

IN THE SUPREME COURT OF FLORIDA

CASE NO.
DCA:10-1028

JAMES WARMINGTON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Warmington v. State*, __ Fla. L. Weekly __ (Fla. 3d DCA April 27, 2012), on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix paginated separately and identified as “A” followed by the page number.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of grand theft. The facts in the light most favorable to the State established that Christine Pistol, who had been a student in Petitioner’s real estate class, and her husband, Robert Pistol, approached Petitioner, expressing a desire to invest in mortgages. Petitioner responded that a friend, Rene Sardina, was interested in borrowing money, secured by a second mortgage on a piece of property he desired to purchase. According to Petitioner, Sardina's credit was such that he could not qualify for a second mortgage loan in the marketplace and, therefore, was willing to pay a higher-than-market, nine-percent interest rate on the mortgage. Petitioner functioned as the middleman for the transaction.

On September 10, 2002, the Pistols and Sardina met Petitioner and his wife at the Petitioners' house for the purpose of closing the transaction. The closing

documents, including a promissory note and mortgage, were prepared by Petitioner. The Pistols brought two \$75,000 checks, representing the loan amount. After Sardina signed the promissory note and mortgage, all of the parties travelled together to Petitioner's bank, where his wife deposited the two checks into the Petitioners' personal bank account. Robert Pistol testified that given Petitioner's role in the transaction as the middleman, he did not find anything suspicious about the fact the money was deposited into the Petitioners' bank account.

The Pistols received payments on the loan from October 2002 through 2005. Payments were made from Petitioner's bank account. When the Pistols stopped receiving payments, they contacted Sardina, who stated he never received the \$150,000, and was told by Petitioner the deal fell through. Petitioner testified the mortgage deal fell through, but the Pistols agreed to continue the transaction as a personal loan to Sardina, upon which Sardina simply had defaulted.

Detective Abolsky was assigned as the lead detective to the criminal case, precipitated by the Pistols' complaint to the authorities after the payments to them ceased. After interviewing the Pistols and Sardina, Detective Abolsky approached Petitioner and obtained an interview. Detective Abolsky testified:

[Prosecutor]: When you interviewed Mr. Warmington, how far [sic] is it that it came about?

[Detective]: Well, what I believed to be the complete case file, I went to his home to visit with him.

[Prosecutor]: What [wa]s the purpose of your visit?

[Detective]: The purpose of my visit was to allow him to dispel any alarms that I may have or concerns that he did anything wrong.

[Prosecutor]: And was he able to do that?

[Defense Counsel]: Objection. Burden shifting.

The Court: Sustained.

[Defense Counsel]: We have a motion to object, Judge.

The Court: Yes.

[Prosecutor]: When you went and spoke to him, what was the extent of your investigation?

[Detective]: I advised him of the nature of the investigation. We spoke outside his residence. **I began explaining to him what the allegations were and I offered him an opportunity to --**

[Defense Counsel]: Objection.

The Court: Sustained.

[Prosecutor]: Your Honor.

The Court: Continue on.

[Prosecutor]: And what was the result of that conversation?

[Detective]: Well, Mr. Warmington had indicated to me that a loan had been funded to Mr. Rene Sardina and that Mr. Sardina was no longer paying on the loan. The loan was comprised basically [of] a mortgage or something and as a result he had explained this to the Pistols and subsequently it was a matter he was trying to take care of.

[Prosecutor]: **Was the defendant able to produce any documentation?**

[Defense Counsel]: Objection. Burden shifting. We reserve --

The Court: Overruled.

[Prosecution]: **Was there documentation that day with regards to this explanation he gave you?**

[Detective]: **No, in fact, he represented that his home was also his office. And when I asked for him to provide any documentation, he couldn't.**

[Defense Counsel]: Objection.

The Court [sic]: Same objection as previously noted. We reserve the motion.

The Court: Continued objection. Go ahead.

[Prosecution]: When you had that conversation with Mr. Warmington, what happened?

[Detective]: I placed him under arrest.

At the conclusion of Detective Abolsky's testimony, Petitioner moved for a mistrial, arguing the State improperly shifted the burden of proof to Petitioner. The trial judge denied the motion, finding the State did not shift the burden. Petitioner argued on appeal the trial judge abused his discretion in denying the motion for mistrial based upon improper burden shifting.

The majority opinion of the Third District Court of Appeal concluded that the state did not improperly shift the burden of proof to the defense since, there was nothing wrong with introducing evidence at trial that defendant prior to trial was unable to produce any documentation to establish his innocence. The dissenting opinion not only concluded that the state had improperly shifted the burden of proof in this case but also, recognized that the majority opinion directly conflicted with this Court's decision in *Hayes v. State*, 660 So.2d 257 (Fla. 1995), the Fourth District Court of Appeal's decision in *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009) and the Second District Court of appeal's decision in *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004). (See appendix A).

A notice to invoke jurisdiction was filed on May 15, 2012.

SUMMARY OF ARGUMENT

Over the objections of defense counsel the state at the trial was allowed to introduce evidence that prior to the arrest of defendant, defendant was unable to produce any documentation to the arresting officer to establish his innocence. The majority opinion of the Third District Court of Appeal concluded that this testimony at trial which established that defendant failed to give the arresting officer evidence of his innocence prior to trial was not burden shifting. The dissenting opinion

correctly pointed out that the majority opinion directly conflicts with this Court's opinion in *Hayes v. State*, 660 So.2d 257 (Fla. 1995), the Fourth District Court of Appeal's decision in *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009) and the Second District Court of appeal's decision in *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004), which all clearly prohibit the state from introducing evidence at trial that defendant failed to produce evidence to the police prior to trial to establish his innocence. Therefore, this Court should accept jurisdiction in this case.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH HOLDS THAT THE STATE CAN INTRODUCE TESTIMONY AT TRIAL THAT ESTABLISHED THAT DEFENDANT FAILED TO PRODUCE DOCUMENTATION TO THE POLICE PRIOR TO TRIAL TO ESTABLISH HIS INNOCENCE DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN *HAYES V. STATE*, 660 SO.2D 257 (FLA. 1995), THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IN *RAMIREZ V. STATE*, 1 SO.3D 383 (FLA. 4TH DCA 2009) AND THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN *MIELE V. STATE*, 875 SO.2D 812 (FLA. 2D DCA 2004).

The state at the trial was allowed to introduce evidence that prior to the arrest of defendant, defendant was unable to produce any documentation to the arresting officer to establish his innocence. The majority opinion of the Third District Court of Appeal concluded that this testimony at trial which established that defendant

failed to give the arresting officer evidence of his innocence prior to trial, was not burden shifting. The conclusion of the majority directly conflicts with this court's decision in *Hayes v. State*, 660 So.2d 257 (Fla. 1995), the Fourth District Court of Appeal's decision in *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009) and the Second District Court of appeal's decision in *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004).

In *Hayes v. State*, 660 So.2d 257 (Fla. 1995), the State called as a witness an employee of the Broward County Sheriff's Office crime lab who testified concerning various pieces of physical evidence found at the scene of the murder, including clothing stained with blood. On cross-examination, the defense brought out the fact that the State had never requested a test of the blood stains. The apparent goal of this line of questioning was to cast doubt on the thoroughness of the State's investigation and to imply, that a test of the blood could have eliminated *Hayes* as a suspect. Then, on redirect, the trial judge overruled a defense objection and allowed the State to inquire whether the defense had requested any testing of the blood stains **prior to trial**. The witness replied that the defense had not asked the crime lab to test the blood stains and added that the lab had complied with such requests in the past for other defense attorneys. Similar comments were made by the prosecutor in closing

argument concerning the failure of the defense to test hairs found at the scene of the murder prior to trial.

On appeal this Court recognized that the state improperly shifted the burden of proof to the defendant by arguing that the defense should have had the blood stains tested prior to trial since the defendant had no burden to do this. Just like the defendant in *Hayes* had no burden to have the blood stains tested prior to trial, the defendant in this case had no burden to produce documentation to the detective to establish his innocence. As the dissenting opinion properly recognized if the state's introduction of evidence that prior to his arrest defendant was unable to produce documentation is not improper burden shifting it is hard to imagine what is. Therefore, the Third District's opinion that the introduction of evidence at trial that defendant failed to provide documentation of his innocence to the detective prior to his arrest was not improper burden shifting directly conflicts with this court's decision in *Hayes v. State, supra*.

As the dissent also properly recognized the Third District's decision directly conflicts with the Fourth District's decision in *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009) and the Second District's opinion in *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004). In both of those cases, similar to this case, the state introduced evidence at trial that the defendant failed to do something prior to trial to establish

their innocence. In both *Ramirez, supra* and *Miele, supra*, the state was able to bring to the jurors' attention that the defendants, prior to trial, failed to take pictures which would have supported their defense at trial. In both cases the district courts held the defendant was entitled to a new trial since the defendant did not have to do anything prior to trial to establish his innocence. Similar in this case defendant's defense at trial was that the victim's signed a valid mortgage and he was not guilty of theft. Introducing evidence at trial that defendant failed to produce any documentation prior to trial was no different than arguing that the defendant in *Hayes* should have had the blood stains tested prior to trial or that the defendants in *Ramirez* and *Miele* should have taken photographs prior to trial. In all of these situations the jury is wrongfully left with the impression that a defendant has an obligation to establish his innocence prior to trial.

The majority opinion in this case has established a rule of law that there is nothing wrong with the state introducing evidence that prior to trial a defendant failed to produce documentation of his innocence immediately prior to his arrest. Since this holding directly conflicts with this Court's decision in *Hayes, supra*, the Fourth District's decision in *Ramirez, supra*, and the Second District's decision in *Miele, supra*, this Court should accept jurisdiction in this case.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this ____ day of May, 2012.

ROBERT KALTER
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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

ROBERT KALTER
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APPENDIX