Q-24

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner/Appellee,

versus

JOHNNY J. JONES,

Respondent/Appellant.

S.CT. CASE NO. 80,069

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

By amended information filed May 9, 1989, the state charged the Respondent, Johnny J. Jones, with two counts of sexual battery against then eight-year-old A M . One count was alleged to have occurred between April 7 and April 22, 1987, and the other between April 21 and June 17, 1987 (R384). Jones pleaded not guilty, firmly rejecting the state's offer of fifteen years' incarceration (R15). His prior record consisted of one old misdemeanor.

A M testified at trial that on December 9, 1986, her sister's boyfriend Ray Wheeler "hunched" her (R55,68,198). She stated in a March 16, 1989, deposition that her mother's boyfriend Johnny Jones "hunched" her twice, once at an earlier residence and again at an unspecified location (R412-413). At trial, A testified that on April 19, 1987, Johnny Jones put his penis into her privates and moved around and around and hurt her, allegedly in the bathroom of the Expressway Motel, a stopping-off place between houses (R39).

Two Child Protection Team physicians testified at the trial that A had identified Johnny Jones as her abuser (R87-103 passim). On June 17, 1987, Dr. Seibel diagnosed gonorrhea, with swelling and discharge but no enlargement or vaginal tearing. The July 1, 1987, follow-up by Dr. Pollock noted recently-treated gonorrhea and a somewhat enlarged hymenal ring with three scars reddened at their borders. The evidentiary rule under which these statements were allowed in is section 90.803(4), Florida

Statutes (1985), the hearsay exception for information offered for the purpose of facilitating medical diagnosis or treatment.

Evidence that A 's natural father had abused her when she was two years old was excluded (R195).

Jones denied any sexual activity between himself and A , and denied having had gonorrhea during the relevant time period. A physical he underwent on June 7, 1987, while it did not include a test specifically for gonorrhea, showed a marked absence of the standard signs of that condition (R217-219).

The jury found Johnny Jones guilty as charged. On appeal, the district court remanded for new trial, citing two bases for the ruling. Jones v. State, 17 F.L.W. 1109 (Fla. 5th DCA May 1, 1992). First, it was error to exclude the proffered evidence of the earlier sexual abuse by the child's father. Second, it was error to admit Dr. Seibel's and Dr. Pollock's testimony that A named Johnny Jones as her abuser.

On the state's motion, the district court certified conflict with the First District's decision in Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991). Jones v. State, 17 F.L.W. 1519 (Fla. 5th DCA June 19, 1992). The state filed a timely notice to invoke the discretionary jurisdiction of this court.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal did not create a rule that hearsay statements made to Child Protection Team physicians are inadmissible per se. The language employed by the Fifth District, in remanding Jones's cause for new trial because of improperly admitted physicians' hearsay evidence, was that in this case "the true and only initial purpose of the examination was to determine whether sexual abuse had occurred and, if so, the identity of the individual responsible for it." This language leaves ample room for the proper admission of information given for the purpose of diagnosis or treatment.

ARGUMENT

THE DISTRICT COURT DID NOT CREATE A RULE THAT EXCLUDES ALL HEARSAY TESTIMONY OF CHILD PROTECTION TEAM MEMBERS OFFERED UNDER THE TREATMENT AND DIAGNOSIS EXCEPTION.

By its opinion in this case the Fifth District Court of Appeal admirably balances the evidentiary rights of the accused with the intent of the Rule 803(4) hearsay exception. The exception applies only where the proffered statement is shown to have been obtained for the purpose of medical assistance. The state failed to show that the evidence was gathered for the required purpose; therefore, the trial court erred in admitting it. The district court does not categorically reject all hearsay offerings by Child Protection people, but rather rejects testimony not gathered for the purpose of medical assistance.

Only evidence which is reasonably pertinent to a victim's treatment is admissible under the medical exception to the hearsay rule. Whether the naming of names is germane appears to depend upon whether the alleged abuser is a family member. The analysis runs like this: When the abuser is a member of the victim's immediate family, the victim will suffer emotional damage; thus, effective treatment requires knowledge of the abuser's identity. The seminal case here is United States v. Renville, 779 F.2d 430 (8th Cir. 1985).

In Renville the Eighth Circuit relied upon its two-part test for admissibility set out in United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), cert. denied, 450 U.S. 1001, 101 S.Ct.

1709, 68 L.Ed.2d 203 (1981). This test "reflects the twin policy justifications advanced to support the rule." Renville at 436. These justifications are (1) the patient's "strong motive" to be truthful and accurate in order to be successfully treated, and (2) the character of such information as the kind of "fact . . . reasonably relied on by experts." Iron Shell at 83-84.

The Iron Shell genesis of this two-part rule did not involve the issue of identity. Two friends of Iron Shell saw him with the victim, and the only question was the form his sexual assault took. But in Renville identity was an issue. The test was elastic enough to embrace identity as a medical fact only because the alleged abuser was the victim's stepfather. The physician witness testified specifically that the identity of the person responsible for the victim's injury, when a member of the family, is "extremely important." 299 F.2d at 437, n.12.

Given the "unique" context of familial abuse, the court reasoned that the traditional assumption that patients do not make accusations of fault with any "reasonable expectation that the information will facilitate treatment . . . does not hold where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding" (emphasis added). Id. at 438. The nine-year-old Renville victim was told by the examining physician that by answering his questions she could be helped to overcome any physical and emotional problems caused by the abuse.

Others jurisdictions have adopted the Eight Circuit's reasoning: Wisconsin, Connecticut, Alaska, Arizona, North Carolina, New Mexico, Maryland, and Oregon. Until Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991), Florida courts relied upon the rationale behind the medical exception: The statements a person makes for treatment purposes are reliable, and therefore admissible, because the person makes them in order to get well. See, e.g., Jones v. State, 17 F.L.W. 1109 (Fla. 5th DCA May 1, 1992); State v. Ochoa, 576 so.2d 854 (Fla. 3d DCA 1991); Lazarowicz v. State, 561 So.2d 392 (Fla. 3d DCA 1990); Begley v. State, 483 So.2d 70 (Fla. 4th DCA 1986).

In Flanagan v. State, supra, however, the First District concluded that any differences between Federal Rule of Evidence 803(4) and Florida's section 90.803(4) are of "no legal moment and that the Florida rule should be construed in accordance with federal decisions interpreting the federal rule." Id. at 1093-1094. Those interpretations require some evidence that the testimony sought to be entered concerns information gathered for the purpose of diagnosis and treatment. The determination whether such evidence exists must be a matter of law, and thus is "the appropriate concern of an appellate tribunal." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981).

Nevertheless, the First District reasoned that the first element of the test for admissibility under section 90.803(4) is not a question of law after all, but of medical perspective. The opinion claims to derive this medical perspective position

directly from Danzy v. State, 553 So.2d 380 (Fla. 1st DCA 1989). But this interpretation is flawed. In Danzy the examining physician testified specifically what he felt he must inquire about, why, and how it would contribute to his diagnosis and treatment. In Flanagan there is nothing of the sort. Despite Flanagan's rhetoric that nothing in its record "even remotely hints" at any purpose for examination of the victim other than treatment, the truth is that nothing in its opinion remotely hints at any showing that would satisfy the evidentiary standard of Danzy, as taken from Renville.

As Judge Erwin's lucid dissent makes clear, the Flanagan majority "does not recite, and there is not one word of evidence in the record to establish, that [the examining Child Protection Team physician] stated it was medically necessary to learn the identity of the alleged abuser in order to make any medical diagnosis or recommend any medical treatment." Moreover, "there simply is no evidence that the victim knew or expected that the doctor was going to provide medical diagnosis and treatment, although the patient's knowledge of this purpose is essential to the theoretical underpinning of the credibility of such statements . . . ." Flanagan, 586 So.2d 1085, 1122 (1991) (Erwin, J., dissenting).

Returning now to the Jones opinion, the testifying Child Protection Team physicians made no claim whatever that identifying the person responsible for A M 's condition would further diagnosis or treatment. The district court pointed

out correctly that "the true and only initial purpose of the examination was to determine whether sexual abuse had occurred and, if so, the identity of the individual responsible for it." 17 F.L.W. at 1109. Where a physician's testimony fails to satisfy the two-part test of sufficiency, it is not admissible.

CONCLUSION

BASED UPON the reasons expressed herein, Respondent respectfully requests that this Honorable Court exercise its discretionary jurisdiction and affirm the decision of the Fifth District Court of Appeal to remand this cause for retrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Johnny J. Jones, Inmate No. 344522, #I-32, West Unit, Apalachee Corr. Inst., P.O. Box 699, Sneads, Florida 32460, on this 1st day of September, 1992.

ANNE MOORMAN REEVES
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