IN THE SUPREME COURT OF FLORIDA

7-17

O/A 10-7-87

PAUL PEREZ,

Petitioner,

v.

CASE NO. 70,027

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts the Statement of the Case and Facts presented by petitioner, except for the following additions and/or corrections:

1. Had the child-victim testified, either by live testimony or by videotape, the trial judge would have first ruled on his statutory competency (R 96; R 111).

2. At the time petitioner pled no contest, the state was unsure if the child could be qualified as a witness (R 142).

3. The dispositive nature of petitioner's issues reserved for appeal are conditioned on the inability of the child to be qualified as a witness:

> THE COURT: Mr. Arther, is it your position that the motion--that the motion to declare the statute unconstitutional and the motion--actually, it was my ruling that rule the two hearsay statements of the victim admissible.
>
> MR. SAUNDERS: We did a motion to exclude them because they were hearsay.
>
> THE COURT: You certainly would have objected to them if the case had been tried?
>
> MR. SAUNDERS: Correct, Your Honor.
>
> THE COURT: Do you feel those two matters would be dispositive of the case from the state's standpoint?
>
> MR. ARTHER: Yes, Your Honor. Our strategy as to what actions or directions to take tomorrow definitely depended on what happened today. There may have been some difficulty. We don't know if we could have qualified the child as a competent witness to testify or

not. As the state heard during earlier arguments, he has been told not to discuss the incident, and there is a good chance we couldn't have been able to discuss the incident.

THE COURT: If the child had not been qualified and not testified and had not his prior hearsay statements not been admissible, the state would not have had a prima facie case?

MR. ARTHER: We would not have proceeded, Your Honor.

THE COURT: Then I agree that those matters would have been dispositive of the case.

(R 141-142).

SUMMARY OF ARGUMENT

Section 90.803(23), Florida Statutes (1985), does not violate any right to confrontation of witnesses had by defendants, because only those statements found to have adequate assurances of reliability are admissible, and an accused is free to call the declarant to the stand if he so desires. If the declarant is unavailable and thus cannot be called by either party, the confrontation clause does not require that hearsay be excluded if it is found to have adequate indicia of reliability. The statute specifically provides for such a finding, after notice and hearing.

Section 90.803(23), was not unconstitutional as applied. Petitioner himself precluded a competency determination and testimony of the child by pleading no contest. Assuming the three and one-half (3 1/2) year old child would have been unable to testify in court, his incompetence to testify does not, per se, render out-of-court statements, made under different circumstances, unreliable.

ARGUMENT

ISSUE: WHETHER SECTION 90.803(23), FLORIDA STATUTES (1985) IS UNCONSTITUTIONAL, OR WAS UNCONSTITUTIONALLY APPLIED.

A. Whether section 90.803(23), Florida Statutes (1985), is unconstitutional on its face.

As recited by petitioner, section 90.803(23), Florida Statutes (1985), permits a specific hearsay exception for out-of-court utterances of children describing sexual acts upon them, but only if:

(1) The trial court determines that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability," and

(2) The child either

(a) testifies, or

(b) is unavailable, and the abuse is corroborated by other evidence.

Petitioner, while recognizing the uniform body of authority to the contrary, contends this statutory formulation is in violation of the confrontation clause of the United States and Florida Contitutions.

At the outset, it must be recognized that nothing in section 90.803(23) prevents a defendant from calling the child as a witness, if he so desires. In U.S. v. Inadi, 106 S.Ct. 1121 (1986), the Court held that a co-conspirator declarant need not be unavailable to testify before the prosecution may introduce his statements against a defendant conspirator. The rationale for the decision was that had Inadi wanted to secure the

declarant's testimony, he could have done so.

> The Compulsory Process Clause would have aided respondent in obtaining the testimony of any of these declarants.[*] If the government has no desire to call a coconspirator declarant as a witness, and if the defense has not chosen to subpoena such a declarant, either as a witness favorable to the defense or as a hostile witness,...then it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant "available." [* Footnote omitted.]

106 S.Ct. at 1128. Consequently, it is not necessary for the prosecution to call available co-conspirator declarants; ..."when the defendant himself can call and cross-examine such declarants...the confrontation clause does not embody such a rule." 106 S.Ct. at 1129; accord, Lee v. Illinois, 106 S.Ct. 2056, 2067 n.3 (Blackmun, J., with three other justices, dissenting on other grounds). Before Inadi, some jurisdictions simply held the failure to call a child victim as the defendant's own witness has barred a confrontation issue from being raised on appeal. See, Jolly v. State, 681 S.W. 2d 689, 695 (Tex. Cr. App. 1984). After Inadi,

> ...it has become settled that, at least in those borderline cases where the likely utility of producing the witness is remote, the Sixth Amendment's guarantee of an opportunity for effective cross-examination is satisfied where the defendant himself had the opportunity to call the declarant as a witness.

Reardon v. Manson, 806 F.2d 39, 42 (2d Cir. 1986). In the instant case, petitioner did not try to call the child to the

stand, and, in fact, deliberately avoided a trial in which the child **would** have been called (R 142). As in Inadi and Reardon, supra, petitioner here did not actually want the child to testify against him. The state was willing to forgo this evidence against petitioner for countervailing policy reasons (avoiding trauma to the child victim). Petitioner now seeks to extend this windfall policy decision to exclude hearsay statements as well, on confrontation grounds. Respondent strongly contends that any challenge based upon petitioner's confrontation clause rights is procedurally barred by his own failure to exercise them, as he could have, in the trial court. The statute itself, on its face, does not prevent petitioner or anyone else from confronting the witnesses against them, simply by calling them to the stand.

The instant statute considers both possible situations after the introduction of a reliable hearsay statement: either the child testifies, or he does not.

If the child testifies, any confrontation clause problem is undercut (assuming the reliability of the hearsay statement). Inadi; Lee v. Illinois, supra; California v. Green, 399 U.S. 149, 158-159; 90 S.Ct. 1930, 1935; 216 L.Ed.2d 489 (1970). If the child does not testify, the statute requires that he be "unavailable." This formulation undoubtedly reflects the legislature's deference to Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), which required a showing of both reliability and unavailability of the declarant before prior testimony could be used against a defendant. In the instant case, we do not know if C[redacted], age three and one-half,

would be "unavailable" by way of incompetence, because petitioner pled no contest[1]. However, we must assume C[redacted] would have been incompetent or he would have testified (R 141-142). This case does not rely upon the trial court's finding of "unavailability" based upon state policy considerations of avoiding trauma to child victims[2].

As petitioner recognizes, whether or not a declarant is "available," the crucial question is the reliability of a hearsay declaration. Lee v. Illinois, 106 S.Ct. 2056 (1986). Section 90.803(23), on its face, specifically requires that a child's hearsay declaration is admissible only after it is found to have sufficient indicia of reliability. See, Ohio v. Roberts. The

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[1]In the Appellate Court below, the state argued that jurisdiction for this appeal was defective, because the issue of the hearsay evidence is only conditionally dispositive, and the condition is speculative. Had the case gone to trial, C[redacted] would have been called as a witness. If he were determined incompetent to testify, the state agreed no corpus delicti could be laid allowing admission of petitioner's confession. The hearsay evidence would not be dispositive, however, if C[redacted] did qualify as a witness. In order for this appeal to be properly before the court, therefore, we must assume, arguendo, that Christopher would have been found incompetent and unavailable to testify. While respondent agrees this is quite likely, the state renews its argument that such speculation does not comply with the jurisdictional requirements of Florida Rule of Appellate Procedure 9.140. Brown v. State, 376 So.2d 382 (Fla. 1979).

[2]However, assuming a child victim were competent and "unavailable" only under state law (based upon state policy considerations) this provision of the statute is not invalid. "Unavailability" is not a necessary requirement as long as the hearsay statement is determined reliable,and the witness is subject to the call by the defendant. The fact that the state is willing to forgo competent evidence for countervailing policy reasons does not prevent the defendant from exercising his compulsory process rights, as discussed above.

statute even requires a hearing on the matter, outside the presence of the jury. To contest this patently constitutional provision, petitioner offers the argument that the legislative requirement of a judicial finding of reliability is too "vague." With due respect, respondent suggests this contention is frivolous. It is the function of the courts to make preliminary evidentiary rulings. Prior to July 1, 1979, there was no codified evidence code in Florida at all, and evidentiary matters, including general hearsay, were governed by judicial decisions alone. See, Laws 1978, c. 78-379; § 90.801 et. seq., Fla. Stat. (1979). Federal Rule of Evidence 803(24) allows **any** hearsay bearing sufficient guarantees of trustworthiness, provides less specific criteria than does section 90.803(23), and has permitted child allegations of abuse in the face of confrontation clause challenge. See, U.S. v. Cree, 778 F.2d 474 (8th Cir. 1985); U.S. v. Nick, 604 F.2d 1199 (9th Cir. 1979). If a defendant wishes to contest the reliability of specific statements, he is free to do so, and challenge the court's factual determinations on appeal.

Petitioner also makes the bare assertion that the instant hearsay exception is "based on a presumption" that small children do not lie about sexual abuse. Respondent notes the obvious: there is no legal presumption incorporated into section 90.803(23), and factual determinations of reliability must be made on a case-by-case basis. In addition, corroboration is required where the child does not himself testify.

Petitioner is perhaps questioning the commonsense

recognition that there are certain activities of which a three and one-half year old would not, ordinarily, have knowledge. In this sense, the reliability of a small child's assertions about sexual abuse is widely accepted. Several other states have enacted hearsay exceptions similar to section 90.803(23); to respondent's knowledge, all have been held constitutional when challenged. Kansas, which was probably the first to enact this exception, has explained:

> It is also beginning to be recognized that a child's statements about sexual abuse are inherently reliable. First, it is highly unlikely that a child will persist in lying to his or her parents, or other figures of authority, about sexual abuse. Second, children do not have enough knowledge about sexual matters to lie about them (cite omitted). Consequently, in light of the need for child hearsay statements in sex abuse cases, as well as their potentially superior trustworthiness to in-court testimony, the traditional reasons for barring use of such hearsay statements become less compelling.

State v. Myatt, 697 P.2d 836, 841 (Kan. 1985); accord, U.S. v. Cree, supra, ("It is highly unlikely that a four-year-old child would fabricate such accusations of abuse." at 477-78); People in Interest of O.E.P., 654 P.2d 312 (Colo. 1982) ("A child of three years is hardly adept at the type of reasoned reflection necessary to concoct a false story relating to a bizarre sexual experience implicating the child's mother" at 318). Further, this legislative exception, respondent submits, only re-catagorizes hearsay which in most cases would be admitted anyway, in so doing, the section helps avoid tortuous manipulation of

other hearsay exceptions. Child sexual abuse is not a new invention. Given the need[3] and inherent reliability of a child-victim's out-of-court statement of abuse, one might expect its use in court long before this legislative exactment; and in fact this is the case. Courts have allowed the hearsay here at issue long before section 90.803(23), by fitting it into other exceptions[4]. The "excited utterance" or "res gestae" exception has been used without reference to any need for temporal proximity, on the grounds that in the case of young child, "the element of trustworthiness...finds its source primarily in 'the lack of capacity to fabricate rather than the lack of time to fabricate.'" People in the Interest of O.E.P., 654 P.2d at

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[3]"Often the child victim's out-of-court statements constitute the only proof of the crime of sexual abuse. Witnesses other than the victim and the perpetrator are rare as people simply do not molest children in front of others (cite omitted). Most often the offender is a relative or close acquaintance who has the opportunity to be alone with the child (cite omitted). Depending on the type of sexual contact, corroborating physical evidence may be absent or inconclusive (cite omitted). The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant. Therefore these hearsay statements are usually necessary to the proceedings as the only probative evidence available." State v. Myatt, 697 P.2d at 841. It cannot be doubted the hearsay statements are needed in this case, assuming C[redacted] cannot qualify to testify (or, on the stand, declined to do so). Here, petitioner admits to committed the crime, but his confession is excluded without the hearsay.

[4]"Courts have thus tended to stretch existing hearsay exceptions to accomodate a child victim's out-of-court statements because they are deemed uniquely necessary and trustworthy." Myatt at 842.

318. Thus "original complaints" made days[5] or even a week [6] after the incident have been admissible in child sexual offense cases. Florida, also, has used other exceptions to allow hearsay statements of child victims. See, Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982); Gray v. State, 184 So.2d 206 (Fla. 2d DCA 1966). While Florida has been understandably reluctant to extend other exceptions[7], there is no difference in the constitutional impact of a reliable "excited utterance" and a reliable "child sexual abuse" exception. Both allow hearsay statements only if they are reliable and trustworthy, and both are therefore constitutional. The legislative formulation of section 90.803(23) is not less valid merely because it is codified. See, Glendening v. State, 12 F.L.W. 317 (Fla. 2d DCA January 14, 1987) (corrected 12 F.L.W. 721).

B. Whether section 90.803(23), Florida Statutes (1985), is unconstitutional as applied in this case.

Petitioner asserts section 90.803(23), Florida Statutes (1985), was unconstitutionally applied in this case because C[redacted] was not personally examined and found competent

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[5] State v. Noble, 342 So.2d 170 (L. 1977); see also, People in the Interest of O.E.P., 654 P.2d 312 (Col. 1982).

[6] People v. Lovett, 272 N.W.2d 126 (Mich. App. 1978).

[7] See, e.g., Salter v. State, 500 So.2d 184 (Fla. 1st DCA 1986).

before the hearsay was deemed admissible[8]. Petitioner does not offer any authority for this proposition, nor any constitutional rationale, nor does he suggest what his constitutional definition of "competence" might be. Respondent is unaware of any federal decision judging the constitutional admissibility of hearsay on any basis other than reliability and unavailability. Presumably, it is petitioner's position that a declarant's failure to meet Florida's competency requirements necessarily renders a hearsay statement unreliable. Respondent replies that competency to testify in court and the reliability of an out-of-court utterance are two separate questions.

Section 90.603, Florida Statutes (1976), provides:

> A person is disqualified to testify as a witness when the court determines that he is:
>
> (1) Incapable of expressing himself concerning the matter in such a manner as to be understood, either directly or through interpretation by one who can understand him.
>
> (2) Incapable of understanding the duty of a witness to tell the truth.

A young child may testify without taking an oath if the court determines the child understands the duty to tell the truth. § 90.602, Fla. Stat. (1976). We do not know, in this case, whether or not the three and one-half year old victim could have qualified as a witness. Had the cause proceeded to trial, we

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[8]Had C[redacted] been called to testify, his competence would have been decided at that time (R 96; R 111).

undoubtedly would have found out. Respondent will assume arguendo that he could not be so qualified, but points out there are numerous instances where a child is too young to understand the duty to tell the truth from the witness and may yet, under different conditions, utter statements bearing very strong guarantees of trustworthiness.

Since the instant hearsay exception (and like statutes in other states) is of recent origin, most cases dealing with this competence/reliability dichotomy are based in other rules. For example, the Colorado Supreme Court has held that a declarant's incapacity due to age does not vitiate the admission of that declarant's assertions under Colorado's "res gestae" [excited utterance] exception. Lancaster v. People, 615 P.2d 720 (Colo. 1980). ["The declarant in this case was unavailable as a witness due to her age (cites omitted). And the requirement of spontaneity underlying the res gestae exception provides an adequate proxy for the truth-enacting sanction of an oath." at 723]. Virtually all modern decisions on the issue reach a similar conclusion. See, Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial, 15 A.L.R. 4th 1043. Florida has also allowed such statements in child sexual abuse cases without regard to the ability of the child to testify at trial. Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982)(excited utterance); Gray v. State, 184 So.2d 206 (Fla. 2d DCA 1966) ("res gestae"). In sum, whether or not a child of three or four is able to comprehend the need to respond truthfully on the stand is one thing; the reliability of

a particular assertion made by the child at a specific time and place, under particular conditions, is quite another. See State v. Bouchard, 639 P.2d 761, 763 (Wash. App. 1982). The reliability of C[redacted]'s out-of-court statements is the relevant inquiry here, not his competence to testify in court. A hearing was had on this reliability issue. The trial judge in fact assumed C[redacted] would be incompetent to testify, but decided this particular out-of-court assertion was reliable. The legislative decision to permit C[redacted]'s reliable, corroborated statements in court is sound policy, and not prohibited by any constitutional bar.

CONCLUSION

The opinion of the District Court of Appeal, Fifth District, in sustaining the constitutionality of section 90.803(23), is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by first-class mail to Christopher S. Quarles, Assistant Public Defender, counsel for petitioner, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, this 22nd day of June, 1987.

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