

IN THE SUPREME COURT OF FLORIDA

NOEL PLANK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-414

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

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 Plank, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

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 is the opinion as Appendix "A". It also can be found at 130 So. 3d 289 (Fla. 1st DCA 2014).

SUMMARY OF ARGUMENT

The First District Court of Appeal held that a defendant does not have the right to counsel under the Sixth Amendment or the Florida Rules of Criminal Procedure when he/she is charged with direct criminal contempt. This holding directly and expressly conflicts with the holding in *Woods v. State*, 987 So. 2d 669 (Fla. 2d DCA 2007) and *Al-Hakim v. State*, 53 So. 3d 1171 (Fla. 2d DCA 2011).

ARGUMENT

ISSUE I: WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IN *PLANK V. STATE*, 130 SO. 3D 289 (FLA. 1ST DCA 2014), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE DISTRICT COURT OF APPEAL IN *WOODS V. STATE*, 987 SO. 2D 669 (FLA. 2ND DCA 2007) AND *AL-HAKIM V. STATE*, 53 SO. 3D 1171 (FLA. 2D DCA 2011)? (RESTATED)

A. *The Decision of the First District Court of Appeal Directly and Expressly Conflicts With Decisions of the Second District Court of Appeal.*

1. Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla.

R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla.

Const. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

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).

2. The decision below is in "express and direct" conflict with *WOODS v. STATE*, 987 SO. 2D 669 (FLA. 2ND DCA 2007) AND *AL-HAKIM V. STATE*, 53 SO. 3D 1171 (FLA. 2D DCA 2011) .

In *Plank v. State*, 130 So. 3d 289 (Fla. 1st 2014), Petitioner was found guilty of direct criminal contempt and was sentenced to 30 days jail for appearing for jury duty intoxicated and for disrupting the process of jury selection. Petitioner argued on appeal that the trial court erred by not appointing him counsel. The First District Court of Appeal affirmed

Petitioner's conviction without a written opinion. Petitioner filed a motion for rehearing, clarification, request for written opinion, and for a certification of conflict. The Court denied petitioner's motion for rehearing, but granted his motion for written opinion. The Court held that a defendant does not have the right to counsel under the Sixth Amendment or the Florida Rules of Criminal Procedure when he/she is charged with direct criminal contempt. The First District certified conflict with *Woods v. State*, 987 So. 2d 669 (Fla. 2d DCA 2007) and *Al-Hakim v. State*, 53 So. 3d 1171 (Fla. 2d DCA 2011).

As a result, the First District's decision expressly and directly conflicts with decisions from a sister court. Both *Woods* and *Al-Hakim* reflect that a defendant does have the right to counsel under the Florida Rules of Criminal Procedure in direct criminal contempt proceedings.

CONCLUSION

Due to the conflict between districts, similarly situated defendants are being treated differently. The State respectfully requests this Honorable Court determine that it does have jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Colleen D. Mullen and Steven L. Seliger, collen.mullen@flpd2.com and steven.seliger@flpd2.com on April 1, 2014.

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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Noel PLANK, Appellant,
v.
STATE of Florida, Appellee.

No. 1D13-4458. Jan. 29, 2014.

An appeal from the Circuit Court for Leon County. Angela C. Dempsey, Judge.

Attorneys and Law Firms

*290 Nancy A. Daniels, Public Defender, and Colleen D. Mullen, Assistant Public Defender, Tallahassee, for Appellant.

William N. Meggs, State Attorney, and Charles Dewrell, Assistant State Attorney, Tallahassee, for Appellee.

Opinion**ON MOTION FOR REHEARING, CLARIFICATION, REQUEST FOR WRITTEN OPINION, AND CERTIFICATION OF CONFLICT**

PER CURIAM.

We deny Appellant's motion for rehearing, but grant his motion for a written opinion and substitute this opinion in place of our previously issued *per curiam* affirmance.

Appellant was found guilty of direct criminal contempt and sentenced to 30 days in jail for arriving drunk to jury duty and disrupting the process of jury selection. He raises three issues in this direct appeal. We affirm two of the issues without further comment, and affirm the remaining issue for the reasons that follow.

Appellant argues that the trial court erred by not appointing him counsel or giving him an opportunity to seek counsel for the contempt proceeding. We affirm on the authority of *Williams v. State*, 698 So.2d 1350 (Fla. 1st DCA 1997), and *Saunders v. State*, 319 So.2d 118 (Fla. 1st DCA 1975), in which this court held that a defendant does not have a right to counsel under the Sixth Amendment or the Florida Rules of Criminal Procedure when charged with direct criminal contempt. *Accord Searcy v. State*, 971 So.2d 1008, 1014 (Fla. 3d DCA 2008); *Forbes v. State*, 933 So.2d 706, 711 (Fla. 4th DCA 2006); see also *In re Oliver*, 333 U.S. 257, 274-75, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (explaining that the right to counsel and other due process requirements are not implicated in contempt cases involving "charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent demoralization of the court's authority before the public") (internal quotations and ellipses omitted); *In re Terry*, 128 U.S. 289, 313, 9 S.Ct. 77, 32 L.Ed. 405 (1888) (explaining that a court's jurisdiction to punish direct contempt vests upon commission of the contemptuous act and that it is within the court's discretion to punish the offense immediately or to postpone action until the defendant is afforded an opportunity to present a defense).

We recognize that the Second District held in *Woods v. State*, 987 So.2d 669 (Fla. 2d DCA 2007), and *Al-Hakim v. State*, 53 So.3d 1171 (Fla. 2d DCA 2011), that a defendant has a right to counsel under the Florida Rules of Criminal Procedure in direct criminal contempt proceedings. The Fourth District reached a similar conclusion in *Hayes v. State*, 592 So.2d 327 (Fla. 4th DCA 1992). *But see Forbes, supra*. Accordingly, we certify conflict with these cases.

AFFIRMED; CONFLICT CERTIFIED.

ROBERTS, WETHERELL, and MARSTILLER, JJ., concur.

Parallel Citations

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