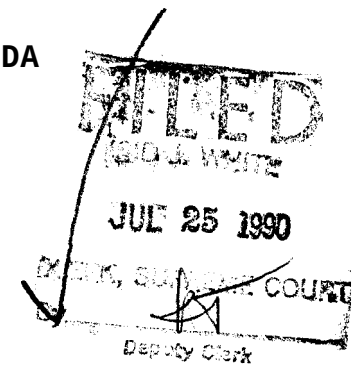
IN THE SUPREME COURT OF FLORIDA



KENNETH RICHARD CUMBIE,

Petitioner,

v. CASE NO. 76,216

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, Kenneth Richard Cumbie, was the defendant in the trial court, the appellant in the district court, and will be referred to here by his last name or as the defendant. The respondent, State of Florida, was the prosecuting authority in the trial court, the appellee in the district court, and will be referred to here as "State."

The one-volume record on appeal of the pleadings, etc. will be referred to by the symbol, "R," and the one-volume transcript of the sentencing hearing by the symbol, "T," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State accepts the statement of the case and facts presented in the initial brief.

SUMMARY OF ARGUMENT

I. The trial court did not err by imposing a departure sentence based on the defendant's position of familial authority and trust. This factor is not common to virtually all sexual batteries committed on children. The victim in the instant case was the defendant's five-year-old stepdaughter.

II. In the event this court decides to address this issue, which was not certified as being of great public importance by the district court, the trial court did indeed provide a written departure reason contemporaneously with the imposition of the new sentence, but even if it had not done so, there would have been no error, for the requirement of a contemporaneous writing established in Ree v. State, infra, is to have prospective application only.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE FOR ATTEMPTED SEXUAL BATTERY ON THE GROUND THAT THE DEFENDANT HAD ABUSED HIS POSITION OF FAMILIAL AUTHORITY AND TRUST.

In Davis v. State, 517 So.2d 670, 674 (Fla. 1987), this court stated that "abuse of the trust of a family relationship may justify departure [from the guidelines recommended range] in some instances." Three District Courts of Appeal have held that abuse of the family relationship justifies imposing a departure sentence in sexual abuse cases. Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1984) (victim's stepfather committed lewd assault); Wilson v. State, 548 So.2d 874 (Fla. 1st DCA 1989), review pending, Case No. 74,872 (Fla. 1989) (victim's stepfather committed lewd assault); Rodriguez v. State, 547 So.2d 708 (Fla. 2d DCA 1989) (victim's de facto stepfather committed lewd assault); and Gopaul v. State, 536 So.2d 296 (Fla. 3rd DCA 1988) (victim's cousin committed sexual battery).

In Williams, the First District stated:

> A lewd and lascivious assault upon a ten-year-old child is bad enough. But for a child to be subjected to such by one in familial authority to whom the child should be able to rely upon for protection and sanctuary from such vile conduct constitutes, by any standard, a substantial aggravating circumstance.

Id., at 37.

Both the First and Third Districts have expressly stated that "this factor is not one which is common to virtually all sexual batteries." Gopaul, at 298; Hawkins v. State, 522 So.2d 488, 490 (Fla. 1st DCA 1988).

Citing Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987) and an article on the competency of children to testify in sexual abuse cases, Cumbie contends that abuse of the trust of a family relationship is common to most child sex offense cases.[1] The State respectfully disagrees. Since the defendant in Laberge was a teacher's aide, the Fifth District did not have occasion to address the issue of the familial relationship, which is at issue in the instant case. The article relied on by Cumbie stated that "[i]n a three-year study of New York City sexual abuse cases, concluded in 1971, researchers found that in 75% of the cases reported, the offender was a member of the child's own household, a relative not living in the neighborhood, a neighbor, a friend, or a person in the community with whom the child had frequent contact." (I.B. 7) Assuming, arguendo, that these statistics are representative of the nation at large and that they relate solely to children under the age of twelve years, there is no way to determine what percentage of the sexual crimes were committed

[1] What Cumbie actually said is that "the child's vulnerability, and abuse of trust or of familial authority are factors common to most child abuse and child sex offense cases," and that "factors common to the majority of cases cannot justify departure because such factors are insufficient to distinguish the extra-ordinarily severe case from the 'typical' case." (I.B., p. 8) The issue here, however, relates solely to the familial relationship.

by family members. Therefore, these statistics do not prove Cumbie's hypothesis that most sexual batteries are committed by family members.

Cumbie obviously has attempted to buttress his argument by lumping together all types of relationships that adults have with children. However, family members, especially a mother, father, or stepparents, hold a unique position of trust with their children, which sets their relationship apart from all other relationships of trust. They are the people who have the greatest influence in molding their children's personality, and they are the primary source of their children's protection. When others violate a child's trust, the child knows he still has his parents, but when parents violate his trust, they deprive him of the very core of his existence [2]

Cumbie also contends that "the phrase 'familial authority' refers to an offense of which he] was not convicted" in violation of section 794.041, Florida Statutes. (I.B., p. 9) Section 794.041, Florida Statutes (1987) prohibits sexual abuse of a child who is between the ages of twelve and eighteen years old. Since the child in the instant case was five years old when the sexual abuse occurred (R. 6), this statute has no application to Cumbie's case.

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[2] It may very well be that sexual offenses on children are committed by family members frequently enough to merit a place on the scoresheet, similar to that with victim injury, but until that happens, it is a valid reason for departing.

ISSUE II

WHETHER THE TRIAL COURT IMPOSED A CONTEMPORANEOUS WRITTEN REASON FOR THE DEPARTURE SENTENCE.

In the event this court decides to address this issue under its reasoning in Savoie v. State, **422** So.2d 308, **310, 312** (Fla. 1982), the trial court did indeed provide (by incorporation of its previously rendered order) a written departure reason contemporaneously with the imposition of the new sentence (T. 5-6), but even if it had not done so, there would have been no error, for the requirement of a contemporaneous writing established in Ree v. State, 15 F.L.W. S395 (Fla. July 19, 1990) is to have prospective application only, Id., at S396.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm the opinion of the First District Court of Appeal in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief on the merits has been furnished by U.S. Mail to Nancy L. Showalter, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 S. Monroe Street, 32301, this 25th day of JULY, 1990.

Carolyn J. Mosley
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