

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 REPLY BRIEF ON THE MERITS

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CASE CITED:

Kelly v. State,
946 So.2d 591 (Fla. 1st DCA 2006) 4

OTHER AUTHORITY:

Section 92.565, Florida Statutes (2006) 3, 4
Section 92.565(2), Florida Statutes (2006) 3

STATEMENT OF THE FACTS

Petitioner adds the following to the statement of the facts:

The State notes in its statement of the facts that the investigation of this case began after “law enforcement was contacted.” (Answer Brief, Page 1) Recounting to a Sheriff’s detective the incident which immediately preceded law enforcement’s involvement, Petitioner stated, “...and that’s when I called you guys . . . I’ll let you guys take care of it.” (R 75-76, Vol. II) Detective Samara Melich noted in an incident report, “[T.M.Z.] had gotten into a verbal argument with Mr. Hobbs and he called law enforcement.” (R 46, Vol. II)

Citing an incident report, the State recounts that the complainant had reported that on the preceding night Petitioner had ejaculated into a towel. (Answer Brief, Page 1) (R 42, Vol. II) Detective Melich wrote in a subsequent report, “Mr. Hobbs provided consent to search the apartment for evidence and signed a consent to search form. The washcloth that [T.M.Z.] described could not be found.” (R 47, Vol. II)

The Answer Brief states, “On November 9, 2006, the media contacted T.M.Z. and she told the media that she had lied and her father had done nothing to her. (R47, Vol. [II]). Another individual on the scene apparently told the reporters that T.M.Z. was lying now and Petitioner had been abusing T.M.Z. for

years. Id.” (Answer Brief, Page 2) The incident report by Detective Melich which contained this account reads:

On November 9, 2006, I received a call from Sergeant Richard Mankewich. He advised me the media had located the residence [T.M.Z.] and Mr. Hobbs live at. [T.M.Z.] was there, with an escort, collecting her clothing. [T.M.Z.] provided a statement to the media. During this statement, she said she had lied and Mr. Hobbs had not done anything to her. Another individual on scene (unknown name) told the reporters she was lying now and Mr. Hobbs had been abusing her for years.”

(R 47, Vol. II)

Within the argument portion of the Answer Brief, the State writes, “Petitioner, after being advised of his constitutional rights, . . . ” (Answer Brief, page 16)

Detective Melich testified at the State’s motion hearing that Mr. Hobbs had come to the Sheriff’s Office voluntarily and, when defense counsel asked, “[S]o therefore I’m assuming you didn’t talk about Miranda Rights or anything?” she answered, “No.” (R 9, Vol. I)

ARGUMENT

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT CORRECTLY RULED THAT A COMPLAINANT'S PRESENT LACK OF COOPERATION DOES NOT RENDER THE STATE "UNABLE" TO PROSECUTE UNDER SECTION 92.565'S STATUTORY EXCEPTION TO THE COMMON LAW *CORPUS DELICTI* REQUIREMENT.

In its answer the State argues that a 17-year-old complainant's "refusal to testify against the adult defendant is consistent with the other factors on the list." (Answer Brief, pages 12 and 17-18) The refusal by a witness who is now an adult to testify, says the State, could be due to the lack of experience "to discern love and affection from exploitation." (Answer Brief, Page 19) (R 21, Vol. II)

"The list" is Section 92.565(2)'s non-exhaustive examples of circumstances of a child victim's inability to assist the prosecution in establishing the elements of the charged crime. Even if the State's theoretical Refusal-to-Testify Syndrome were seen as being akin to the mental and/or physical disabilities contemplated by and set out in Section 92.565, however, there would be no basis for its invocation in this case. Even the State's assertions in the trial court in its "motion regarding admissibility" -- including that the 17-year-old Straight-A student "has a limited amount of education" -- do not contend that this young lady is psychologically impaired as a result of the alleged abuse, nor is there any evidence or testimony other than that she is simply refusing to go forward with what she now says was a lie. (R 113, Vol. II) Speculating on the possibility that the complainant's refusal

to cooperate *could* be due to a disability or incapacity is no substitute for establishing or at least presenting some evidence of the existence of that fact. The chance of there ever being a worst-case scenario does not dispense with the need for evidence in every, or any, case. Based on the evidence before him, the trial judge correctly determined that a complainant's refusal to cooperate with the State is not akin to the mental and/or physical disability contemplated by and set out in Section 92.565 and denied the State's motion to suspend the *corpus delicti* rule in this case. (R 133-134, Vol. II) The conflict between the First and Fifth District Courts of Appeal should be resolved by approving the First District Court's decision in Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006), and quashing the Fifth District Court's decision herein.

CONCLUSION

For the reasons expressed herein and in his initial brief on the merits, Petitioner respectfully requests that this Honorable Court quash the Fifth District Court of Appeal's decision reversing the trial court's denial of the State's motion regarding admissibility of admissions without establishing the *corpus delicti* of the crimes charged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Charles J. Crist, Jr., 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 32821-6419, this 2nd day of September, 2008.

ATTORNEY

CERTIFICATE OF FONT

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

ATTORNEY