IN THE SUPREME COURT OF FLORIDA

JARVIS RAMON HAYNES,

Petitioner,

v. **CASE NO. SC07-123**

STATE OF FLORIDA,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

MR. HAYNES' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the Petitioner, **JARVIS RAMON HAYNES**, will be referred to as "Mr. Haynes." The Respondent, **STATE OF FLORIDA,** will be referred to as "the state."

The trial court record on appeal in this case consists of two volumes. References herein will be to the number of the volume, followed by the appropriate page reference therein. The record from the Fifth District has also been filed. It will be referred to as "5R," followed by the appropriate page reference therein.

STATEMENT OF THE CASE AND FACTS

This case is before the Court on a notice to invoke the Court's discretionary jurisdiction to review of a decision by the Fifth District Court of Appeal arising from a direct appeal from a final judgment and sentence entered in a direct contempt proceeding in the Circuit Court, Ninth Judicial Circuit, Orange County, Florida ("trial court").

On May 10, 2005, the state filed an indictment against Mr. Haynes, Charlie Hamilton, and Taveress Webster, charging each with three counts (2/13-14). The first count alleged murder in the first degree, felony murder, of Roy Deering, in violation of §§ 775.087(1),(2) (2/13). Count Two alleged that the three men committed robbery with a firearm on Roy Deering or Jessica Alers, in violation of §§ 812.13(2)(a), 775.08(1),(2) (2/13). Count Two also alleged that during the

commission of the offense, Mr. Hamilton actually possessed and carried a firearm, and Mr. Webster possessed, carried, and discharged a firearm, resulting in Mr. Deering's death. Count Three charged the three defendants with dealing in stolen property, in violation of §812.019(1) (2/14).

Following a jury trial involving only Mr. Haynes, the jury returned a verdict on Count One of guilty of a lesser included offense of third degree felony murder. On Counts Two and Three, Mr. Haynes was found guilty as charged (Progress Docket, p. E). He was sentenced to life in prison on Count Two, and concurrent terms of five years in prison on Count One and fifteen years in prison on Count Three (Progress Docket, p. E). Mr. Haynes' convictions and sentences were affirmed by the Fifth District. Haynes v. State, 946 So.2d 1106 (Fla. 5th DCA 2006). A petition for review of that decision is pending before this Court in Haynes v. State, SC07-432.

The state tried Mr. Hamilton and Mr. Webster together in December, 2005. Mr. Haynes was allegedly subpoenaed by the state to testify in that trial.[1/] Because Mr. Haynes refused to testify the state requested that the trial court hold Mr. Haynes in direct contempt of court (1/9).

A direct contempt hearing was held on December 8, 2005 (1/1-12). The state

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1/ ❍ Mr. Webster was convicted as charged, and sentenced to life in prison (Progress Docket, pp. B-C). His direct appeal is still pending at the Fifth District, 5D06-1. Mr. Hamilton was convicted on Count Three, and is serving a 15 year sentence (Progress Docket, pp. B-C). His conviction and sentence were affirmed by the Fifth District, 5D06-29.

filed a subpoena which required Mr. Haynes to appear in Mr. Hamilton's trial and a subpoena which required Mr. Haynes to testify in Mr. Webster's trial (1/4; 2/16-17). On their face, the documents state that they were personally served on Mr. Haynes on December 2, 2005 (2/16-17).

The trial court placed Mr. Haynes under oath (1/3). Mr. Haynes invoked his Fifth Amendment privilege and stated that he would not testify at the ongoing Hamilton/Webster trial (1/8-9). The trial court never inquired to Mr. Haynes as to whether he had ever been served with a subpoena in either case. The trial court immediately found Mr. Haynes in direct contempt of court, and imposed a sentence of 179 days in the Orange County Jail, to be served consecutive to the DOC prison sentences previously imposed (1/9-10). A written order was filed on December 8, 2005, which found and adjudicated Mr. Haynes guilty of contempt of court and imposed the sentence (2/18-19).

On January 9, 2006, Mr. Haynes filed a timely notice of appeal to the Fifth District (2/23). He argued in his briefs, among other things, that the trial court's failure to provide him the opportunity to show cause and to present evidence of excusing or mitigating circumstances required vacation of both the judgment and sentence.

The state agreed with Mr. Haynes on this point (5R/B at p. 14):

C. THE TRIAL COURT DID NOT AFFORD AN

> OPPORTUNITY FOR APPELLANT TO PRESENT EVIDENCE OF EXCUSING OR MITIGATING CIRCUMSTANCES:
>
> Appellant's final assertion, that the trial court did not afford him an opportunity to present evidence of excusing or mitigating circumstances, is well taken. See Fla.R.Crim.P. 3.830; see Johnson v. State, 906 So.2d 361 (Fla. 5th DCA 2005) (reversing as defendant was given no real opportunity "to present evidence of excusing or mitigating circumstances.") McCrimager v. State, 919 So.2d 673 (Fla. 1st DCA 2006); Garrett v. State, 876 So.2d 24, 25-26 (Fla. 1st DCA 2004). This Court's reversal should be "without prejudice to the institution of proper contempt proceedings." Johnson v. State, 906 So.2d 361 (Fla. 5th DCA 2005); Marshall v. State, 764 So.2d 908 (Fla. 1st DCA 2000).

Initially, the court issued a "per curiam affirmed" written opinion on July 18, 2006 (5R/4). After Mr. Haynes filed a timely motion for rehearing, rehearing en banc, or request for a written opinion (5R/5-8), the Fifth District issued a written opinion affirming the conviction and reversing the sentence. Haynes v. State, ___ So.2d ___ (Fla. 5th DCA 10/27/06)[31 Fla. L. Weekly D2694]. It rejected Mr. Haynes' claims that the evidence was insufficient, that the trial court deprived Mr. Haynes of an opportunity to show cause why he should not be held in contempt, and that the written order did not set forth the facts underlying the adjudication. In addressing the specific claim regarding the lack of opportunity to present evidence of excusing or mitigating circumstances, the Fifth District wrote:

> However, the trial court did err by failing to permit

> Appellant to present evidence in mitigation, as authorized by rule 3.840(g). This is fundamental error. See, e.g., Gooden v. State, 931 So.2d 146 (Fla. 1st DCA 2006); Hibbert v. State, 929 So.2d 622 (Fla. 3d DCA 2006). The proper remedy is reversal of the sentence and remand for a new sentencing proceeding.

Id. at D2695.

Mr. Haynes file a timely motion for rehearing, rehearing en banc, or certification (5R/20-25). Before ruling on the motion, the Fifth District issued a corrected opinion.[2/] In it, the court changed the second to the last paragraph to read:

> However, the trial court did err by failing to permit Appellant to present evidence in mitigation, as authorized by rule 3.830. This is fundamental error. See, e.g., Hibbert v. State, 929 So.2d 622 (Fla. 3d DCA 2006). We believe that the proper remedy under the facts of this case is reversal of the sentence and remand for a new sentencing proceeding. Cf. Gooden v. State, 931 So.2d 146 (Fla. 1st DCA 2006).

See Appendix A, at p. 6, attached to Mr. Haynes' Brief on Jurisdiction, and Appendix, at p. 6, attached to State's Brief on Jurisdiction. The motion for rehearing, etc., was denied by order dated December 20, 2006 (5R/26).

The case now appears in the Southern Second reporter system. Haynes v. State, 944 So.2d 417 (Fla. 5th DCA 2006). The second to the last paragraph now reads:

2/ ❍ The fact of its issuance does not appear on the docket sheet available on the Fifth District's website.

> However, the trial court did err by failing to permit Appellant to present evidence in mitigation, as authorized by rule 3.830. This is fundamental error. See, e.g., Hibbert v. State, 929 So.2d 622 (Fla. 3d DCA 2006). 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. at 420. Somewhere along the way the Fifth District dropped its citation to Gooden.[3/]

On January 18, 2007, Mr. Haynes filed a timely notice to invoke this Court's discretionary jurisdiction (5R/28). Jurisdiction was accepted by order dated April 5, 2007.

3/ ❍ The "corrected" opinion in Mr. Haynes' Appendix to his Brief on Jurisdiction is the last opinion undersigned counsel ever received from the Fifth District. Counsel never received an amended or corrected opinion in which the Gooden citation was removed.

SUMMARY OF ARGUMENTS

I. CONTEMPT ORDER MUST BE VACATED WHERE TRIAL COURT FAILED TO COMPLY WITH FUNDAMENTAL REQUIREMENTS OF FLA.R.CRIM.P. 3.830

Mr. Haynes' direct contempt conviction must be vacated because the trial court failed to comply with the specific dictates of Fla.R.Crim.P. 3.830. The trial court failed to give Mr. Haynes an opportunity to show cause why he should not be held in contempt, and failed to permit him to present evidence of excusing or mitigating circumstances, prior to adjudication and sentencing. The trial court's order must also be vacated because the trial court considered prejudicial hearsay evidence, and failed to make the required findings of fact.

II. EVIDENCE WAS INSUFFICIENT TO PROVE DIRECT CONTEMPT FOR FAILURE TO TESTIFY

An essential element of a direct contempt conviction for failure of a witness to testify is proof that the witness was served with a valid subpoena which required his testimony. In Mr. Haynes' case, the state failed to prove this element beyond and to the exclusion of every reasonable doubt. Therefore, Mr. Haynes is entitled to a vacation of the judgment and sentence and a remand for entry of a judgment of acquittal.

ARGUMENTS

I. CONTEMPT ORDER MUST BE VACATED WHERE TRIAL COURT FAILED TO COMPLY WITH FUNDAMENTAL REQUIREMENTS OF FLA.R.CRIM.P. 3.830

A. Introduction

The direct contempt proceeding and the order entered thereafter failed to comply with the dictates of Fla.R.Crim.P 3.830. Therefore, the contempt conviction must be vacated.

Fla.R.Crim.P. 3.830 states, in its entirety:

> A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts on which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against the defendant and inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt by the court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

B. Standard of Review

The provisions of Rule 3.830 define the essence of due process in criminal contempt proceedings, and therefore must be scrupulously followed. Hutcheson v. State, 903 So. 2d 1060, 1062 (Fla. 5th DCA 2005). Failure to follow these

procedural requirements is fundamental error. Id. Because any defect in the proceedings is direct criminal contempt is fundamental error, objection in the trial court is not required to preserve an issue for appellate review. Garrett v. State, 876 So. 2d 24, 25-26 (Fla.1st DCA 2004).

C. Failure to Allow Mr. Haynes to Show Cause, or Present Evidence of Excusing or Mitigating Circumstances

As the record reveals, prior to the adjudication of guilt, the trial court did not inquire of Mr. Haynes as to whether he had any cause to show why he should not be adjudged guilty of contempt by the court and sentenced. Tied in closely with this failure is the trial court's failure to provide Mr. Haynes an opportunity to present evidence of excusing or mitigating circumstances. Immediately after Mr. Haynes testified that he would not testify in the Hamilton/Webster trial, the trial court adjudicated him guilty and sentenced him. There was never an opportunity given to Mr. Haynes by the trial court to show cause or to present any evidence of excusing or mitigating circumstances.

As to the claim that the trial court failed to allow Mr. Haynes to show cause why he should not be held in contempt, the Fifth District stated:

> . . . the colloquy between the trial court and Appellant reveals that the trial court on two occasions gave Appellant the opportunity to show cause why he should not be held in contempt. The court first asked Appellant for an answer as to why he refused to follow the court's order to testify, then asked essentially the same question again.

Haynes, 944 So.2d at 420 (emphasis added). Respectfully, the Fifth District misconstrued the record on the point. The colloquy, quoted in that court's opinion, 944 So.2d 418-19, shows that Mr. Haynes was never asked "why" he would not testify. Both times he was essentially asked if he would testify. Both times he said no, based on his Fifth Amendment right. Mr. Haynes simply answered the trial court's questions. There was no real opportunity offered to Mr. Haynes to show cause, or give reasons, or offer excusing circumstances, prior to adjudication.

That failure is fundamental error, requiring reversal of both the judgment and sentence. See e.g., McCrimager v. State, 919 So.2d 673, 674 (Fla 1st DCA 2006); Telfair v. State, 903 So. 2d 257, 258 (Fla.1st DCA 2005); Garrett, supra. The Fifth District's decision to reverse only the sentence contradicts many Florida appellate decisions. The proper remedy - that provided in nearly all cases discussing this issue - is vacation of the judgment as well as the sentence.

Of importance, in reading Rule 3.830, is that the sentence addressing excusing or mitigating circumstances is included in the group of sentences dealing with adjudication and the judgment. It is not next to the single sentence dealing with sentencing.

Additionally, "excusing" circumstances are those that are typically offered as

a defense to a charge, i.e., those that are an effort to negate some essential element of the offense. That evidence - those "excusing" circumstances - is thus relevant to adjudication, and would necessarily have to be offered before the issue of adjudication has been decided.

Uniformly, the First, Second, Third, and Fourth district courts of appeal reverse both the judgment and sentence upon finding error in a direct contempt proceeding for the failure to provide an opportunity to present evidence of excusing or mitigating circumstances. See, e.g., McCrimager v. State, 919 So.2d 673, 674 (Fla. 1st DCA 2006); Garrett v. State, 876 So.2d 24, 25 (Fla. 1st DCA 2004); Rhoads v. State, 817 So.2d 1089, 1092 (Fla. 2d DCA 2002); Sanjuro v. State, 677 So.2d 965, 966 (Fla. 3d DCA 1996); Bouie v. State, 784 So.2d 521, 523 (Fla. 4th DCA 2001)("Prior to the adjudication of guilt, the judge did not inquire as to whether appellant had any cause to show why he should not be adjudged guilty of contempt and was not given an opportunity to present evidence of excusing or mitigating circumstances, contrary to rule 3.830") . See also Bauder v. State, 923 So.2d 1223, 1224 (Fla. 3d DCA 2006)(prior to a finding of contempt the accused must be given opportunity to offer any mitigation of his conduct). In the one case cited by the Fifth

District on this issue - Hibbert v. State, 929 So.2d 622 (Fla. 3d DCA 2006) - it is

important to note that the Third District's remedy was the vacation of the judgment as well as the sentence.

The Fifth District's citation (in its first written opinion and in its corrected opinion) to Gooden v. State, 931 So.2d 146 (Fla. 1st DCA 2006), was misplaced. Gooden is an indirect criminal contempt case, governed by Fla.R.Crim.P. 3.840 and not Rule 3.830. That appears to be the reason it was dropped from the opinion now appearing in the Southern Second reporter.

In the past, the Fifth District had also uniformly held that the appropriate remedy for a violation of this part of Rule 3.830 is reversal of both the judgment and sentence. See Johnson v. State, 906 So.2d 361 (Fla. 5th DCA 2005); Jackson v. State, 562 So.2d 855, 855-56 (Fla. 5th DCA 1990)(judgment reversed due to trial court's failure to provide opportunity to present evidence of excusing or mitigating circumstances prior to finding of direct criminal contempt); State v. Eastmoore, 393 So.2d 567, 573 (Fla. 5th DCA 1981)("The opportunity to present evidence of excusing circumstances must precede the adjudication of guilt; . . . .").

Additionally, in Hutcheson v. State, 903 So.2d 1060 (Fla. 5th DCA 2005), the court stated "Where a claim of false or perjured testimony is involved, the accused must, **prior to the adjudication of guilt**, be given an opportunity to present evidence of excusing or mitigating circumstances." Id. at 1062 (emphasis added).

In S. B. v. State, 940 So.2d 576 (Fla. 5th DCA 2006), an opinion issued the same day as Mr. Haynes', the court construed Fla.R.Juv.P. 8.150(a), the virtually identical juvenile counterpart to Rule 3.830. M. L. v. State, 819 So.2d 240, 242 (Fla. 2d DCA 2002). In S. B. the court vacated both the judgment and sentence, in part because the defendant was not provided the opportunity to present evidence of excusing or mitigating circumstances.

The conflict between these cases and Mr. Haynes' must not be allowed to exist. He is entitled to the same relief as the other defendants in the same situations. There is no legal basis to treat his case differently. Therefore, his judgment of conviction, as well as his sentence, must be vacated.

D. Failure to Make Findings of Fact[4/]

The conviction must also be reversed because the trial court failed to make

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4/ ❍ Once this Court accepts jurisdiction over a cause in order to resolve a legal conflict, it has jurisdiction over all issues. See Savoie v. State, 422 So.2d 308, 310 (Fla. 1982). The Court's authority to consider issues other than those upon which jurisdiction is based is discretionary and is exercised only when those other issues have been properly briefed and argued and are dispositive of the case. Murray v. Regier, 872 So.2d 217, 223 (Fla. 2002). This issue, and all issues subsequently addressed in this brief, have been properly briefed in both the Fifth District and in this Court. They too present issues which are dispositive of the case.

the mandatory findings of fact required by Rule 3.830. The trial court made no findings of fact in its written order. Reversal is therefore mandated. Hutcheson, 903 So.2d at 1062; Guardado v. Guardado, 813 So.2d 236, 237 (Fla. 5th DCA 2002). See also McCrimager, supra; Porter v. State, 917 So.2d 1010 (Fla. 4th DCA 2006); Ward v. State, 908 So. 2d 1138 (Fla. 3d DCA 2005).

In Cutwright v. State, 934 So.2d 667 (Fla. 2d DCA 2006), the Second District reversed a judgment of direct contempt because it did not contain a recital of the facts on which the judgment was based, i.e., it failed to specify the conduct involved. Id. at 668. The trial court's order is Mr. Haynes' case is similarly deficient.

E. Admission of Testimonial Hearsay Violated Mr. Haynes' Right To Confrontation of Witnesses

Additionally, the statement on the witness subpoena as to service of the subpoena was hearsay, as it clearly offered for the truth of matter asserted. It should not have been accepted in the face of Mr. Haynes' objection (1/6-7). Acceptance of the document also violated Mr. Haynes' state and federal rights to confrontation of witnesses against him, in violation of the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, § 9, of the Florida Constitution. As the United States Supreme Court made clear in Crawford v.

Washington, 541 U.S. 36 (2004), it is a violation of a defendant's right to confrontation to allow testimonial statements to be admitted without the defendant having the ability to confront and cross-examine the witness making the statement. See also Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006).

Although Crawford did not provide a complete definition of what constitutes "testimonial" evidence, the Supreme Court did include affidavits in its list of examples of testimonial evidence. The Court explained that the confrontation clause applies to witnesses against the accused, in other words, those who "bear testimony." Testimony includes a solemn declaration or affirmation made for the purpose of establishing or proving some fact. Crawford, 541 U.S. at 51-52.

Here, the affirmation of "J. Dawling" was relied upon as by the state and the trial court as substantive proof of the fact that Mr. Haynes was served with these two subpoenas. That should not have been permitted. See also Belvin v. State, 922 So.2d 1046 (Fla. 4th DCA)(en banc)(admission of breath test affidavit violated Crawford), review granted, 928 So.2d 336 (Fla. 2006); Shiver v. State, 900 So.2d 615 (Fla.1st DCA 2005)(accord). The trial court's reliance on this affirmation was reversible error, requiring a new hearing.

II. EVIDENCE WAS INSUFFICIENT TO PROVE DIRECT CONTEMPT FOR FAILURE TO TESTIFY

Summary though it may be, a direct contempt proceeding pursuant to Rule 3.830 is still a criminal proceeding. Therefore, under the due process clause of both the state and federal constitutions the state was required to prove every fact necessary to the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Turner v. State, 283 So.2d 157 (Fla. 2d DCA 1973).

Review of a sufficiency of the evidence issue is done under the de novo standard.

One essential element of a direct contempt conviction for failure of a witness to testify is proof by the state that the witness was served with a valid subpoena requiring such testimony. Proof of that element was missing in Mr. Haynes' case.

In order to be compelled to testify pursuant to §914.04, Florida Statutes (2005), the witness must be "duly served" with a subpoena requiring his presence and testimony. Perez v. State, 453 So.2d 173 (Fla. 2d DCA 1983). That is an essential predicate to any grant of statutory immunity in Florida. Without such a subpoena, the Florida immunity statute simply does not apply. Therefore, as a predicate - as an essential element of the direct contempt charge - the state, because it had the burden of proof beyond a reasonable doubt in the criminal case, was required to prove that Mr. Haynes was personally served with a valid subpoena requiring his testimony at the Webster/Hamilton trial.

The Fifth District avoided this issue by stating that Mr. Haynes was held in contempt for refusing to obey the court's order, not for failure to appear in compliance with a subpoena. Haynes v. State, 944 So.2d 417, 419 n.2 (Fla. 5th DCA 2006). The trial court's order to testify, in the face of an assertion of a Fifth Amendment privilege, was only valid if Mr. Haynes had no Fifth Amendment privilege, i.e., if he had been served with a valid subpoena pursuant to §914.04. So the Fifth District's avoidance of the issue was simply erroneous. It is critical to the determination of direct contempt for failure to testify.

Prior to the contempt proceeding, the state simply filed two subpoenas directed to Mr. Haynes, one for the Hamilton trial and one for the Webster trial (2/16-17). Neither was ever admitted into evidence at the direct contempt proceeding.[5/] Both of the subpoenas contained the following statement:

> I swear and affirm that I, J Dawling served a copy of this subpoena to J. Haynes at OCC on this 2 day of Dec, 2005 in accordance with Florida Statutes.

The state did not present the testimony of J. Dawling to establish proof of service of

5/ ❍ The Fifth District asserted that Mr. Haynes did not deny that he had been served, or attempt to impeach the return of service. Haynes, 744 So.2d at 419 n. 2. However, this ignores the fact that Mr. Haynes has no burden in this criminal proceeding. The burden to prove valid service was on the state.

these subpoenas. Neither the state nor the trial court inquired of Mr. Haynes as to whether or not he was ever served with either subpoena. There is no proof as to who J. Dawling was, or if he or she even was a person authorized to serve a witness subpoena. Instead, because the two subpoenas were placed in the court file by the state, the trial court simply relied on them and required no further evidence on this issue.

Because the state failed to prove the essential element of service of a valid subpoena on Mr. Haynes which required his testimony, the direct contempt judgment and sentence must be vacated, and remanded for entry of a judgment of acquittal.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must reverse the judgment and sentence imposed upon Mr. Haynes and remand for entry of a judgment of acquittal. In the alternative, the Court must remand for a new hearing.

RESPECTFULLY SUBMITTED this 30th day of April, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2007, a true copy of the foregoing was furnished by United States mail to counsel for the Respondent: Rebecca Rock McGuigan, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief is typed in Times New Roman 14 point font.

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