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IN THE SUPREME COURT OF FLORIDA

JEAN CLAUDE NOEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-1952

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Noel, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number. "A" will designate the Appendix to this Response.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form as the Appendix. The facts relied on by Respondent are as follows:

Prior to sentencing for conspiracy to racketeer and first degree grand theft, the trial court asked Petitioner if he was in a position to make "up front restitution" (A. 1-2). Petitioner stated that he could make a lump sum between $20,000 and $40,000 (A. 2). It was established that Petitioner had received at least $108,795 of the stolen proceeds (A. 2).

Petitioner faced 30 years imprisonment for both offenses, and the State argued that he should be sentenced for a minimum of 15 years (A. 2). The trial court sentenced Petitioner to 10 years imprisonment, followed by 10 years probation (A. 2). As a condition of probation, the court ordered Petitioner to pay $650,000 in restitution to the victims, with 15% of his net pay going towards restitution (A. 2).

It made a provision that if Petitioner were to pay $20,000 in restitution within 60 days, then his prison sentence would be mitigated to 8 years (A. 2). It voiced the hope that "it accomplishes something [for] these victims that have lost so much as a result of the whole incident." (A. 2).

On appeal, Petitioner argued that the restitution provision of the sentence violated his equal protection rights (A. 2).

Amongst other precedent, the Fourth District considered Bearden v. Georgia, 461 U.S. 660, 661 (1983) and stated that the Supreme Court had noted that due process analysis was superior to an equal protection approach in evaluating the impact of a defendant's indigency in the sentencing context (A. 5). The majority stated that it was employing the due process approach favored by Bearden instead of using equal protection analysis (A. 8).

The majority receded from the earlier case of DeLuise v. State, 72 So. 3d 248 (Fla. 4th DCA 2011), to the extent that it was inconsistent with its opinion in this case (A. 12). It noted in the opinion that DeLuise primarily relied on Tate v. Short, 401 U.S. 395 (1971), which addressed the constitutionality of a fine for a non-criminal traffic offense that was converted into incarceration due to the defendant's indigency (A. 3-4). It stated that DeLuise failed to consider the impact of Bearden, which drew a constitutional line between a judge's initial sentencing decision, and a revocation of probation proceeding (A. 5). It stated that the primary difference between its opinion and that in DeLuise is that DeLuise used an equal protection analysis while it employed the due process approach favored in Bearden (A. 8).

The majority determined that the sentence was proper and noted that the trial judge considered the enormity of the crime

and Petitioner's criminal record in fashioning a sentence within the statutory maximum (A. 12). It stated that there is no constitutional limit on a judge's ability to show mercy by imposing a shorter sentence in trying to do justice for the victim (A. 11-12).

The Fourth District certified conflict with Nezi v. State, 119 So. 3d 517 (Fla. 5th DCA 2013), in which the Fifth District aligned itself with DeLuise (A. 12).

SUMMARY OF ARGUMENT

The opinion of the district court is not in direct and express conflict with the decision cited by Petitioner. Petitioner has failed to show that this court has jurisdiction to review the opinion of the district court. This court should decline to review this cause on the merits.

ARGUMENT

THE FOURTH DISTRICT'S OPINION IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE CASE CITED BY PETITIONER.

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the Florida Constitution (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. See The Florida Bar v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). This Court in Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975) made it clear that its "jurisdiction to review decisions of

courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law to produce a different result in a case which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. In this second situation, the facts of the case are of the utmost importance." [emphasis added]. See also Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) ("cases which are cited for conflict that are distinguishable on their facts will not vest this Court with jurisdiction").

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980).

Here, the decision below is not in "express and direct" conflict with Nezi v. State, 119 So. 3d 517 (Fla. 5th DCA 2013). First, in this case, the trial court set out the exact terms for

both payment and mitigation, whereas in Nezi, the trial court merely stated that if the defendant were to come up with some "monies," then it would consider "some modification." Nezi, 119 So. 3d at 521. Second, in Nezi, the defendant did not indicate that she could pay any restitution upfront but instead stated that she could pay $400 a month at best or $500 at the time of sentencing. Id. at 517-521. Here, on the other hand, Petitioner said that he could pay $20,000 to $40,000 in upfront restitution.

Lastly, in Nezi, the court considered the sentencing in terms of equal protection. Id. at 518, 522. The majority in this case, though, expressly chose to employ a due process analysis. In her dissent, Judge Taylor acknowledged that the court in Bearden indicated that the question to be asked is whether the consideration of the defendant's finances in setting a sentence is so arbitrary or unfair as to be a denial of due process, and stated that her opinion was consistent with this due process analysis (A. 16, 22, 24). Judge Ciklin did the same in his dissenting opinion (A. 25, 27, 30, 31, 33). In Nezi, the Fifth District acknowledged that under Bearden, the court was authorized to consider the defendant's financial resources in fashioning a sentence. 119 So. 3d at 522.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been e-filed at the Florida e-filing Portal and by e-mail on October 23rd, 2014 to: Tatjana Ostapoff, Assistant Public Defender, at appeals@pd15.state.fl.us; tostapof@pd15.state.fl.us; cgload@pd15.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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