

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2001

Lower Tribunal No. 3D08-2187

CARLOS DEL VALLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, CARLOS DEL VALLE, was the Defendant in the trial court and the Appellant in the Third District. Respondent, THE STATE OF FLORIDA, was the Prosecution in the trial court and the Appellee in the Third District. The parties shall be referred to as they stand in this Court. In this brief, all references to the opinion under review will be referred to as they exist in the published opinion, Del Valle v. State, ___ So.2d ___ (Fla. 3d DCA October 23, 2008).

STATEMENT OF THE CASE AND FACTS

The decision of the Third District reads as follows:

Affirmed. See Gonzales v. State, 909 So.2d 960, 960 (Fla. 3d DCA 2005) ("If the probationer's defense is inability to pay, 'it is incumbent upon the probationer or offender to prove by clear and convincing evidence that he or she does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so.' § 948.06(5), Fla. Stat. (2004)").

The instant petition follows.

SUMMARY OF ARGUMENT

There is no basis upon which discretionary review can be granted in this case because the Third District's opinion does not conflict with any case of this Court or of any other district court in Florida. As such, no conflict exists for this

Court to exercise discretionary jurisdiction to review the decision below.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Petitioner contends that this Court should invoke its discretionary review power to review the Third District's opinion on the basis that "THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH *STEPHENS v. STATE*, 630 So.2d 1090 (Fla. 1994); *BLACKWELDER v. STATE*, 902 So.2D 905 (Fla. 2d DCA 2005); *OSTA v. STATE*, 880 So.2d 804 (Fla. 5th DCA 2004); and *SHEPARD v. STATE*, 939 So.2d 311 (Fla. 4th DCA 2006)." (Petitioner's Brief, p. 2). As set forth below, there is clearly no conflict with this Court's decision in Stephens. There is an apparent conflict with the decisions in Blackwelder, Osta and Shepard. However, as the Third District's decision is clearly correct, this Court should, in its discretion, decline review of the instant case.

In Stephens, this Court stated: "before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has willfully refused to do so." Stephens, 630 So.2d at 1091. Stephens addresses what determination is necessary in order to revoke probation but is

completely silent as to who the burden of **proving the ability to pay** rests on. Given that the opinion in Stephens makes no mention of the burden of proof, it does not address the same legal question as that addressed by the Third District and no conflict, therefore, exists.

The issue in Stephens was not which party had the burden of proving or going forward with evidence of ability or inability to pay restitution as a basis for revocation of probation. In Stephens, probation revocation proceedings were instituted as a result of the defendant's failure to make his scheduled restitution payments. During the course of those revocation proceedings, the trial court imposed new probationary requirements for restitution in the future. One of those requirements was that Stephens acknowledge that he understood all of the conditions and that he waived his right not to be imprisoned for debt. This was a waiver which would apply in future revocation proceedings if Stephens failed to pay restitution and, although Stephens voluntarily made the waiver, he argued on appeal and in this Court that the waiver of the right not to be imprisoned for debt in the future, based on future revocations for failure to pay, was unconstitutional. This Court, in Stephens, agreed with Stephens' position, and found that the waiver of the right not to be imprisoned for debt in the future was invalid, as that waiver would not require a

future determination of the probationer's ability to pay. The Stephens Court did not decide which party would have the burden of proving or going forward with evidence of ability or inability to pay. That simply was not even at issue in Stephens. As such, the Third District's opinion does not conflict with this Court's opinion in Stephens.

There is an apparent conflict between the Third District's opinion and Blackwelder, Osta and Shepard. Review, however, is discretionary and it is the State's position that this Court should not exercise its discretionary power to review the instant case. The Third District's opinion is a correct and sound interpretation of § 948.06(5), *Fla. Stat.* The opinions in Blackwelder, Osta and Shepard are an incorrect interpretation of Stephens, which as discussed above does not address the burden of proof or the application of § 948.06(5), *Fla. Stat.*

To the extent that Blackwelder, Osta and Shepard rely on the decision in Bearden v. Georgia, 461 U.S. 660 (1983), they are also incorrect in finding that the burden of proof is on the State to prove the probationer's inability to pay. Bearden held that a court must investigate the reasons for failing to pay a fine or restitution in probation revocation proceedings but was silent as to who the burden of proving inability to pay belongs to.

Several other jurisdictions, in reviewing Bearden, have held that the burden of proving inability to pay is properly placed on the probationer. In *State v. Fowlie*, 138 N.H. 234, 237 (N.H. 1994), the New Hampshire Supreme Court stated: "The State's initial burden when, as here, it brings a petition, is to show that the defendant did not meet a condition of his sentence, in this case, the payment of restitution. The court then 'must inquire into the reasons for the failure to pay.' [citation omitted]. If the defendant then 'demonstrates sufficient bona fide efforts to repay his debt', alternatives to imprisonment must be considered by the court before probation may be revoked and imprisonment ordered." In *State v. Jacobsen*, 746 N.W.2d 405, 408 (N.D. 2008), the North Dakota Supreme Court stated: "Although the State generally has the burden of proving the defendant violated the terms of probation, 'the defendant has the burden to raise and prove an inability to pay restitution at... revocation proceedings triggered by the defendant's failure to pay ordered restitution.'" In *The Matter of J.M., III*, 2003 Tex. App. LEXIS 9083 (Tex. App. 13th Dist. 2003), the Texas Court of Appeals held: "the inability of a juvenile to pay restitution was an affirmative defense to the revocation of probation and the burden of proof was on the juvenile."

As shown above, there is no conflict between the instant case and Stephens. Although there is arguably a conflict between the instant case and Blackwelder, Osta or Shepard, the Third District's opinion is a correct decision in light of the plain language of § 948.06(5), *Fla. Stat.* and is in line with cases from several other jurisdictions on the same issue. Discretionary jurisdiction entails only a judicial power to review a case, and not an obligation to do so. This court should not exercise its power to review the instant case.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed and sent via facsimile this 10th day of November, 2008 to ROBERT, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, fax no.: (305) 545-1999.

HEIDI MILAN CABALLERO

CERTIFICATE REGARDING FONT SIZE AND TYPE

The foregoing Brief of Respondent on Jurisdiction was typed in Courier New, 12-point font, in accordance with the Florida Rules of Appellate Procedure.

HEIDI MILAN CABALLERO