

Request
App

047 DA. 1-5-93

FILED

SID J. WHITE

AUG 10 1992 9/1

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

JOHN DOE,

Petitioner,

vs.

CASE NO: 79,508

STATE OF FLORIDA,

Respondent.

DISTRICT COURT OF APPEAL
SECOND DISTRICT NO: 91-02739

FLORIDA BAR NO: 0650201

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the District Court
of Appeal, Second District
State of Florida

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	iii
STATEMENT OF THE CASE AND FACTS	1-2
SUMMARY OF THE ARGUMENT	3-4
ARGUMENT	5-7
 I. THE STATE ATTORNEY'S OFFICE MAY NOT COMPEL AN INDIVIDUAL PURSUANT TO THE STATE ATTORNEY'S INVESTIGATIVE SUBPOENA POWERS TO PROVIDE HANDWRITING EXEMPLARS AND FINGERPRINT SAMPLES WITHOUT PROBABLE CAUSE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATE'S CONSTITUTION.	
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

CASES:

Saracusa v State, 528 So.2d 520 (Fla. 4th DCA 1988)

Hayes v Florida, 470 US 811, 84 L.Ed. 2d 705, 105 S.Ct. 1643 (1985)

Wyche v State, 536 So. 2d 272 (Fla. 3d DCA 1988), review denied,
544 So. 2d 201 (Fla. 1989)

State v Pettis, 520 So. 2d 250 (Fla. 1988)

CONSTITUTIONAL PROVISIONS AND STATUTES:

Section 27.04, Florida Statutes (1989)

PRELIMINARY STATEMENT

In this Brief, the Petitioner, SHERNEQUA PACE, will be referred to by name or as the Petitioner. The Respondent will be referred to as the State or the Respondent.

Citations to the transcript from the original Circuit Court proceedings will be made by the letter "T" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Petitioner, SHERNEQUA PACE, was the subject of a John Doe Subpoena issued by the State Attorney's Office in an attempt to compel the Petitioner to provide fingerprint samples and handwriting exemplars pursuant to the powers of the State Attorney's Office through Section 27.04, Florida Statutes (1989). Pursuant to a Motion to Quash filed on behalf of the Petitioner in the Trial Court, the Trial Court entered an Order Quashing the State Attorney's Investigative Witness Subpoena relying upon the rulings in Saracusa v State, 528 So.2d 520 (Fla. 4th DCA 1988) and Hayes v Florida, 470 US 811, 84 L.Ed. 2d 705, 105 S.Ct. 1643 (1985). The State Attorney's Office filed a Petition for Writ of Certiorari to the Second District Court of Appeal.

The Second District Court of Appeal entered an opinion dated December 11, 1991, granting the Petition for Writ of Certiorari and Quashing the Trial Court's Order. The Second District Court of Appeal specifically disagreed with the conclusion reached in Saracusa. A Motion for rehearing filed by the Petitioner was denied on February 10, 1992, and the Petitioner's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on March 9, 1992.

An examination of the transcript of the original Circuit Court proceedings from July 24, 1991, reveals that the Petition was served with a State Attorney's Investigative Subpoena for the purpose of providing fingerprints and handwriting exemplars. (T-

2-3). At the time of the request, there was no indication to the Petitioner as to the scope of the investigation involved, nor the actual allegations of the investigation. (T-3). The Petitioner was being compelled by the State Attorney's Office pursuant to their subpoena power to provide handwriting exemplars and fingerprint samples without any indication as to the nature of the investigation. (T-3). The Petitioner had not been charged with any crime nor had there been any finding of probable cause for purposes of the compulsion pursuant to the Respondent's subpoena. (T-4).

Upon examining the cases provided, the Trial Court noted that "a person being under the Subpoena Duces Tecum, if you don't respond to it, you can be held in contempt of Court." (T-7). The purpose of the Trial Court's analogy is to demonstrate the fact that the Petitioner was in fact in a custodial situation with regards to the compulsion by the Respondent. The Court further provided the Respondent with an opportunity to indicate to the Court the necessity for the Subpoena and the Respondent declined to do so. (T-9). As a result, the Trial Court granted the Motion to Quash relying on Hayes and Saracusa. (T-19).

As a result, the Respondent filed a Petition for Writ of Certiorari to the Second District Court of Appeal. The Second District Court of Appeal quashed the Trial Courts Order and this Petition to Invoke the Discretionary Jurisdiction of the Court followed.

SUMMARY OF THE ARGUMENT

In this case, the District Court of Appeal held that the State Attorney with its constitutional and statutory duties to summons witnesses can obtain nontestimonial evidence without the showing of reasonableness and without the establishment of probable cause. The decision of the District Court cannot be reconciled with the previous decision of the Fourth District Court of Appeal in Saracusa v State, 528 So.2d 520 (Fla. 4th DCA 1988) and Hayes v Florida, 470 US 811, 84 L.Ed. 2d. 705, 105 S.Ct. 1643 (1985). As a result, this Court has accepted jurisdiction of this matter and set oral argument.

The Second District Court of Appeal has sought to follow the rationale of Wyche v State, 536 So. 2d 272 (Fla. 3d DCA 1988), review denied, 544 So. 2d 201 (Fla. 1989). The Second District Court of Appeal has drawn a distinction between a person being taken into custody by the police without probable cause for the mere purpose of taking fingerprints as opposed to the State Attorney's Office compelling an individual to do the same pursuant to their investigative subpoena power. Section 27.04, Florida Statutes (1989). The opinion set forth by the Second District Court of Appeal appears to indicate that the State Attorney will not be required to work under the concept of probable cause in compelling an individual to testify or provide nontestimonial evidence. In the absence of probable cause, the Respondent is

acting in violation of the Fourth Amendment to the United States Constitution and no exception has been carved out for the Respondent which would in any way distinguish the Respondent from any other police organization. In the absence of probable cause, the State Attorney's investigative subpoena should be quashed and the opinion of the Second District Court Appeal reversed.

ARGUMENT

The State Attorney's Office may not compel an individual pursuant to the State Attorney's investigative subpoena powers to provide handwriting exemplars and fingerprint samples without probable cause in violation of the Fourth Amendment to the United State's Constitution.

The District Court of Appeal for the Second District interprets the constitutional and statutory duties of the State Attorney to summon witnesses as providing for such authority without showing a reasonableness and without the establishment of probable cause. As has been previously noted, the decision of the Second District Court of Appeal conflicts with the decision of the Fourth District Court of Appeal in Saracusa v State, 528 So.2d 520- (Fla.) 4th DCA 1988) and Hayes v Florida, 470 US 811, 84 L.Ed. 2d 705, 105 S.Ct. 1643 (1985). The Trial Court chose to follow the well reasoned holdings of Saracusa and Hayes while the Second District Court of Appeal has chosen to follow the Wyche decision. The Petitioner respectfully submits that this Court should follow the decisions rendered in Saracusa and Hayes.

In Hayes, the United States Supreme Court reversed the decision of the Second District Court of Appeal in Florida inhaled that forcibly removing a person from their home or any other place where they are entitled to be without probable cause or a warrant results in an illegal detention in violation of the Fourth and Fourteenth Amendments. Hayes at 815 and 816. The Hayes decision

dealt specifically with the issue of compulsory finger printing. While Hayes involved the police coming to a Defendant's home and informing the Defendant that he must accompany the police to the police station for fingerprinting, it is the Petitioner's position that a State Attorney subpoena is no different than the direct contact of a law enforcement officer for purposes of compelling an individual to provide either fingerprint samples or handwriting exemplars.

As noted in Saracusa, the Court followed Hayes and found that compelling a person to appear in a live line up and to submit to a blood test could not be made without a finding of probable cause. Saracusa at 521. In Saracusa, the State moved to compel a prisoner to appear in a line up and to submit to the taking of a blood sample in connection with unrelated charges from which the Defendant was being held. Saracusa at 521. In other words, the compulsion attempted by the State in Saracusa on the prisoner is directly analogous to the situation in the present case. The prisoner in Saracusa was not being held in connection with the investigation being conducted and for which the State sought the compulsion of a line up and the taking of a blood sample. In the present situation, the Respondent is attempting to compel the Petitioner to provide fingerprint samples and handwriting exemplars pursuant to an investigative subpoena without a prior finding of probable cause. The compulsory method attempted by the Respondent results in the same violation of the Fourth and Fourteenth Amendments as outlined in Hayes and Saracusa.

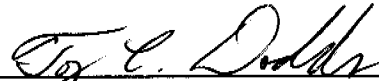
The Wyche decision relied upon by the Second District Court of Appeal and by the Respondent, is based on decisional law that predates the Hayes decision. The Hayes decision establishes the requirement of probable cause and the Respondent may not sit in a better position than that of any other law enforcement agency. Section 27.04, Florida Statutes (1989) was not intended and cannot subvert the requirements of the Fourth and Fourteenth Amendments to the United State's Constitution.

As noted by the dissenting opinion of Judge Hall with the Second Court of Appeal, there is nothing in the record that would establish that the Trial Court's ruling was a departure from the essential requirements of law. State v Pettis, 520 So. 2d 250 (Fla. 1988). The Respondent was given the opportunity to provide to the Court for the necessity of the fingerprints and handwriting exemplars and the Respondent failed to provide any explanation. As a result, it can only be inferred that the Respondent lacked probable cause for purposes of being able to compel handwriting exemplars and fingerprint samples in compliance with the Fourth and Fourteenth Amendments.

CONCLUSION

The decision of the Second District Court of Appeal should be reversed and the Trial Judge's Order reinstated based on the lack of probable cause and the violation of the Fourth Amendment of the United State's Constitution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Michael Cusick, State Attorney's Office, Bartow, Florida, and to Peggy Quince at the Attorney General's Office, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607, by hand delivery and/or regular U.S. mail this 7th day of August, 1992.



Tony C. Dodds