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IN THE SUPREME COURT OF FLORIDA

ORIGINAL

ROBERT J. FRANCOIS,
Petitioner,

V.

STATE OF FLORIDA,
Respondent

CASE NO.: SC07-1997
L.T. CASE NO.: 1D07-582
3RD JUD. CIR.: 99-637CF

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PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT FOR THE STATE OF FLORIDA

PETITIONER / PRO SE:
ROBERT J. FRANCOIS, PRO SE (182196)
216 S.E. CORRECTIONS WAY
LAKE CITY, FLORIDA 32025

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STATEMENT OF THE CASE AND FACTS

On December 12, 2006, the appellant's motion to disqualify was properly filed in the lower tribunal pursuant to, and invoking Florida Statutes § 38.01; § 38.04; § 38.05; § 38.10; and Florida Rules of Judicial Administration 2.160 (See R.O.A., Pp. 6-7).

Petitioner's motion specifically stated that Hon. E. Vernon Douglas (Douglas), Circuit Court Judge for the Third Judicial Circuit, in and for Columbia County, Florida, could not lawfully continue to preside on petitioner's pending case at bar, and all postconviction proceedings. Primarily where the face of the record bears Douglas had been recused from the case at bar: per "Assignment Order", no.: 99-247, entered by Chief Judge Thomas J. Kennon, Sr. on December 17, 1999 (See R.O.A., Pp. 31-32).

On December 21, 2006, Douglas entered an order denying said motion in which he was a party (R.O.A., Pp. 29-30), constituting a void order which, has no force or effect, and is a nullity within itself. (SEE R.O.Ap. 29)

On January 25, 2007, appellant timely filed a notice of appeal to review the trial court's order denying the petitioner's motion to disqualify. The District Court (1st DCA) adopted the trial court's response, and permitted Douglas' sua sponte denial to stand; stating, "The Court [District] has concluded that there is no basis for the exercise of its appellate jurisdiction. Accordingly, the motion dismiss is granted and the appeal is hereby dismissed." (APPEND. "C")

On March 28, 2007, appellant filed a motion objecting to state's

"Motion To Dismiss", as ordered by the First District Court on March 15, 2007.

On July 6, 2007, the First District Court filed a "Per Curiam" opinion. stating in part "the appeal is hereby dismissed." (APPEND. "C")

On August 3, 2007, appellant filed a notice to invoke discretionary jurisdiction.

On September 5, 2007, the Supreme Court of Florida (SC07-1497 - LT. 1D07-542) ordered petitioner to file a jurisdictional initial brief in (15) days.

On September 18, 2007, petitioner timely submits the instant brief, with attached order and appendix.

SUMMARY OF THE ARGUMENT

In the case at bar the First District Court of Appeal's (1st DCA) dismissal of appellant's "Motion To Disqualify" does not make a determination on whether the issue(s) presented by the appeal has been settled as the law of the case at bar. (APPEND. "C")

By its nature, an order dismissing an appeal signifies that the court did not reach the merits. In the case at bar, the appellate court does not specifically address or make a determination on whether Douglas could lawfully continue to preside over petitioner's pending postconviction motions. Where petitioner demonstrated by the face of the record his well grounded fear of not receiving a fair and impartial hearing in future postconviction proceedings, with Douglas presiding. (R.O.A. p 8-10)

Secondly, whether Douglas could lawfully respond to the motion

to disqualify and specific issues where "he is a party" ... especially where the record bears Douglas recused himself (or removed) for whatever reason after the "Heated" November 23, 1999 chamber hearing, and did not proceed with petitioner's trial, Douglas could not thereafter reconsider the recusal decision and unlawfully re-assert judicial authority over petitioner's postconviction filings. (R.O.A., Pp. 3-5); (Order of Reassignment - R.O.A., Pp. 31, 32); (Appendix "B")

Upon this Court's close scrutiny of the record on appeal, specifically: the "Order of Assignment" entered by the Chief Judge. It is prima facie that Douglas' denial order on the "Motion To Disqualify", at bar, is a void order, and has no force or effect and is a nullity. As in all denial orders entered by Douglas on petitioner's postconviction motions; i.e., initial Rule 3.850 motion; Rule 3.800(a) motion(s); and Habeas Corpus Petition. (R.O.A., Pp. 8-10); (See Docketing Statement, where petitioner notes specific dates - Appendix "D")

The opinion filed on July 6, 2007, by the 1st DCA, merely stated: "The Court has concluded that there is no basis for the exercise of its appellate jurisdiction. Accordingly, - - - - the appeal is thereby dismissed." Petitioner states that this order resolves only the preliminary question: whether the court had judicial power to review judgement. The opinion does not address, much less adjudicate, the merits of the controversy, and it has no impact on any remedy the petitioner may have in another forum.

Review of petitioner's "Standard of Review", and the applicable doctrine of the law of the case, assumes that an issue was decided in the appellate court. (R.O.A., Pp. 7-8). Yet, the very point of dismissal for lack of jurisdiction is that the court lacks judicial power to make a decision. Held in Pompi v. City of Jacksonville, 872 So.2d 931, 933 (Fla. App. 1 Dist. 2004).

Petitioner seeks an order reversing the lower tribunal's order. Thus, the petitioner contends that the decision of the 1st DCA expressly and directly conflicts with the previous decision(s) of this Court.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. Art. V, § 3(b)(3), Fla. Const. (1980); Fla.R. App. P., Rule 9.030 (a)(2)(A)(iv).

ARGUMENT

The decision of the 1st DCA in this case expressly and directly conflicts with the decision of this Court, in Barnhill v. State, 834 So.2d 836 (Fla. 2002); 123 S.Ct. 2281, 539 U.S. 917, 156 L.Ed.2d 134, 2003 WL 1889239; and, as set forth by Justice Terrell in State Ex. Rel. Davis, V. Parks, 141 Fla. 516, 199 So.2d 613, 615 (1939); Goolsby v. State, 914 So.2d 991 (Fla. App. 5 Dist. 2005)

The 1st DCA interpreted section(s) §38.01; §38.04; §38.05, Fla. Statutes governing the disqualification of a judge, does not rise to appellate review in the case at bar. On July 6, 2007, the 1st DCA's opinion provides in pertinent part: "Upon consideration ... the Court has concluded that there is no basis for the exercise of its appellate jurisdiction - - - Accordingly, the appeal is hereby dismissed."

As explained below, the decision of the District Court conflicts

with a decision of this Court, holding that section(s) 38.01, 38.04, 38.05, and 38.10 as raised by appellant in the lower tribunal and 1st DCA can support the disqualification of a judge, in a pending future post-conviction proceedings, specifically in the case at bar, where Douglas was officially recused by way of the Cheif Judge's "Order of Assignment.

The appellant respectfully submits that this Court should grant discretionary review and resolve the conflict by quashing the decision of the 1st DCA.

The standard for determining whether a motion to disqualify the trial judge is legally sufficient; whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. Barnhill v. State, 834 So.2d 836 (2002); 123 S.Ct. 2281, 539 U.S. 917, 156 L.Ed.2d 134, 2003 WL 1889239; citing Cave v. State, 660 So.2d 705 (Fla. 1995).

As in the instant, issues in a motion to disqualify are reviewed under a de novo standard as to whether the motion is legally sufficient as a matter of law. Barnhill, supra, provides in part: "When deciding whether disqualification of trial judge from case due to prejudice is warranted, it is not appellate courts function to determine how the trial judge actually feels, but rather what feelings resides in the petitioner's mind and the basis for such feelings; held in Valdes-Fauli v. Valdes-Fauli; 2005 WL 435500 (2005)

The courts have long held in State Ex. Rel. Davis v. Parks, 141 Fla. 516, 194 So.2d 613, 615 (1939): [every litigant is entitled

to nothing less than the cold neutrality of an impartial Judge. It is the duty of courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question.]

Thus, at bar, the 1st DCA has expressly held that "[T]here is no basis for the exercise of its appellate jurisdiction... and the appeal is hereby dismissed."

The 1st DCA's decision is in direct conflict with the decision of Goolsby v. State, 914 So.2d 994 (Fla. App. 5 Dist. 2005), where in the court expressly stated that a void order has no force or effect and is a nullity. In Goolsby, the court concluded: "Defendant's failure to object to trial judge who recused herself from case... on his postconviction relief did not waive the issue of trial judge's authority; trial judge's orders entered after her recusal were void, rather than merely voidable;" citing Davis v. State, 849 So.2d 1137 (1st DCA 2003) -- providing in pertinent part: "... contrained to reverse, to assure due process is afforded to Davis;" citing Meaweather v. State, 732 So.2d 499 (Fla. App. 1st Dist. 1999) - holding judge who had recused himself could not rule on motion to correct illegal sentence 3.800(a).

In light of the Legislator's intent and and specific language expressed in the Florida Statutes governing the disqualification of judges. §38.10 and Rule 2.160 supports petitioner's substantive right to seek disqualification, but even more pertinent, petitioner has demonstrated all orders entered by Douglas in the case at bar, lower tribunal (#99-637CF) are void, and this Court on its own motion should afford petitioner due process and enter an order vacating all orders entered by Douglas subsequent to the "Order of Assignment", which effectively recused Douglas from petitioner's lower tribunal proceedings, and all subsequent postconviction proceedings.

This Court correctly interpreted Florida Statute(s) § 38.01, § 38.04, § 38.05, and § 38.10, and Goolsby, as stated above, and the Court should now affirm that interpretation by accepting discretionary review and quashing the contrary decision of the court below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument, and instantly afford petitioner due process and equal protection rights as secured by the U.S. Constitution, which were not afforded, and denied in the lower tribunal and 1st DCA.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been furnished to the Florida Supreme Court c/o Clerk of Court, 500 South Duval Street, Tallahassee, Fla. 32399-1925; Hon. Bill McCollum, Atty. General, PL-01-The Capitol, Tallahassee, Fla. 32399-1050; Office of the State Atty. (3rd J.C.), P.O. Box 1546, Live Oak, Fla. 32060; and Hon. E. Vernon Douglas, P.O. Box 2075, Lake City, Fla. 32056 by placing same in the U.S. mail within the confines of Columbia C.I., Lake City, Florida on this 18TH day of September, 2007.

* Robert J. Francois 9-18-07

Robert J. Francois, # 182196, Pro.se
Columbia C.I.
216 S.E. Corrections Way
Lake City, Fla. 32025-2013