

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-24

DCA NO. 3D04-1541

RAYON DAVENPORT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

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

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INTRODUCTION

The Petitioner, Rayon Davenport, was the Appellant in the district court of appeal and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

On direct appeal of his judgment of conviction and sentence Petitioner, Rayon Davenport, alleged that the trial court abused its discretion in denying his motion for continuance. Defense counsel served a subpoena on a potential witness, which required the witness to appear at the start of trial. On the third day of trial, defense counsel informed the court that the witness had not appeared. The trial court issued a writ of bodily attachment and continued the trial until the next day. The witness failed to appear during the additional two days of the five-day trial.

The lower court found no abuse of discretion in the trial court's denial of the motion to continue because Petitioner failed to exercise due diligence to ensure the presence of a subpoena witness at trial. The opinion stated

as follows:

To prevail on a motion for continuance, prior due diligence to obtain a witness' testimony must be shown. See Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996). We distinguish Robinson v. State, 561 So. 2d 419 (Fla. 1st DCA 1990), where defense counsel immediately moved for a continuance prior to the commencement of trial when he learned that a witness failed to appear in response to a subpoena. Here, defense counsel's subpoena required the witness to appear before the start of jury selection. The witness' failure to appear was thus known prior to trial. Yet counsel did not raise the issue until the third day of trial.

Davenport v. State, 914 So. 2d 1004 (Fla. 3rd DCA 2005).

Petitioner thereafter filed the subject pro se petition for review.

SUMMARY OF THE ARGUMENT

The Court does not have jurisdiction to review the lower court's decision in the instant case, as it does not expressly and directly conflict with this Court's opinion in Geralds v. State, or the first district's opinion in Robinson v. State. In Robinson, when defense counsel learned that a witness failed to appear in response to a subpoena, he immediately moved for a continuance, prior to the commencement of trial. In the instant case, defense counsel was aware of the witness' failure to appear prior to trial, but did failed to bring the issue to the court's attention until the third day of trial.

In Geralds, because no subpoena was ever served, Petitioner concludes that the mere serving of a subpoena

automatically satisfies the requirement of prior due diligence to obtain the witness's presence. This is not so. Instead, the service of a subpoena is most usually required, but does not necessarily fully satisfy due diligence.

Petitioner also argues that jurisdiction exists because the lower court's decision denied him his constitutional right to compulsory process. This Court does not have jurisdiction on this basis, as the lower court did not even mention the right to compulsory process much less "expressly construe" a provision of the state or federal constitution.

ARGUMENT

I. THE SUPREME COURT OF FLORIDA DOES NOT HAVE JURISDICTION TO REVIEW THE THIRD DISTRICT COURT OF APPEAL'S DECISION. (REPHRASED)

Petitioner seeks the Court's discretionary review of the district court's decision based on two subsections of Rule 9.030 (a)(2)(A), Fla. R. App. P. Respondent maintains that the Court is without jurisdiction to review this decision.

A. THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN GERALDS V. STATE, 674 SO.2D 96 (FLA. 1996) OR THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN ROBINSON V. STATE, 561 SO.2D 419(FLA. 1ST DCA 1990). (REPHRASED).

Petitioner claims that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., which provides for this Court's discretionary review of decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. Respondent maintains that the Court is without jurisdiction, as no such conflict exists.

Petitioner claims that Robinson and Geralds both held that timely serving a missing witness with a subpoena to appear at trial constitutes the necessary amount of prior due diligence to prevail on a motion for continuance. Petitioner then concludes that conflict exists because the third district's decision holds that the serving of a subpoena on a defense witness is insufficient to satisfy the requirement of prior due diligence. Neither of these purported holdings is correct.

In Robinson, a defense witness was served prior to trial with a subpoena to appear at trial on the date trial was to commence. Right after jury selection, but before the panel was sworn and before the trial commenced, defense counsel advised the court that its witness failed to appear. The trial court heard testimony confirming that the witness was served with the subpoena. The testimony also

indicated that the witness might be deliberately evading the command of the subpoena. The court then issued a writ of bodily attachment. When trial was about to begin two days later, and the witness did not appear, defense counsel moved for a continuance. The trial court allowed the defense 24 hours to secure the witness's presence and postponed the commencement of trial until the following day. On the following day, the defense renewed its motion for continuance. The state objected to the motion and argued that it would not be an abuse of discretion to deny the motion because the witness is not available to testify, as the witness is not willing to testify. The trial court denied the motion.

The appellate court noted that the defense took the necessary steps to have the witness subpoenaed in advance of trial and when the witness failed to appear, the defense immediately advised the court and sought the court's enforcement of its process. The defense also presented sworn testimony as to the witness's anticipated testimony, which went to the very heart of the defense. The appellate court held that the trial court failed to require the exhaustion of reasonable efforts to execute the writ of attachment for the purpose of bringing an apparently material witness before the court. The court expressly

rejected the speculative argument that the witness probably would not testify even if the subpoena was enforced. In doing so, the court noted that it did not intend to suggest that the defendant was entitled to an indefinite delay to execute the writ of attachment. However, because of the circumstances of the case, including the critical nature of the anticipated testimony of the witness, the court held that the defendant was entitled to more consideration than was given by the lower court. Id. at 421.

The instant case is distinguishable from Robinson. Unlike Robinson, Petitioner waited two days to inform the court that the witness had not appeared. Additionally, there was no finding that the testimony of the witness in the instant case was critical or that Petitioner was compelled to testify because of the witness's absence. In the instant case, the trial court granted a one day continuance and left the door open for the witness to testify for three days until the conclusion of the trial. The lower court's opinion recognized this distinction and expressly distinguished Robinson on the basis that defense counsel in Robinson *immediately* moved for a continuance when he learned that a witness failed to appear in response to a subpoena, and such motion was made *prior* to the

commencement of trial.

Petitioner attempts to diminish this important distinction by claiming that the majority in Robinson expressly rejected a similar line of reasoning which was suggested by Judge Booth, in a dissenting opinion. Judge Booth reasoned that the due diligence requirement was not met because defense counsel knew of the witness' intentions to ignore the mandate of the subpoena and should not have waited until the witness actually failed to appear before asking the trial court for assistance. In response to the dissent's opinion, the majority opinion stated:

Judge Booth's interpretation would be an open invitation to material witnesses to decide for themselves whether to appear and testify in response to the properly invoked process of the court.

Petitioner misinterprets the majority's position on the dissenting opinion to be a blanket statement that the majority rejected the argument that the attorney could have acted quicker in notifying the court, as is the situation in the instant case. The majority comment was stating that the properly invoked process of law, via the service of a subpoena's command to do something on a given future date, would be diluted by the suggestion that a non-committal witness can invoke action even before the subpoena's edict

has been officially disregarded. The majority's comment on the dissent has no impact on the holding that Robinson was entitled to have his continuance granted because, among other things, he promptly brought the matter to the court's attention.

In Geralds, although Dr. Sybers performed the autopsy on the victim, the state notified the defense well in advance of the start of the trial that it would be calling Dr. Lauridson to testify as to the manner and cause of death of the victim. Despite this knowledge, defense did not list Sybers on its witness list prior to trial. Instead, at the close of the state's case, defense requested a continuance to serve and call Sybers. Defense counsel could not confirm that Sybers agreed to be a witness or would be available to testify. Additionally, defense could not and did not make any proffer as to what Sybers' testimony would be and made no showing of material prejudice. Based on these facts, the Court held that Geralds failed to demonstrate any of the four requirements set forth in O'Neill and Robinson. Accordingly, the Court held that the trial court did not abuse its discretion in denying the motion for continuance.

Because a subpoena was never served in Geralds, Petitioner concludes that the mere service of a subpoena

would have satisfied the requirement of prior due diligence to obtain the witness's presence. This is not so. Although the service of a subpoena is most usually required, it does not necessarily fully satisfy due diligence. As illustrated in Robinson, the service of a subpoena but the failure to diligently take further action when the subpoena is not complied with would constitute a failure to act diligently.

B. THE DECISION OF THE LOWER COURT DID NOT EXPRESSLY CONSTRUE A PROVISION OF THE STATE OR FEDERAL CONSTITUTION. (REPHRASED)

Petitioner is claiming that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(ii), Fla. R. App. P., which provides for this Court's discretionary review of decisions of district court's of appeal that *expressly construe* a provision of the state or federal constitution. Petitioner argues that the lower court's decision denied him his constitutional right to compulsory process.¹ This Court does not have jurisdiction on this basis, as the lower court did not even mention the right to compulsory process much less "expressly construe" a provision of the state or federal constitution. For purposes of this Court's jurisdiction, a lower court opinion does not "expressly construe" a

provision of the state or federal Constitution by merely applying a constitutional provision to the facts of the case. Rojas v. State, 288 So. 2d 234 (Fla. 1973). Fla. R. App. P. 9.030(a)(2)(A)(ii). As this Court explained in Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958), in order for a lower court to be considered to have *construed* a constitutional provision, the lower court: must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the [lower court] examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution. Id. at 409. Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973) (Court lacked jurisdiction because the lower court's decision failed to explain or define any constitution terms or language).

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the lower court's opinion does not expressly and directly conflict with Geralds v. State or Robinson v. State, nor does it expressly construe a provision of the

¹An accused has a constitutional right to compulsory process to obtain witnesses in his defense. Dickerson v. Alabama, 667 F.2d 1364, 1369 (11th Cir. 1982).

state or federal constitution. Thus, the Respondent respectfully maintains that this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was mailed to Shannon P. McKenna, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125 on this ___ day of February, 2006.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in font
Courier New, 12 point, in compliance with Rule 9.210(a)(2)
of the Florida Rules of Appellate Procedure.

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