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' REPLY BRIEF ON THE MERITS

TERRENCE E. KEHOE
LAW OFFICES OF TERRENCE E. KEHOE

Tinker Building
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (fax)
tekehoelaw@aol.com

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

In this brief, the parties and record on appeal will be referred to as in Mr. Haynes' initial brief on the merits. Mr. Haynes' initial brief on the merits will be referred to as "IB. The state's answer brief on the merits will be referred to as "AB."

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

There is no disagreement as to the rule that applies in this appeal.

B. Standard of Review

On each issue raised by Mr. Haynes, the state argues that the issue was not preserved and therefore is not subject to review by this Court. In so doing, the state has ignored the argument made in Mr. Haynes' initial brief as to the standard of review, and has chosen a standard different from that applied by every district court of appeal in appeals from direct contempt convictions.

Mr. Haynes, citing cases from the First and Fifth Districts, asserted that any defect in the proceedings in a direct criminal contempt proceeding is fundamental error, and

an objection in the trial court is not necessary to preserve an issue for appellate review (IB 8-9). The state has chosen not to directly address either of those cases, or this legal principle. Instead, throughout it argues that Mr. Haynes has failed to comply with the contemporaneous objection rule, and therefore waived each issue (AB 23, 24, 27).

In reviewing dozens of direct contempt cases, undersigned counsel has not found one which applied the contemporaneous objection rule in a direct criminal contempt case, or one which ruled that a claim was waived due to failure to properly assert it at the contempt hearing, including any in which a court ruled that a failure to make a proffer waived a direct contempt claim. The state does not cite one. The standard cited by Mr. Haynes, and not that relied on by the state, is the proper standard in this appeal[1/].

It is important to note that in its decision below the Fifth District did not apply the contemporaneous objection rule on any issue it reviewed. Indeed, it ruled that the failure to permit an opportunity to provide evidence in mitigation was fundamental error, and did not require any contemporaneous proffer of such evidence as the state now asserts is needed.

1/ This standard is the same as the one applied in Rule 3.840 cases. See Hunt v. State, 659 So.2d 363, 364 (Fla. 1st DCA 1995).

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

The state's position on the merits of this issue before this Court is a complete reversal from its position before the Fifth District (IB 4). There it conceded that this issue constituted fundamental, reversible error requiring vacation of the judgment as well as the sentence. Here it contends that there is no basis to vacate the conviction. Such a change in position should not be countenanced by this Court. See Vaprin v. State, 437 So.2d 177, 178 n. 2 (Fla. 3d DCA 1983)(state should not attempt in appellate court to renege on concession made in lower tribunal).

One overriding problem with the state's argument in this Court is that it wants this Court to consider the rule governing indirect criminal contempt proceedings - Fla.R.Crim.P. 3.840 - in deciding this direct criminal contempt proceeding. Yet, because direct and indirect criminal contempt proceedings cover two different situations, they have long had different rules of procedure. Rule 3.840 simply does not apply to Mr. Haynes' case. Most importantly, Rule 3.840(g), unlike Rule 3.830, does not explicitly require the trial court to provide the defendant an opportunity to present evidence of excusing or mitigating circumstances.

The crux of the state's argument is its assertion that the provision of Rule 3.830 that requires the trial court to give the defendant an opportunity to present evidence of excusing or mitigating circumstances " . . .applies not to his adjudication of the

crime but to his sentence" (AB 14). Yet it cites no case to support that position. In his initial brief, Mr. Haynes cited a number of cases which have ruled that this provision applies to the adjudication as well as the sentence, including several from the Fifth District (IB 11-13). The state does not directly attack the correctness of any of the cases cited by Mr. Haynes on this point. See also Marshall v. State, 764 So.2d 908 (Fla. 1st DCA 2000); Keezel v. State, 358 So.2d 247, 248 (Fla. 4th DCA 1983)(Rule 3.830 requires the defendant be afforded an opportunity to explain his conduct before being adjudicated guilty).

The state asserts that Mr. Haynes does not offer " . . . any citation to authority . . ." for the proposition that the inclusion of the term "excusing" circumstances in Rule 3.830 requires vacation of the judgment because excusing circumstances are typically offered as a defense to a charge (AB 20). The cases cited at IB 11-13 all support that proposition. Self-defense is an excusing circumstance in a battery case. Consent is an excusing circumstance in an adult sexual battery case. See also Standard Jury Instructions in Criminal Cases, Instruction 7.1 (Excusable Homicide). The cases cited by Mr. Haynes recognize that an excusing circumstance is a defense, which must be heard before the adjudication. Failure to allow the defendant to present evidence of excusing circumstances thus requires vacation of the judgment as well as the sentence.

The state makes an efficiency argument (AB 21-22) that the Court should reject outright. Fairness - basic due process - cannot be trumped by the state's desire for efficiency. The courts have made it clear that Rule 3.830 must be complied with scrupulously. There is no need to cut corners by treating the " . . . violation of this single provision . . . " differently in this case than in the numerous other cases that have considered it. Contrary to the state's assertion, this is not an "absurd result" (AB 22), but rather the legally correct one.

D. Failure to Make Findings of Fact

The trial court's brief statement that Mr. Haynes was found in direct contempt " . . . for refusing to testify" does not comport with the requirements of Rule 3.830. This is not a " . . . recital of those facts on which the adjudication of guilt is based."

As argued in connection with issue II infra, Mr. Haynes had a lawful, constitutional privilege under the Fifth Amendment to refuse to testify unless that privilege was overcome by a lawful grant of immunity. The trial court's order does not state that Mr. Haynes was lawfully granted immunity, and therefore was legally required to testify. It does not even state that Mr. Haynes' refusal to testify was willful, an essential element of any direct criminal contempt charge[2/]. It does not state that Mr.

2/ This argument deals with the requirement that the findings be made in the written judgment. To bolster its argument, the state cites to the oral findings of the trial court (AB 23). Those play no role in this issue. See Johnson v. State, 584 So.2d 95, 96-97 (Fla. 1st DCA 1991)(reference in judgment to trial transcript does not satisfy requirement that factual basis be set forth in judgement). But it is interesting to note that in the cited oral findings the trial court made no finding of willfulness, or of a

Haynes refused to testify after being ordered to do so by the trial court. It simply is inadequate to comport with the Rule 3.830 requirement.

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

The state asserts that the returns of service on the two subpoenas could not violate the confrontation clause because they were not admitted into evidence (AB 24). It asserts that after being placed into the court file, the subpoenas were not relied on by the trial court once the contempt proceedings were instituted (AB 25). It also asserts that the documents were not relevant once the trial court ordered Mr. Haynes to testify (AB 25-26). All of these assertions must be rejected.

The state relied on these returns of service when it asserted that Mr. Haynes had been granted immunity (1/3-4). The trial court then referred to them when it reiterated that the state had granted immunity (1/7). So whether they were "offered" or not, they were part of the factual record relied on by the state and the trial court to overcome Mr. Haynes' assertion of his Fifth Amendment privilege. They were obviously relevant, because without proper service of a legal subpoena, Mr. Haynes still possessed his Fifth Amendment privilege.

Thus the subpoenas were relevant and relied on at the contempt hearing.

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lawful grant of immunity that overrode the Fifth Amendment privilege.

Because Mr. Haynes could not confront "J. Dawling," his constitutional rights were violated by the trial court's reliance on Dawling's affidavits.

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

In addressing the sufficiency of the evidence issue (AB 27-30), the state seems to assert that the abuse of discretion standard controls the issue (AB 28). While that standard may govern some of the components of a direct criminal contempt case, the sufficiency of the evidence issue in a criminal case is a constitutional one, governed by the "proof beyond a reasonable doubt" standard set forth in In re Winship, 397 U. S.458 (1970). See e.g., Turner v. State, 283 So.2d 157, 160-61 (Fla. 2d DCA 1973). Such an issue is reviewed on appeal by this Court under the de novo standard. Jones v. State, 790 So.2d 1194, 1196-98 (Fla. 1st DCA 2001)(en banc).

Mr. Haynes agrees with the state's general proposition that a person who refuses to testify when ordered to do so by a trial judge may be held in direct criminal contempt (AB 28-30). However, that general proposition ignores the specific context of this case. Mr. Haynes possessed a Fifth Amendment protection against self-incrimination. In order to overcome that privilege, the state had to legally immunize

him. Absent a legal grant of immunity, Mr. Haynes had a constitutional basis to assert his Fifth Amendment privilege, and in doing so could never be in "willful" contempt of the trial court.

The state's argument on appeal simply assumes a proper grant of immunity, and therefore a lack of a Fifth Amendment privilege. It ignores the fact that a proper grant of immunity was a fundamental component of the legality of the trial court's order to Mr. Haynes to testify. Pursuant to § 914.04, Florida Statutes (2005), the state was required to prove that Mr. Haynes had been "duly served" with a subpoena requiring his presence and testimony. It is not enough to simply say that Mr. Haynes was present and therefore could be forced to testify. Before it forced him to testify, the trial court was required to find that he had been legally granted immunity by being "duly served" with a subpoena. The state, in this appeal, refuses to accept that requirement. In so doing it simply chooses to gloss over Mr. Haynes' Fifth Amendment privilege. That privilege is too important to allow it to be eviscerated in such a cavalier fashion.

The state asserts that Mr. Haynes did not fail to appear, and " . . . actually appeared at the time required" (AB 30). The implication is that this appearance was a voluntary one. The reality is that, as an inmate, Mr. Haynes was forced to appear in court.

Because the state failed to prove that Mr. Haynes was properly served with a valid subpoena to testify, and thus did not have a valid Fifth Amendment claim, the conviction for direct criminal contempt cannot stand.

CONCLUSION

Based on the arguments and authorities set forth in this brief, and in Mr. Haynes' initial 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 19th day of June, 2007.

LAW OFFICES OF TERRENCE E. KEHOE
Tinker Building
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (fax)

tekehoelaw@aol.com

_____
TERRENCE E. KEHOE
Florida Bar No. 0330868

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June, 2007, a true copy of the foregoing was furnished by United States mail to counsel for the Respondent: Mary G. Jolley, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

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TERRENCE E. KEHOE
Florida Bar No. 0330868

CERTIFICATE OF COMPLIANCE

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

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TERRENCE E. KEHOE
Florida Bar No. 0330868