

IN THE SUPREME COURT OF FLORIDA

TRAVIS WELSH,

Petitioner,

v.

CASE NO. SC02-1092

STATE OF FLORIDA,

Respondent.

_____ /

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the circuit court for Duval County, where he was convicted of one count of capital sexual battery and one count of lewd and lascivious assault. Petitioner was the Appellant in the First District Court of Appeal. He will be referred to in this brief as petitioner or as Mr. Welsh.

The record on appeal consists of eight volumes, nine exhibits and two supplemental volumes. Citations to the record will appear as "R," followed by the appropriate volume and page number, e.g., (R.I,1). Citations to the supplemental record will appear as "SR," followed by the appropriate volume and page number, e.g., (SR.II,1). Citations to the state's answer brief

will appear as "AB", followed by the appropriate page number, e.g., (AB,1).

STATEMENT OF THE CASE AND FACTS

Nothing added.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING PETITIONER'S REQUEST TO INSTRUCT THE JURY ON LEWD AND LASCIVIOUS CONDUCT AS A LESSER OFFENSE OF SEXUAL BATTERY?

JURISDICTION

The state misapprehends the principal basis of the court's jurisdiction. The state argues that the court lacks jurisdiction of this case because

an examination of the operative facts and principles of law addressed in the decision below reveals no express and direct conflict with the decisions in [King v. State, 642 So. 2d 649 (Fla. 2d DCA 1994)] and [Velazquez v. State, 648 So. 2d 302 (Fla. 5th DCA 1995)].

(AB,7). The state refers to the basis of jurisdiction as "express and direct conflict" of decisions. By implication and reliance on Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), the jurisdictional basis contemplated by the state derives from

Article V section 3(b)(3) of the Florida Constitution. The principal basis of jurisdiction in the present case, however, is found in Article V section 3(b)(4) of the Florida Constitution which provides that a district court of appeal may certify that its decision passes upon a question of great public importance or that its decision is in "direct conflict" with a decision of another district court of appeal. In its opinion below, the district court wrote

we certify conflict with two of the three cases appellant cited as supporting his position that he is entitled to an instruction advising the jury that a lewd and lascivious act may be considered a lesser offense to that of sexual battery, *i.e.*, *Velazquez v. State* and *King v. State*.

The principal basis for the court's jurisdiction, therefore, derives from Article V section 3(b)(4) of the Florida Constitution. That is why no jurisdictional briefs were required in this case and why the court's discretionary authority to review the case is undeniable.

In the alternative, petitioner notes that the court also possesses the discretionary authority to review this case under Article V section 3(b)(3) of the Florida Constitution because the district court's opinion expressly and directly conflicts with or misapplies the holding of this court in State v. Hightower, 509 So. 2d 1078 (Fla. 1987).

PRESERVATION

The state acknowledges that the parties, in the trial proceedings, discussed the issue of whether the jury should be instructed on the offense of lewd and lascivious conduct as a lesser offense of sexual battery. (AB,12). The state acknowledges that defense counsel argued that there was conflicting case law on that issue. (AB,12). The state acknowledges that defense counsel argued that case law supported the view that the jury is permitted to decide whether a particular act constitutes sexual battery or lewd and lascivious conduct. (AB,12). The state acknowledges that at the end of the charge conference defense counsel articulated that he explained to petitioner that the defense was "requesting certain lessers, and the court had ruled on that." (AB,13). Notwithstanding these concessions the state points to the fact that defense counsel cited authority contrary to petitioner's position for the implicit conclusion that the defense was satisfied with the trial court's instructions or reversed its position on the issue thereby waiving the issue for appellate review.

The fact that a party cites authority contrary to its position should not be construed as a reversal of position or a waiver unless such is specifically expressed on the record. All parties have a duty of candor toward the tribunal. This duty may include informing the trial court of contrary decisional authority. R. Regulating Fla. Bar 4-3.3(a)(3). To hold that an

attorney's obligatory satisfaction of the Rules of Professional Conduct operates as a waiver of his or her client's position would be cruel, unwise, unworkable and unjust. Unlike the cases upon which the state relies, there is nothing in the record to suggest that petitioner abandoned his position in regard to the requested instruction. Mere acquiescence to the trial court's ruling should not be construed as abandonment or waiver. Most importantly, this court has held that once a defendant raises an objection to a jury instruction and obtains a ruling thereon, there is no need to renew the objection at the close of the charge conference or at the time of jury instruction. Carpenter v. State, 785 So. 2d 1182, 1199 (Fla. 2001). The issue, therefore, was preserved for review.

MERITS

Nothing added.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS LIMITED DISCRETION IN ADMITTING PETITIONER'S LETTERS CONTAINING WILLIAMS RULE EVIDENCE INVOLVING MARGARITA AND OLGA BECAUSE THE PREJUDICIAL NATURE OF THE LETTERS OUTWEIGHED THEIR PROBATIVE VALUE?

Nothing added.

ISSUE III

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING THE WILLIAMS RULE EVIDENCE TO BECOME A FEATURE OF THE CASE WHERE THE LETTERS INTRODUCED INTO EVIDENCE WERE

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EXTREMELY PREJUDICIAL AND THE PROSECUTOR
EMPHASIZED THEM IN CLOSING ARGUMENT?

Nothing added.

ISSUE IV

WHETHER PETITIONER WAS DENIED HIS FEDERAL AND STATE DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR COERCED THE COOPERATION AND TESTIMONY OF THE MOTHER OF THE ALLEGED VICTIM BY CHARGING HER WITH TAMPERING WITH A WITNESS, AND ALSO COERCED THE COOPERATION AND TESTIMONY OF THE ALLEGED CHILD VICTIMS BY THREATENING THE UNITY AND TRANQUILITY OF THE FAMILY WITH THE IMPENDING PROSECUTION OF THE MOTHER?

The claim that petitioner received an unfair trial is underscored by the state's defense to the claim. Specifically, the state argues that the mother's trial testimony supports its claim that her prosecution for tampering with a witness was reasonable and justified. Ms. Vargas testified that she forged her child's signature on one of the letters and added a sentence to another of the letters. (AB,42). On direct examination, she testified that she had not been threatened or promised anything in return for her cooperation. (AB,43). The problem, of course, is that Ms. Vargas' testimony cannot be trusted because she was under extreme duress to assist the state at peril of incarceration and the commitment of her children to the custody of the state.

The state claims that there is no evidence that Princess and Margarita were coerced into testifying with regard to the letters written to the judge, or that Ms. Vargas was coerced into admitting to forgery. (AB,44). The state must mean that

there is no "smoking gun" evidence because the circumstantial evidence is overwhelming. Moreover, there is smoking gun evidence--the mother's inconsistency between her depositions and trial testimony, and her cross-examination testimony that someone from the state attorney's office coerced her incriminating testimony by threatening her. "Smoking gun" evidence is not necessary to acknowledge the inescapable conclusion that a mother threatened with imprisonment and the loss of her children has a strong motive to lie, i.e, to save herself and her children. It follows that the children have the same motive to lie. In fact, the state's entire case was developed by cultivating the witnesses' motive to lie.

The fact that the state learned of the letters prior to the arrest does not bolster its position. Although the authorities learned of the letters prior to the mother's arrest, there is no reason to believe that the children retracted their written statements until the fate of their family depended on it.

The state asserts its "prerogative" to file criminal charges against Ms. Vargas. Petitioner concedes that the state possesses the discretion to file criminal charges. Petitioner does not concede that the state had "evidence" of the commission of a criminal offense by Ms. Vargas. The more important point, however, is that the exercise of prosecutorial discretion does not constitute immunity from the practical effect, and legal

consequences of that exercise, nor immunity from the charge of unethical behavior. The state chose to file charges against Ms. Vargas. That choice resulted in the coercion of the testimony of every crucial witness against petitioner. The state assumed the risk that the natural and probable consequences of its choice may be subject to judicial scrutiny for constitutional error.

From petitioner's perspective the prosecutor committed multiple counts of tampering with the witnesses by charging Ms. Vargas with the offenses of tampering with the witnesses. Petitioner notes that the state could have avoided this accusation by exercising the discretion to charge Ms. Vargas after the conclusion of petitioner's trial. The state did not defer prosecution, however, because the coercion of the witnesses was the linchpin of the state's case.¹

¹ The undersigned notes, as an officer of the court, that this issue is a very disturbing one, made all the more serious by the fact that it is not unique. The undersigned fears that the prosecutors of Duval County are involved in the cavalier practice of charging the mothers of alleged sexual abuse victims with tampering with a witness any time the alleged victim vacillates in her accusations. Given the frequency with which young victims vacillate in their accusations, this situation demands close scrutiny by the Court and by the Florida Bar. The undersigned, alone, has encountered two such cases in recent times. The first is the present case. The second was the case of James Lee Manns v. State, Case No. 1D00-4001, which was per curiam affirmed without opinion. In the Manns case, as well, there was very little provocation or evidence to support the charge of tampering with the witness.

ISSUE V

WHETHER THE SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR A SEXUAL BATTERY NOT INVOLVING PENETRATION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL CONSTITUTION OR CRUEL OR UNUSUAL PUNISHMENT UNDER THE FLORIDA CONSTITUTION?

Nothing added.

CONCLUSION

Based upon the argument and authority raised in ISSUE IV, petitioner requests that the court reverse his convictions and remand with directions to discharge petitioner. Based upon the argument and authority raised in either ISSUE I, II, III, or IV, or the cumulative effect thereof, petitioner requests that the court reverse his convictions and remand for a new trial. Based upon the argument and authority raised in ISSUE V, petitioner requests that the court vacate his sentence and remand for imposition of a constitutional sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Anne C. Toolan, Asst. Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to petitioner, Travis Welsh, #D95328, Hamilton C.I., on this ____ day of July, 2002.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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