

IN THE SUPREME COURT OF THE STATE OF FLORIDA

BERNARD DOUGHERTY

Petitioner,

v.

Case No. SC12- 2365
5th DCA No. 5D10-2755

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the District Court.¹ Respondent, therefore, offers the following as a substitute for Petitioner's statement of the case and facts.

The Fifth District Court of Appeal's (Fifth District) opinion in *Dougherty v. State*, 96 So. 3d 984 (Fla. 5th DCA 2012), states:

Appellant raises two issues on appeal, only one of which merits discussion. Appellant challenges his conviction, claiming that he was never declared competent to proceed after a period of incompetency. Concluding that Appellant was adjudicated competent by oral pronouncement of the trial court based upon the stipulation of defense counsel, we affirm the conviction but remand this cause for entry of a written order effective to September 10, 2003.

On August 21, 2002, the court found Appellant incompetent to proceed and committed him to the Department of Children and Families. He was initially placed in a mental institution, but subsequently released and transferred to the county jail when the facility's staff determined that he no longer met the criteria for involuntary commitment. The court set a competency review hearing for February 27, 2003. At the competency hearing, immediately following the court's calling of the case, defense counsel stated:

Your Honor, this is Mr. Dougherty who just returned from the State Hospital. This would be a comp review.

¹ *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

Apparently, the hospital feels Mr. Dougherty is capable of going forward and we would request that since they feel he's capable of going forward, I talked to Mr. Dougherty briefly this morning, and he feels he's ready to go forward. We would like to have this set for the next docket sounding.

The State did not object and the court set the case for docket sounding on April 21, 2003.

Approximately four months later, defense counsel filed a motion to determine Appellant's competency. The trial court appointed three experts to evaluate Appellant and scheduled a hearing for September 10, 2003. At the hearing, defense counsel stipulated that Appellant was competent to proceed. The transcript of the hearing reveals the following:

THE COURT: This is the matter of the State of Florida versus Bernard Dougherty. Who's got that case?

[STATE ATTY.]: Judge, Ms. Cobrand and I. It should not be that complicated.

[DEFENSE ATTY.]: **We did get the evaluation back from the three doctors, so we will stipulate he is competent to proceed.**

THE COURT: Very good. We'll put it on just the regular docket sounding then.

(Emphasis added). Thereafter, the case proceeded to trial without any further mention of Appellant's competence.

Appellant now contends that the lack of a written order adjudicating him competent requires that we

reverse his conviction and order a new trial. Appellant also argues that he did not receive a proper and sufficient competency hearing, again necessitating a new trial. We disagree. It is apparent from the record that the trial court found Appellant competent to proceed based upon the representation and stipulation of defense counsel. The lack of a written order may be cured without the need for a new trial. *Martinez v. State*, 851 So.2d 832, 833–34 (Fla. 1st DCA 2003). Appellant's contention that the hearing was insufficient is also without merit. Because Appellant stipulated to the written reports at a properly scheduled competency hearing, the trial court was authorized to base its competency finding on the written reports. *Molina v. State*, 946 So.2d 1103, 1105 (Fla. 5th DCA 2006). The cases cited by Appellant are distinguishable.

Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction in the instant case. The Court is limited to the facts contained within the four corners of the decision in determining whether an express and direct conflict exists. On the face of the decision under review, there is no express and direct conflict with any decision of this Court or any district court.

ARGUMENT

ON THE FACE OF THE DECISION IN *DOUGHERTY v. STATE, INFRA*, THERE IS NO EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THIS COURT OR OF ANOTHER DISTRICT COURT. THIS COURT SHOULD THEREFORE DECLINE TO ACCEPT JURISDICTION.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. *See also* Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.”

Petitioner cites to a single case to establish jurisdiction, *Macaluso v. State*, 12 So. 3d 914 (Fla. 4th DCA 2009). *Macaluso* is factually distinguishable from the case herein and thus no conflict exists. In *Macaluso*, the defendant was declared incompetent and, five months later, his attorney advised the court that the defendant had been found competent “based on ‘the evaluations that were obtained by the Public Defender’s Office.’” *Id.* at 915. The trial court then spontaneously declared the defendant competent and the case proceeded to trial. *Id.* Just before jury selection, the defendant’s attorney added that facility doctors had found the defendant competent to be tried. *Id.*

In the instant case however, Petitioner was declared incompetent and was committed to the Department of Children and Families. After the Department determined that Petitioner no longer met the criteria for involuntary commitment, it transferred Petitioner back to the county jail. A competency review hearing was held on January 27, 2003, at which defense counsel declared:

Your Honor, this is Mr. Dougherty who just returned from the State Hospital. This would be a comp review.

Apparently, the hospital feels Mr. Dougherty is capable of going forward and we would request that since they feel he's capable of going forward, I talked to Mr. Dougherty briefly this morning, and he feels he's ready to go forward. We would like to have this set for the next docket sounding.

Dougherty, 96 So. 3d at 985. Four months later, pursuant to defense counsel's motion, three experts were appointed by the court to evaluate Petitioner, and a competency hearing was set. *Id.* At the competency hearing, the following exchange occurred:

THE COURT: This is the matter of the State of Florida versus Bernard Dougherty. Who's got that case?

[STATE ATTY.]: Judge, Ms. Cobrand and I. It should not be that complicated.

[DEFENSE ATTY.]: **We did get the evaluation back from the three doctors, so we will stipulate he is competent to proceed.**

THE COURT: Very good. We'll put it on just the regular docket sounding then.

Id. (Emphasis added by court).

During his 2010 appeal, Petitioner alleged that his 2003 competency hearing was insufficient. *Id.* The Fifth District disagreed, holding, “[b]ecause Appellant stipulated to the written reports at a properly scheduled competency hearing, the trial court was authorized to base its competency finding on the written reports.”

Id.

Thus, in the instant case, unlike *Macaluso*, the trial court did not solely rely on the stipulation of counsel in determining competency, but rather relied on the stipulation to the written reports of the court appointed experts at a competency hearing. Because the two cases are factually distinguishable, no conflict exists. Without express and direct conflict between the two districts, this Court lacks jurisdiction to consider this cause.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

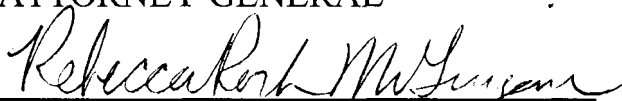
I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been delivered via U.S. Mail to: *pro se* Petitioner Bernard Dougherty, DOC # D19763, at Apalachee Correctional Institution, 52 West Unit Dr., Sneads, FL 32460, this 26th day of November, 2012.

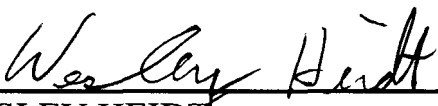
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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COUNSEL FOR RESPONDENT

96 So.3d 984, 37 Fla. L. Weekly D1913
(Cite as: 96 So.3d 984)

H

District Court of Appeal of Florida,
Fifth District.
Bernard DOUGHERTY, Appellant,
v.
STATE of Florida, Appellee.

No. 5D10-2755.
Aug. 10, 2012.


Rehearing and Rehearing En Banc Denied Sept. 28,
2012.

Background: Defendant was convicted of resisting an officer with violence and acquiring controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, following jury trial in the Circuit Court, Brevard County, Robert T. Burger, J. Defendant appealed, and the District Court of Appeal, 33 So.3d 732, affirmed in part, reversed in part, and remanded. After resentencing, defendant appealed.

Holding: The District Court of Appeal held that trial court was authorized to base its competency finding on the written reports.

Affirmed and remanded.

West Headnotes

Criminal Law 110  **625.15**

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency

110k625.15 k. Evidence. Most Cited

Cases

Because defendant's defense counsel stipulated to the written reports, which found defendant competent to stand trial, at a properly scheduled competency hearing, the trial court was authorized to base its competency finding on the written reports.

*984 James S. Purdy, Public Defender, and Thomas J. Lukashow, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Rebecca Rock McGuigan, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Appellant raises two issues on appeal, only one of which merits discussion. Appellant challenges his conviction, claiming that he was never declared competent to proceed after a period of incompetency. Concluding that Appellant was adjudicated *985 competent by oral pronouncement of the trial court based upon the stipulation of defense counsel, we affirm the conviction but remand this cause for entry of a written order effective to September 10, 2003.

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pellant are distinguishable.

AFFIRMED AND REMANDED.

TORPY, LAWSON and COHEN, JJ., concur.

Fla.App. 5 Dist., 2012.
Dougherty v. State
96 So.3d 984, 37 Fla. L. Weekly D1913

END OF DOCUMENT