FILED
SID J. WHITE
SEP 24 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 80,069
5th DCA CASE NO. 91-307

JOHNNY JONES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

NANCY RYAN
ASSISTANT ATTORNEY GENERAL
FLA. BAR # 765910
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR PETITIONER

TOPICAL INDEX

PAGES:

AUTHORITIES CITED.....ii

SUMMARY OF ARGUMENT.....1

ARGUMENT

IN REPLY: THE DISTRICT COURT IMPROPERLY CREATED A PER SE RULE PRECLUDING ADMISSION OF THE TESTIMONY OF CHILD PROTECTION TEAM DOCTORS PURSUANT TO THE TREATMENT AND DIAGNOSIS HEARSAY EXCEPTION.....2

CONCLUSION.....5

CERTIFICATE OF SERVICE.....5

AUTHORITIES CITED

CASES: PAGES:

Teffeteller v. State,
439 So.2d 840 (Fla. 1983).....4

Torres-Arboledo v. State,
524 So.2d 403 (Fla. 1988).....3

United States v. Renville,
779 F.2d 430 (8th Cir. 1985).....4

OTHER AUTHORITIES:

Section 90.803(4), Florida Statutes.....2-4

2 McCormick on Evidence (4 ed. 1992).....4

SUMMARY OF ARGUMENT

The respondent argues that the proponent of a hearsay statement proffered pursuant to Section 90.803(4) must show that the statement was elicited, that the declarant was told that the statement was being elicited for the purpose of diagnosis or treatment, and that the declarant manifested an understanding that the statement was important for a medical purpose. Those requirements should not be superimposed on the plain language of the statute; statements should be ruled presumptively admissible pursuant to the statute when any circumstance, or all the circumstances, satisfy the trial judge that the statement was made for the purpose of medical diagnosis or treatment, and when the statement was reasonably pertinent to diagnosis or treatment.

ARGUMENT

IN REPLY: THE DISTRICT COURT IMPROPERLY CREATED A PER SE RULE PRECLUDING ADMISSION OF THE TESTIMONY OF CHILD PROTECTION TEAM DOCTORS PURSUANT TO THE TREATMENT AND DIAGNOSIS HEARSAY EXCEPTION.

The respondent argues that the district court held that *in this case*, "the true and only initial purpose of the [child protection team's] examination was to determine whether sexual abuse had occurred and, if so, the identity of the individual responsible for it."[1] He goes on to argue that the district court's decision was correct, because Section 90.803(4) excepts statements from the hearsay rule only when the proponent shows that the person to whom the statement was made elicited the statement for the purpose of giving medical assistance.[2] The state disagrees with both arguments.

Section 90.803(4), in pertinent part, excepts from the hearsay rule

> [s]tatements made for purposes of medical diagnosis or treatment ... which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

The statute refers to those statements *made* for the purpose of diagnosis or treatment which are reasonably pertinent to diagnosis or treatment. The statute does not require a showing

---

[1] Respondent's brief on the merits at 3, 7-8.

[2] Respondent's brief at 4.

that the statement was *elicited* for the purpose of treatment or diagnosis, or indeed that it was elicited at all; nothing in the statute excludes spontaneous statements.

The state asks this court to consider the following five hypothetical reports, each made to a doctor by an eight-year old girl:

1) I was raped by my father;

2) I was raped by my stepfather;

3) I was raped by my mother's long-term live-in boyfriend, who still lives with our family and who is an authority figure in the household;

4) I was raped by a man my mother went out with on one occasion; his name is Bob Smith and he lives at 123 Columbus Drive; and

5) I was raped by a stranger; he was a tall man with red hair and a rose tattoo on his left arm.

The state submits that the last two reports are divisible into parts which are and parts which are not reasonably pertinent to medical diagnosis and treatment, but that the first three are pertinent in their entirety to medical diagnosis and treatment. See Torres-Arboledo v. State, 524 So.2d 403, 407 (Fla. 1988). The respondent argues, in essence, that trial judges should consult the doctors or nurses testifying before them that day to find out what they believe to be pertinent to the diagnoses and treatment they give, and that whatever the doctor or nurse tells the judge should determine what evidence is admissible. Section 90.803(4) limits admissibliity to statements that are *reasonably*

pertinent to diagnosis or treatment; the test is an objective one to be applied by the courts. See 2 McCormick on Evidence §277 at 248 and n.14 (4 ed. 1992).

The respondent cites United States v. Renville, 779 F.2d 430 (8th Cir. 1985), for a proposed rule that the witness who testifies that a statement proffered pursuant to 90.803(4) was made must testify that the statement was elicited, that the declarant was told that the statement was being elicited for the purpose of diagnosis or treatment, and that the declarant manifested an understanding that the statement was important for a medical purpose. The state submits that these requirements were contrived to meet a perceived need in a hard case, and that they represent bad law. Cf. Teffeteller v. State, 439 So.2d 840, 843 (Fla. 1983), cert. den. 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984) (any or all circumstances that satisfy judge that declarant aware of impending death sufficient predicate for admitting dying hearsay declaration). The Teffeteller "any circumstance or...all the circumstances" standard should be adopted as the rule for the Florida courts to use in deciding whether statements are presumptively admissible pursuant to Section 90.803(4). The district court's emphasis on where the witness who testifies to the hearsay works, and the respondent's proposed emphasis on why the witness elicited the statement, cannot fairly be read into the statute.

CONCLUSION

The petitioner requests this court to disapprove the district court's opinion, to reverse the district court's decision, and to remand for further proceedings.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

NANCY RYAN
ASSISTANT ATTORNEY GENERAL
FLA. BAR # 765910
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Reply Brief has been delivered by hand to Anne Moorman Reeves, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 21st day of September, 1992.

NANCY RYAN
Assistant Attorney General