IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,318

JAMES ANTONIO PARDO, a/k/a
JAY PARDO FOLIACCI, a/k/a
ANTHONY JAMES PARDO FOLIACCI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

****

BRIEF OF RESPONDENT

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INTRODUCTION

Respondent, **THE STATE OF FLORIDA**, was the prosecution in the trial court and the petitioner in the District Court of Appeal of Florida, Third District. Petitioner, **JAMES ANTONIO PARDO**, was the defendant in the trial court and the respondent in the District Court of Appeal. All parties will be referred to as they stand before this Court. The symbol "R" will be used to refer to the index on appeal.

STATEMENT OF THE CASE AND FACTS

An information was filed on March 19, 1991 charging petitioner with seven (7) counts of capital sexual battery. (R. 10-16). On June 19, 1990 respondent filed a Notice of Intent to Rely on Fla. Stat. 90.803(23) Re: Hearsay Statements of A Child Victim, in Case No. 90-42238. The Notice listed statements made by the eight (8) year old victim, N.T., to the following: her elementary school counselors, her mother, North Miami Beach Police Department Detective Quartiano, Rape Treatment Center doctor Karen Simmons, and State Attorney Children's Center interviewer Merci Restani. (R. 17-19). The Notice also referred to the deposition and report of Dr. Simmons for additional details. (R. 29-57).

On November 21, 1990 respondent filed another Notice of Intent to Rely on Fla. Stat. 90.803(23) Re: Hearsay Statements of

A Child Victim. (R. 20-28). This Notice listed additional statements made by N.T. to her mother and to Dr. Simmons. Additionally, the Notice described statements made by N.T. to mental health counselor Dawn Bralow, to Rape Treatment Center worker Karen Weissman, to Child Assault Program worker Terry Vazquez, and to Dr. Raquel Bild-Libbin (A copy of Dr. Libbin's report re: N.T. was attached to the Notice). The Notice also referred to the depositions of the aforementioned persons for a more detailed account of the victims' statements.

A hearing on the motions to introduce hearsay was held on March 19. 1991, before the Honorable Richard Margolius. (R. 159-276). At the hearing, Dawn Bralow, licensed mental health counselor, testified about the statements N.T. made during their five (5) interview sessions. (R. 164-185). Dr. Raquel Bild-Libbin testified about statements N.T. made to her, and described N.T.'s demonstration, using anatomically correct dolls, of what petitioner had done to her. (R. 187-205). State Attorney Children's Center interviewer Merci Restani described the videotaped interview she had with N.T. on April 16, 1990. The videotape was introduced into evidence and played for the trial court. (R. 206-216).

At the conclusion of the hearing the trial court made specific findings of fact that the statements made by N.T., to the three witnesses who testified at the hearing, had the requisite safeguards of reliability and were admissible. (R. 232-

239). However, the trial court denied Petitioner's motions to introduce hearsay due to the Fifth District Court of Appeal's ruling in Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991). (R. 255). An order denying the motion to admit hearsay was entered by the trial court on April 18 1991. (R. 277-278). The order listed several findings of fact regarding the circumstances surrounding the statements made by the victim. Further, the trial court found that these facts indicated that the statements of the victim were trustworthy and reliable, and were made under circumstances which provided sufficient safeguards of reliability. However, the trial court concluded with the following:

> "...this Court feels that it is compelled to exclude such statements on the authority of Kopko v. State, 16 F.L.W. D508. It is the ability of the child to testify live and testify fully concerning all of the elements of the alleged crimes that leads the court to this conclusion. Were it not for the Fifth District Court of Appeal holding in Kopko v. State, this Court would admit the statements made to those persons indicated in the State's Notice of Intention to Introduce said Hearsay Statements."
> (R. 278).

After ruling on the motion was heard, the prosecution and defense stipulated that the depositions of Dr. Simmons (R. 29-57), and N.T. (R. 58-158), would be made part of the record for appellate purposes. (R. 270).

Respondent sought review of the trial court decision via a petition for writ of certiorari in the District Court of Appeal of Florida, Third District. (R. 1-278). Petitioner was ordered to file a response to the petition, (R. 279), and did so on May 29, 1991. (R. 280-288). Following oral argument, the Third District reversed the trial court's order excluding N.T.'s hearsay statements from introduction into evidence at trial. (R. 289-295).

The Third District certified express and direct conflict with Kopko and certified the following question of great public importance:

> WHERE A CHILD VICTIM'S HEARSAY STATEMENTS SATISFY SUBSECTION 90.803(23), FLORIDA STATUTES (1989), AND THE CHILD IS ABLE TO TESTIFY FULLY AT TRIAL, MUST THE HEARSAY STATEMENTS BE EXCLUDED SOLELY BECAUSE THEY ARE PRIOR CONSISTENT STATEMENTS BY THE CHILD, OR IS THE TEST FOR EXCLUSION THAT FOUND IN SECTION 90.403, FLORIDA STATUTES (1989)?

On July 26, 1991, this Court postponed its decision on jurisdiction and ordered petitioner and respondent to submit briefs on the merits.

POINT ON APPEAL

WHETHER THE DISTRICT COURT CORRECTLY REVERSED THE PRETRIAL ORDER OF THE TRIAL COURT EXCLUDING HEARSAY STATEMENTS OF A CHILD VICTIM WHICH WERE ADMISSIBLE UNDER FLORIDA STATUTE 90.803(23)?

SUMMARY OF ARGUMENT

The Third District properly reversed the pretrial order of the trial court which prohibited admission of hearsay statements made by a child victim. Pursuant to the plain language, and the legislative intent, of §90.803(23), the hearsay statements of the child victim should be admitted whether or not the child testified at trial.

ARGUMENT.

THE DISTRICT COURT CORRECTLY REVERSED THE PRETRIAL ORDER OF THE TRIAL COURT EXCLUDING HEARSAY STATEMENTS OF A CHILD VICTIM WHICH WERE ADMISSIBLE UNDER FLORIDA STATUTE 90.803(23).

The Third District properly granted certiorari and reversed the order of the circuit court which departed from the essential requirements of law by prohibiting the introduction of admissible evidence. Petitioner sought, and obtained, the admission of statements made by a child victim of sexual abuse under §90.803(23), Fla. Stat. (1987), which provides as follows:

> **(23) Hearsay exception; statement of child victim of sexual abuse or sexual offense against a child.**
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the

> offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate: and
>
> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness...

Although the trial court found the statement of the victim, who is under the age of eleven, to be trustworthy and reliable, and found that the circumstances surrounding the statements provided sufficient safeguards of reliability, the statements were deemed inadmissible as they would be cumulative of the victim's direct testimony, under the holding of Kopko.

Section 90.803(23)(a)2.a. specifically provides for the admission of hearsay statements when the child victim does testify, thus the Third District properly held that the trial court's ruling ran counter to the plain language of the statute. (R. 294). The District Court disapproved of the decision in Kopko and stated that prohibiting admission of hearsay statements in cases where the child victim testified at trial was a limitation not found in the statute. Further, "[b]y its placement in section 90.803, as well as by the explicit language of subsection 90.803(23) itself, a child victim's hearsay statement cannot be objected to on hearsay grounds where the criteria of subsection 90.803(23) are met--whether or not the child testifies at trial." (R. 294).

The ruling of the Third District comports with the Legislative intent creating statute 90.803(23) as expressed in Ch. 85-53, Laws of Florida, which provides:

> WHEREAS, reports of sexual abuse and the commission of unlawful sexual acts against children have increased dramatically, and
>
> WHEREAS, children are in need of special protection as victims or witnesses in the judicial system as a result of their age and vulnerability, and
>
> WHEREAS, the rights of the defendant in a criminal prosecution must be balanced with the right of a child victim to be protected, and
>
> WHEREAS, a young child is able to relate descriptions of acts involving sexual contact or sexual acts performed in the child's presence in a reliable manner based upon consideration of the child's age and development, and
>
> WHEREAS, the credibility and reliability of a child's testimony can be assured by procedural safeguards that will not infringe upon the defendant's right to a fair trial or the rights or any party in a judicial proceeding, and
>
> WHEREAS, it is necessary that safeguards be instituted for the children of the State of Florida who are victimized to assure that their right to be free from emotional harm and trauma occasioned by judicial proceedings is protected by the court, and
>
> WHEREAS, effective handling of child abuse cases in the judicial system is essential to future protection of the child, and
>
> WHEREAS, the Legislature recognizes that special provisions are necessary to assure that evidence of unlawful sexual offenses against children is admissible in courts, based upon sound principles of child development, and

> WHEREAS, the assistance of professionals and persons having a special relationship with the child can aid the courts in assuring full access to legal remedies for the protection of children, NOW THEREFORE....

The foregoing expressly shows a legislative intent to admit at trial hearsay statements, made by child sexual abuse victims, which are shown to be reliable. Additionally, the Supreme Court of Florida held that section 90.803(23) meets the requirements of both the Florida and federal constitutions as it requires specific findings of reliability and mandates that either the child testify or be unavailable. Perez v. State, 536 So.2d 206 (Fla. 1988), cert. denied ___ U.S. ___, 109 S.Ct. 3253, 106 L.Ed.2d 599 (1989).

While the Fifth District Court of Appeal recently held cumulative testimony of a child victim's prior consistent statements to be inadmissible, in Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991), the District Court correctly followed the express language of §90.803(23) which requires the child to either (a) testify, or (b) be corroborated by other evidence. The Fifth DCA ignored this specific provision of the statute which provides for the admission of hearsay statements when the child does testify, therefore, the holding in Kopko is an improper interpretation of the statute. It is apparent that the legislature intended for such hearsay statements to be admitted where, as here, the statements and the circumstances surrounding them were found to be reliable, thereby protecting the defendant's confrontation rights.

CONCLUSION

Based upon the foregoing argument and citations of authority, the decision of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **CLAYTON R. KAEISER,** One N.E. 2nd Avenue, Suite #200, Miami, Florida 33132, on this 31st day of October, 1991.

ANITA J. GAY
Assistant Attorney General