

Supreme Court of Florida

No. 76,216

KENNETH RICHARD CUMBIE,
Petitioner,

vs .

STATE OF FLORIDA,
Respondent.

[January 3, 1991]

PER CURIAM.

We have for review Cumbie v. State, 562 So.2d 845 (Fla. 1st DCA 1990), which certified a question similar to one recently answered by this Court in Wilson v. State, 567 So.2d 425 (Fla. 1990):

Whether abuse of a position of familial authority over a victim may constitute a clear

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and convincing reason justifying the imposition of a departure sentence for a conviction of attempted capital sexual battery?

Cumbe, 562 So.2d at 845. The court below erroneously stated that it had certified the same question in both cases. Id. The questions differed only in that Wilson dealt with lewd and lascivious assault on a child and the present case deals with capital sexual battery.

We believe this factual difference alone is not sufficient reason to require a different answer to the certified questions. Familial authority is not a necessary element of either lewd and lascivious assault on a child, or capital sexual battery. Thus, the factual difference between the questions in Wilson and the present case is essentially irrelevant. As we stated in Wilson, any act of child molestation involves an abuse of authority and breach of trust. A factor should not be approved as a valid reason for departure if it routinely will authorize departure sentences. Wilson; State v. Rousseau, 509 So.2d 281, 284 (Fla. 1987). Accordingly, we answer the question in the negative, quash the opinion under review, and remand for further proceedings in keeping with our opinion in Wilson.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of
Appeal - Certified Great Public Importance

First District - Case No. 89-1196

(Washington County)

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