

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JARVIS RAMON HAYNES,

Petitioner,

v.

Case No. SC07-123

5th DCA No. 5D06-0458

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 only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the District Court.¹ Respondent, therefore, offers the following as a substitute for Petitioner's statement of the case and facts.

The Fifth District Court of Appeal's (Fifth District) opinion in Haynes v. State, 944 So. 2d 417 (Fla. 5th DCA 2006) states:

On May 10, 2005, the State filed an indictment against Appellant, Charlie Hamilton and Taveress Webster, charging each with felony murder in the first degree, robbery with a firearm, and dealing in stolen property. The State tried Appellant separately, and Appellant was found guilty of a lesser included offense of third-degree felony murder and guilty as charged on the remaining two counts. [] As to the other two co-defendants, the State tried them together, and Appellant was subpoenaed to testify in that trial. During his short appearance as a witness, and at the contempt proceedings that followed, Appellant was represented by an experienced and well-regarded private criminal defense attorney.

At his co-defendants' trial, the following exchange occurred between Appellant and the court, after both the State and the court explained to Appellant that his testimony at trial was subject to immunity, and that it could not be used against him in the event his appeal was successful:

¹ Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

THE COURT: As to testifying here today and responding to the State's questions, what is your position?

APPELLANT: I'm going to exercise my Fifth Amendment right.

THE COURT: All right. So if the Court directs that you must respond and orders you to respond, *your answer to that?*

APPELLANT: I'm going to exercise my Fifth Amendment right.

THE COURT: And if I direct, under the powers of the Court for Contempt of Court that you must respond, you understand that you could be exposed to a maximum 179 days incarceration as part of any sentence or disposition for refusing to respond? Do you understand that?

APPELLANT: Yes, I do. But I'm going to exercise my Fifth Amendment right also.

THE COURT: So under no terms, even if you're court-ordered by the Court to do so, you will not respond?

APPELLANT: Under no terms.

THE COURT: I am ordering you to testify truthfully; *what is your response?*

APPELLANT: I exercise my Fifth Amendment right.

THE COURT: Refusing to testify; is that right?

APPELLANT: Yes.

THE COURT: State ask anything?

PROSECUTOR: I would just ask that [Appellant] be held in contempt, Your Honor.

THE COURT: [Appellant] you've been advised by counsel. You've been explained in court as to your obligations to testify truthfully. The Court has ordered and directed you to respond. You have indicated that you will not respond even after court order. I do find that you're in violation of this Court's order, direct violation, and that you be sentenced as a direct violation, as a criminal contempt, in court, to 179 days in the Orange County Jail, and that this will be consecutive to any times that you're currently serving on any other offense.

(emphasis added). The trial court subsequently entered an order finding Appellant in direct contempt of court for refusing to testify.

Haynes, 944 So. 2d at 417. (footnote omitted).

On appeal, the Fifth District rejected Petitioner's argument that the evidence was insufficient to support the trial court's finding of direct criminal contempt. Id. As to Petitioner's procedural arguments, the Fifth District concluded that Petitioner was given the opportunity to show cause and that the trial court provided a sufficient recitation of facts in its written order. Id. However, the Fifth District agreed with

Petitioner that the trial court committed fundamental error by failing to allow him to present evidence in mitigation. Id. The Fifth District held, "We believe that the proper remedy under the facts of this case is reversal of the sentence and remand for a new sentencing proceeding." Id. The Fifth District affirmed the judgment of contempt, reversed the sentence, and remanded for re-sentencing. Id.

Petitioner filed a timely notice to invoke jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction in the instant case. The Court is limited to the facts contained within the four corners of the decision in determining whether an express and direct conflict exists. On the face of the decision under review, there is no express and direct conflict with any decision of this Court or any district court.

ARGUMENT

ON THE FACE OF THE DECISION IN HAYNES v. STATE, INFRA, THERE IS NO EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER DISTRICT COURT. THIS COURT SHOULD THEREFORE DECLINE TO ACCEPT JURISDICTION.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), this Court explained:

Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Reaves, 485 So. 2d at 830, n.3. This Court further stated:

This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explained in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless

and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

Reaves v. State, 485 So. 2d at 830, n.3. Therefore, Petitioner's references to facts in his case which are not contained in the district court's opinion should be should be disregarded as not relevant. Additionally, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. DHRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986).

Petitioner has failed to demonstrate express and direct conflict between the instant decision of the Fifth District and the cases string cited as examples by Petitioner. McCrimager v. State, 919 So. 2d 673, 674 (Fla. 1st DCA 2006); Garrett v. State, 876 So. 2d 23 (Fla. 1st DCA 2004); Rhoads v. State, 817 So. 2d 1089 (Fla. 2nd DCA 2002); Sanjuro v. State, 677 So. 2d 965(Fla. 3d DCA 1996); Bouie v. State, 784 So. 2d 521 (Fla. 4th DCA 2001); and Bauder v. State, 923 So. 2d 1223 (Fla. 3d DCA 2006). Respondent contends no such conflict exists between the cited cases and the instant opinion.

In each of the aforementioned cases, the courts uniformly held that it was error to fail to allow the defendant the opportunity to present evidence of excusing or mitigating circumstances

during a direct criminal contempt proceeding. This is precisely the holding of Haynes, where the Fifth District held that it was fundamental error to fail to permit Petitioner to present evidence of excusing or mitigating circumstances. Haynes, 944 So. 2d at 420. Petitioner argues that the conflict between these cases and Haynes is the remedy the Fifth District provided. However, the Fifth District specifically limited its holding to the specific facts of Petitioner's case stating, "We believe that the proper remedy **under the facts of this case** is reversal of the sentence and remand for a new sentencing proceeding." Id. (emphasis added). The cases cited by Petitioner either do not contain a statement of the factual circumstances surrounding the case, or the facts provided are not the specific facts of the Haynes case. Because Haynes limits its holding to its particular set of facts, the cases cited by Petitioner are not in conflict with Haynes.

Further, the cases cited by Petitioner out of the Fifth District cannot serve as the basis for conflict jurisdiction. The conflict must "expressly and directly conflict[] with a decision of **another** district court of appeal **or of the supreme court** on the same question of law." Article V, Section 3(b)(3) (emphasis added). The Florida Constitution does not provide for supreme court review of intra-district conflict. Terry v. State, 808 So. 2d 1249, n1 (Fla. 2002).

Likewise, Petitioner's discussion regarding Florida Rule of Criminal Procedure 3.830 cannot form the basis for conflict jurisdiction of this Court. Petitioner's discussion focuses on the merits of his argument rather than this Court's ability to take jurisdiction in this cause.

Petitioner also states the Fifth District's reliance on Gooden v. State, 931 So. 2d 146 (Fla. 1st DCA 2006) was misplaced. This is also not a basis for conflict jurisdiction. Regardless of the fact that Gooden is a Rule 3.840 case and not a Rule 3.830 case, the Fifth District used the signal "cf." prior to the citation. Haynes, 944 So. 2d at 420. "Cf." means "cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare.'" THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbian Law Review Ass'n et al. eds., 17th ed. 2000).

Petitioner has failed to establish that the Fifth District's opinion in Haynes expressly and directly conflicts with any case of this Court or a district court. Jurisdiction should be denied.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been furnished via U.S. Mail to: Terrence E. Kehoe, counsel for Petitioner, at Law Offices of Terrence E. Kehoe, Tinker Building, 18 West Pine Street, Orlando, Florida 32801, this 23rd day of February, 2007.

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 Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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