OA 2-7-91 047

IN THE SUPREME COURT OF FLORIDA

KENNETH D. SCHMITT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 76,317

REPLY BRIEF OF PETITIONER

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

CHERRY GRANT
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, Kenneth D. Schmitt, was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

RB = Respondent's Brief

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement in his initial brief.

SUMMARY OF ARGUMENT

Petitioner relies on the summary in his initial brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS ITEMS SEIZED DURING THE EXECUTION OF A SEARCH WARRANT WHICH WAS ISSUED IN THE ABSENCE OF PROBABLE CAUSE.

Respondent has raised two preliminary points before responding to Petitioner's argument in this issue. First, Respondent claims this Court should not review the issue here because it is distinct from the basis upon which jurisdiction was sought. It will come as no surprise to this Court that once the case has been accepted for review, this Court may review any issue arising in the case that has been properly preserved and properly presented. Savoie v. State, 422 So.2d 308 (Fla. 1982); Tillman v. State, 471 So.2d 32 (Fla. 1985); Reed v. State, 470 So.2d 1382 (Fla. 1985). That said, Petitioner nevertheless opposes Respondent's suggestion to address the ancillary issue which the state has attempted to raise in a footnote in its answer brief. Petitioner's position is based upon the fact that this issue has not been properly preserved or presented by Respondent as it acknowledges, citing State v. Rogers, 565 So.2d 724 (Fla. 4th DCA 1990). Not only did Respondent not cross petition in this Court, no effort was made in the District Court to have that court certify any question with regard to the issue Respondent now attempts to raise. Respondent's presentation of its claim, not as a point on appeal but as a footnote to an unrelated point, can hardly represent a properly presented, fully briefed issue. Where would Petitioner even respond to such an issue, in a footnote in its reply brief?

As to the merits of the issue, judging from its brief, Respondent would like this Court to accept the proposition that a generalized hunch that something is amiss is the equivalent of probable cause. Fortunately that is not the law. To state probable cause for a search an affidavit must state some facts which match up to the elements of the crime for which it is alleged that probable cause exists. See New York v. P.J. Video, Inc., 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986). Requiring that such probable cause be stated before a warrant is issued to search a person's home is not blind obedience to technical niceties as Respondent suggests (RB at 6); it is the very essence of the Fourth Amendment.

Respondent would like to gloss over the gross deficiencies in the warrant here by suggesting that the affidavit was after all drafted by a non-lawyer "in the midst and haste of a criminal investigation." (RB at 7). That line of argument ignores the fact that Silvas claimed to be an officer experienced in investigations of child abuse and sexual battery (R 107). Indeed Respondent relies on that expertise in claiming that Silvas reasonably believed a felony was being committed. Silvas must therefore have had some knowledge of the elements of those crimes. Indeed, United States v. Leon requires that a police officer have some reasonable knowledge of what the law prohibits. U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405 at 3419 fn. 20, 82 L.Ed.2d 677 (1984). Nevertheless Silvas failed to allege in his affidavit even a single fact which correlated to any element of any of the crimes which were allegedly being committed. In fact, Silvas did not even ask Christy what had occurred or any questions about the nature of the photographs

beyond that they contained nudity or partial nudity which Christy herself described as "nice poses." (R 119). Again, Silvas can reasonably be required to know that nudity cannot be deemed obscene even as to minors. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). The lack of probable cause in the warrant here had nothing to do with the "haste of a criminal investigation." Officer Silvas failed to state probable cause because he had none.

Respondent disputes that claim but its brief wholly fails to suggest how the facts known to Silvas corresponded to the elements of any suspected crime. Respondent suggests rather that Silvas suspected "child abuse at the very least, not to mention sexual misconduct." (RB at 7). It is rather hard to imagine probable cause for "sexual misconduct" since there is no such crime. If Respondent is referring to the taking or possession of photographs depicting nudity or partial nudity by minors as sexual misconduct, no doubt the American Sunbathers Association and its 30,000 members would take issue. See Massachusetts v. Oakes, 491 U.S. ____, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989), Justice Brennan 109 S.Ct. at 2643. (Family photographs taken by its members routinely contain nudity which would subject them to prosecution if there were no requirement that the photographs be somehow lewd or obscene). The fact that Respondent cannot identify any crime described by the affidavit except the vague claim of "sexual misconduct" demonstrates the deficiency in the warrant as clearly as anything Petitioner could argue! As to Respondent's claim of child abuse, even the trial court did not find that the affidavit stated probable cause for that crime.

Finally Respondent contends that even absent probable cause the detective's "undisputed" and "uncontroverted" good faith would save this defective warrant. (RB at 6, 7). How Respondent can claim the officer's actions were in undisputed or uncontroverted good faith wholly eludes Petitioner, since he has at all stages argued that the officer did not act in good faith, whether actual or objective. Objectively the officer lacked good faith in executing the warrant because of the total failure of the supporting affidavit to state probable cause as explained above and in Petitioner's initial brief. Further, the officer had no actual good faith because, by his own admission, he had no reason to believe there was anything obscene, lewd, pornographic or otherwise illegal in the photographs! (SR 37-38).

The trial court erred in failing to grant Petitioner's motion to suppress because the warrant here was not supported by probable cause and could not be relied upon in good faith. The district court erroneously decided this issue and that erroneous decision deprived Petitioner of his rights under the Fourth and Fourteenth Amendments to the United States Constitution. This Court should reverse.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN ADJUDGING PETITIONER GUILTY OF POSSESSION OF A PHOTOGRAPH OF A CHILD'S SEXUAL CONDUCT, BECAUSE THAT STATUTE IS UNCONSTITUTIONAL ON ITS FACE.

Petitioner will rely on the argument in his initial brief for this point on appeal with two additional comments.

The scope of potential applications of Florida Statute 827.071(5) which encompasses the definition of sexual conduct in section 827.071(1)(g) is full of ambiguities as described in Petitioner's initial brief. Respondent claims that Petitioner's numerous innocent examples of societally accepted nudity are irrelevant based on the Fourth District's decision in this case, Schmitt v. State, 563 So.2d 1095 (Fla. 4th DCA 1990). Respondent is wrong. First, that case did not accept the Fifth District Court's remedy fashioned in State v. Tirohn, 556 So.2d 447 (Fla. 5th DCA 1990) as Respondent states. In Tirohn the district court excised some of the offending portion of section 827.071(1)(g). In Schmitt the court did not excise the offending portion of that statute but added a scienter requirement instead. However as explained further in Petitioner's initial brief, it is inappropriate for a court to attribute a legislative intent clearly missing from the definition of a crime. See State v. Keaton, 371 So.2d 86 (Fla. 1979). Further, contrary to Respondent's claim, in the very least this Court must still resolve the conflict between the remedies fashioned by the district courts. The fact that both courts agree that the statute is overbroad but cannot agree on the

appropriate remedy is just further evidence that the statute here is unconstitutional and must be stricken as such.

As to Respondent's answer to Petitioner's claim of a violation of substantive due process, if the statutes here were limited to pornography then they would be a legitimate means to realize the legislative goal. They are not. Instead, the statutes here prohibit possession of all representations and other presentations depicting or describing contact in any form with any child's clothed or unclothed genitals, pubic area, buttocks, or female breast, whether or not mature, without regard to any requirement that anything pornographic or obscene be depicted or described. Because that requirement is lacking, the statutes as they now stand are not rationally related to achieving the legislative goal. For that reason they violate substantive due process

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the judgment and sentence of the trial court and to remand this cause with proper directions.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Cherry Grant

CHERRY GRANT
Assistant Public Defender
Florida Bar No. 260509

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to John Tiedemann, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 8 day of January, 1991.

Cherry Grant
Counsel for Petitioner