

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,760

MARIO D'OLEO-VALDEZ,

Petitioner

vs.

THE STATE OF FLORIDA,

Respondent.

C
pl

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Assistant Attorney General
Department of Legal Affairs
Suite 921-N
401 Northwest 2 Avenue
Miami, Florida 33130
(305) 377-5441

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STATEMENT OF THE CASE AND FACTS

The relevant facts are set forth in the opinion of the Third District Court of Appeal, filed December 22, 1987, which states:

Although he made no such complaint below, the defendant now claims error in the fact that the trial court, upon an appropriate suggestion of incompetency to stand trial, appointed only one examiner to render an evaluation¹ rather than the two provided by Florida Rule of Criminal Procedure 3.210. Because the number of examiners is merely a non-fundamental procedural matter - unlike, for example a total failure to determine competence by failing to secure any expert opinion whatever, *Scott v. State*, 420 So.2d 595 (Fla. 1982) -- we hold that the failure to bring the deviation from the rule to the trial court's attention effected a waiver of the contention. *Castor v. State*, 365 So.2d 701 (Fla. 1978); *De La Cova v. State*, 355 So.2d 1227 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 831 (Fla. 1978); *Page v. State*, 412 So.2d 454 (Fla. 2d DCA 1982); 3 Fla. Jur.2d Appellate Review §§293, 300-301 (1978). We do not read *Graydon v. State*, 502 So.2d 25 (Fla. 4th DCA 1987), to hold otherwise. If we are wrong about this, we think Graydon is wrong.

There is no other error.

* * *

¹

The appointed psychiatrist found Valdez fully competent. No point is made of the trial court's ensuing determination to that effect.

QUESTION INVOLVED

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL BELOW, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION IN GRAYDON V. STATE, 502 SO.2D 25 (FLA. 4TH DCA 1987).

SUMMARY OF ARGUMENT

The trial court appointed one expert witness to determine the defendant's competency. On appeal, the defendant alleged that the applicable rule of procedure required that two experts be appointed. The Third District Court of Appeal held that the issue was not preserved for appeal, as the defendant never called the deviation to the attention of the trial court. That opinion does not conflict with Graydon v. State, 502 So.2d 25 (Fla. 4th DCA 1987), as Graydon does not indicate that the error in Graydon was not properly preserved, and Graydon does not address the issue of the need to properly preserve this matter.

ARGUMENT

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL BELOW, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE OPINION IN GRAYDON V. STATE, 502 SO.2D 25 (FLA. 4TH DCA 1987).

The opinion of the Third District Court of Appeal below, held that the defendant failed to preserve the alleged error for appellate review, by failing to bring the deviation from the rule of procedure (requiring to expert examinations for competency) to the attention of the trial court. This ruling does not expressly and directly conflict with the opinion in Graydon v. State, 502 So.2d 25 (Fla. 4th DCA 1987). While Graydon held that a trial court erred in appointing only one expert, Graydon does not discuss the need for properly preserving the issue for appeal. The Graydon opinion does not state that the defendant failed to call the error to the attention of the trial court. Thus, there is no indication that Graydon involved an improperly preserved issue for appeal.


As Graydon does not address the need to properly preserve the issue by calling it to the attention of the trial court, the opinion in Graydon does not expressly and directly conflict with the opinion of the Third District Court of Appeal below.

CONCLUSION

Based on the foregoing, the opinion below does not conflict with Graydon, supra, and in the absence of jurisdiction, the petition to invoke discretionary jurisdiction should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



RICHARD L. POLIN
Assistant Attorney General
Department of Legal Affairs
Suite 820
401 Northwest 2 Avenue
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to SUSAN S. LERNER, ESQ., Suite 705, 19 West Flagler Street, Miami, Florida 33130 on this 10th day of February, 1988.



RICHARD L. POLIN