6. Nooe authorized Jones to receive two separate loans out of the Center's account. Those two loans totaled $4,500.00.(Nooe supra at 1141)

7. Nooe used the Center's credit cards for his own personal benefit. Those charges totaled $2,500.00.(Nooe supra at 1141)

8. Nooe was prosecuted via a single count information for Grand Theft Of The First Degree, i.e., $100,000.00 or more between January 1, 1998, through August 31, 2001 (44 months) and the alleged victims were the Florida Department of Health and/or the Volusia County Rape Crisis Center or any other person not the Defendant.(Nooe supra at 1138)

9. That the $70,125.65 fraudulently taken from the Department, via the 49 invoices, went into the Center's account and from that account, Nooe misappropriated funds for his and Michelle Jones' personal benefit, which totaled $16,365.94.(Nooe supra at 1141)

Based upon the foregoing facts, the Fifth District made the following conclusions of law:

(a) Based upon the omnibus theft statute, Florida Statute 812.014, and Florida Statute 812.012(9)(c), the state could combine all of the 49 invoices submitted over the 44 months alleged in the Information so that a theft of $70,125.65 was established.(Nooe supra at 1141);

(b) "…theft of Center funds could be aggregated with the takings from the Department, given that some of the grant money taken from the Department was misappropriated by the defendant

from the Center for the defendant's and Michelle Jones' personal use."(Nooe supra at 1141)(emphasis added);

(c) The aggregated monies taken from the Department could be combined with the aggregated sums of money and credit taken from the Center, for a total sum of $86,491.59.(Nooe supra at 1141);

(d) That the proper method of prosecution was a single count information charging the highest monetary amount, based upon Florida Statute 812.012(9)(c). The Fifth District's reasoning being, "… if one scheme or course of conduct is involved, the takings could be combined to reach the $100,000.00 threshold, even if multiple victims are involved."(Nooe supra at 1140)(emphasis added)

On appeal Nooe relied upon State v. Diaz, 814 So.2d 446 (Fla. 3rd DCA 2002) for the authority that the thefts, including the invoices, could not be aggregated into a single count charging document. In Diaz supra, 23 individual false invoices were submitted to the City of Miami Dade for contracted landscaping over eleven months. The 23 invoices had been alleged in a single count information, with the State's theory that it was a continuing course of conduct or scheme.

The Fifth District said Nooe's reliance on Diaz supra was misplaced as Diaz supra dealt with the statute of limitations, not consolidated thefts by the state into a single count.

Remarkably, the Fifth District went on to laud Judge Cope's strong dissent in Diaz supra, that the 23 invoices were a scheme or continuing course of conduct which Florida Statute 812.012(9)(c) authorized. The Fifth District went on to say that that statute was ignored by the majority in Diaz, supra.(Nooe @ 1140,1141)

Not only is Nooe supra in direct conflict with Diaz supra, but also State v. Davis, 890 So.2d 1242 (Fla. 4th DCA 2005) which held, absent an allegation in the charging document that the thefts occurred as a result of a scheme or course conduct, a single count of Grand Theft for multiple thefts is impossible. Nooe, supra, also conflicts with Reyes v. State, 888 So.2d 95 (Fla. 3rd DCA 2004) wherein Reyes complained that he should have been charged in a single count information, as opposed to 29 separate counts of Grand Theft. The Reyes court cited Diaz, supra, for its determination that each event was a separate and distinct taking; therefore, to be prosecuted individually. The opinion of the Fifth District in Nooe supra is also in conflict with this court's opinion in Hearn v. State, 55 So.2d 559 (Fla. 1951) wherein it was determined that when property is taken at different times, or places, or as a result of a series of acts, separated in time, place, or circumstance, each taking is a separate and distinct offense.

CONCLUSION

The holding in Nooe, supra, based upon the facts in Nooe supra, would authorize the State of Florida to not include within a charging document an element that "pursuant to a scheme or course of conduct", a denial of fundamental due process. Additionally, it would authorize multiple thefts from various places over an extended period of time that are not even remotely connected to one another, to be aggregated to reach the highest offense level.

With regard to the 49 invoices, as the theft statute 812.014 includes endeavor to obtain, the commission of the offense would consummated on the date of the submission of an invoice. With regard to the insurance checks, that offense would have been consummated at the time the check was sent to Ms. Nooe for reimbursement. With regard to the raises, though it is not understood how that is theft, as Nooe had the authority to grant raises if approved by the board, those thefts would have occurred at the time of the submission of each check to the Internal Revenue Service. As to the loans, they would have been consummated at the time they were withdrawn by Jones and put into her personal account. With regard to the improper credit card use, that would have occurred at the time of the use of the credit card for personal use.

Each subsequent invoice, check, raise, loan, or credit card use is a separate and distinct offense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by hand delivery, to Douglas Squire, Esquire, Assistant Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, this 12th day of December, 2005.

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CERTIFICATE OF COMPLAINCE

I HEREBY CERTIFY that this Reply Brief complies with the font requirements of Fla.R.App.P. 9.210.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

FSC CASE NO. SC05-514
FIFTH DCA CASE NO.: 5D03-2658

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APPENDIX TO PETITIONER'S REPLY BRIEF ON MERITS

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