

IN THE SUPREME COURT OF FLORIDA

DAVID ERIC HOBBS,

Petitioner,

versus

CASE NO. SC08-615

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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STATE OF FLORIDA,

Respondent.

JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida. In the Brief the Respondent will be referred to as “the State” and the Petitioner will be referred to both by his name (“Mr. Hobbs”) and as he appears before this Honorable Court.

In the brief the following symbols will be used:

“R” - Record on appeal, volume two of record on appeal

“T” - Transcript of motion hearing, volume one of record on appeal

STATEMENT OF THE CASE

Petitioner David Eric Hobbs was charged by an information filed in the Circuit Court of Orange County, Florida, with sexual activity with a child by a person in a familial relationship and lewd or lascivious battery. (R 28-29, Vol. II) The trial court ruled that Petitioner's statements to law enforcement were inadmissible because the State was unable to independently establish the *corpus delicti*, and that Section 92.565(2) did not authorize their admission, because the State's inability to prove the crime was due to the complainant's declining to cooperate with the prosecution rather than her incapacity. (R 132-137, Vol. II; T 9, Vol. I) (Appendix.)

The State appealed the trial court's order denying the admission of Petitioner's statements and the Fifth District Court of Appeal reversed, ruling that "where a victim repudiates charges and declines to cooperate, and other evidence is not available to prove the corpus delicti, the burden of the state can be met even though the victim is not incapacitated[.]" and certifying conflict with Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006). State v. Hobbs, 974 So.2d 1119, at 1122-1123 (Fla. 5th DCA 2008). (Appendix). Petitioner's motion for rehearing was denied on February 26, 2008; the Office of the Public Defender was designated to represent Petitioner on appeal; and his notice to invoke this Honorable Court's discretionary jurisdiction was filed in the District Court on

March 26, 2008. Rule 9.030(a)(2)(A)(vi), Fla.R.App.P.

STATEMENT OF THE FACTS

In its decision herein, the District Court wrote:

We conclude, therefore, that where a victim repudiates charges and declines to cooperate, and other evidence is not available to prove the corpus delicti, the burden of the state can be met even though the victim is not incapacitated. *See Hernandez v. State*, 946 So.2d 1270 (Fla. 2d DCA 2007) (statute permits use of trustworthy confession when state unable to locate victim). Because the trial court was bound by *Kelly [v. State]*, 946 So.2d 591 (Fla. 1st DCA 2006),] and based its ruling entirely on that precedent, it did not fully address the issues and make the specific findings required by the statute. On remand, the trial court shall conduct a new hearing, as contemplated by the statute, and make specific findings as appropriate.

We certify that our holding today conflicts with the First District's decision in *Kelly*.

State v. Hobbs, 974 So.2d 1119, at 1122-1123 (Fla. 5th DCA 2008). (Appendix).

In Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006), the District Court had held:

. . . Applying the principle of *eiusdem generis*, it becomes clear that a prerequisite to the application of section 92.565(2) is the prosecution's inability to independently prove the crime due to some disability on the part of the victim. *See Bradley v. State*, 918 So.2d 337, 340 (Fla. 1st DCA 2005). As enunciated in the portion of the statute introducing the list of factors to be considered by the trial court, the disability which prevents the state from proving the elements of the crime must exist at the time the crime is committed. *See* § 92.565(2), Fla. Stat. (2005).

Here, the trial court attributed the State's inability to prove the *corpus delicti* to the victim's refusal to cooperate with the prosecution.

Such refusal on the part of the victim is not sufficient to meet the requirements of the statute. The victim's statement during a deposition that she would not appear at a trial to testify against Appellant did not create the sort of disability contemplated by the statute and this alleged disability was not present at the time the crime was committed. Because the State's inability to prove the *corpus delicti* of the crime was not attributable to a disability of the victim present at the time of the crime, the trial court erred in admitting Appellant's confession.

Id., 946 So.2d at 593.

Summary of Argument

The Supreme Court has jurisdiction to review the Fifth District Court of Appeal's decision in this cause. The District Court's decision expressly and directly conflicts with a decision of the First District Court of Appeal on the same question of law. The District Court's decision further has certified that its holding conflicts with the First District Court of Appeal's decision in Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006). Rule 9.030(a)(2)(A)(iv)&(vi), Fla.R.App.P. (Appendix).

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS, AND CERTIFIES THAT IT CONFLICTS, WITH THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN KELLY V. STATE, 946 So.2d 591 (Fla. 1st DCA 2006).

In its decision the Fifth District Court of Appeal reversed the Orange County Circuit Court's order that Petitioner's statements to law enforcement were inadmissible because the State's inability to establish the *corpus delicti* of the crimes with which Petitioner was charged was due to the complainant's declining to cooperate with the prosecution rather than due to her incapacity. (R 132-137, Vol. II; T 9, Vol. I) (Appendix). The Circuit Court had relied on the First District Court of Appeal's ruling in Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006), that a victim's refusal to cooperate with the State does not meet the requirements of Section 92.565(2). Section 92.565(2) creates in sexual abuse prosecutions an exception to the rule that the *corpus delicti* of the offenses charged must be established by independent means before the accused's out-of-court admissions may be introduced against him.

The First District Court had held:

. . . Applying the principle of *ejusdem generis*, it becomes clear that a prerequisite to the application of section 92.565(2) is the prosecution's inability to independently prove the crime due to some disability on the part of the victim. *See Bradley v. State*, 918 So.2d 337, 340 (Fla. 1st DCA 2005). As enunciated in the portion of the statute introducing the list of factors to

be considered by the trial court, the disability which prevents the state from proving the elements of the crime must exist at the time the crime is committed. *See* § 92.565(2), Fla. Stat. (2005).

Here, the trial court attributed the State's inability to prove the *corpus delicti* to the victim's refusal to cooperate with the prosecution. Such refusal on the part of the victim is not sufficient to meet the requirements of the statute. The victim's statement during a deposition that she would not appear at a trial to testify against Appellant did not create the sort of disability contemplated by the statute and this alleged disability was not present at the time the crime was committed. Because the State's inability to prove the *corpus delicti* of the crime was not attributable to a disability of the victim present at the time of the crime, the trial court erred in admitting Appellant's confession.

Kelly, 946 So.2d at 593.

In this case, the Fifth District Court of Appeal wrote:

We conclude, therefore, that where a victim repudiates charges and declines to cooperate, and other evidence is not available to prove the corpus delicti, the burden of the state can be met even though the victim is not incapacitated. *See Hernandez v. State*, 946 So.2d 1270 (Fla. 2d DCA 2007) (statute permits use of trustworthy confession when state unable to locate victim). Because the trial court was bound by *Kelly* [*v. State*, 946 So.2d 591 (Fla. 1st DCA 2006),] and based its ruling entirely on that precedent, it did not fully address the issues and make the specific findings required by the statute. On remand, the trial court shall conduct a new hearing, as contemplated by the statute, and make specific findings as appropriate.

We certify that our holding today conflicts with the First District's decision in *Kelly*.

State v. Hobbs, 974 So.2d 1119, at 1122-1123 (Fla. 5th DCA 2008) (Appendix).

This Honorable Court has jurisdiction to accept review of this cause and resolve the express and direct conflict which the decision herein certifies exists between the Fifth and First District Courts of Appeal on the same question of law.

Rule 9.030(a)(2)(A)(iv)&(vi), Fla.R.App.P.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF FONT

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. David Eric Hobbs, 8300 Elm Park Drive, #7211, Orlando, Florida 32821, this 4th day of April, 2008.

I HEREBY FURTHER CERTIFY that the size and style of type used in this brief is 14-point "Times New Roman."

ATTORNEY