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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE COON,

Petitioner,

vs. Case No. 80,151

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICTK COURT OF APPEAL OF FLORIDA SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was Appellant/Defendant on appeal and will be referred to as Petitioner. Respondent was Appellee/State on appeal and will be referred to as Respondent or the State. The record will be referenced as "R" followed by the appropriate page number.

Respondent hereby provides Notice of Similar Issue in the following cases:

1. McCall v. State, Case No. 78,536
2. State v. Johnson, Case No. 79,150
3. State v. Johnson, Case No. 79,204
4. Savoury v. State, Case No. 79,715

STATEMENT OF THE CASE AND FACTS

The State rejects Petitioner's Statement or the Case and Statement of the Facts. These statements raise facts and one of Petitioner's points on direct appeal that are not properly before this Court. The single question before this Court is that issue expressed and ruled upon by the Second District Court of Appeal involving Petitioner's sentence. See Coon v. State, 17 F.L.W. D1538 (Fla. 2d DCA, June 17, 1992).

On March 6, 1991, the State Attorney of the Tenth Judicial Circuit, in and for Hardee County, Florida, filed an information charging Petitioner, Robert Lee Coon, with possession of child pornography in violation of Section 827.071(5), Florida Statutes (1986). (R1, 2)

On August 26, 1991, the State filed a Notice of Intention to Seek Sentencing as Habitual Offender. (R316) The State filed copies of Petitioner's judgments and sentences from two (2) prior crimes. (R317-18, 320-21, 329-31) The State filed notice that Petitioner had not been granted clemency. (R323) Petitioner admitted that he had two (2) prior convictions. (R27-28).

Petitioner did not object to his sentencing as an habitual felony offender on September 3, 1991. (R305-08) Petitioner's issue on appeal to the Second District Court of Appeal was whether the trial court erred because Petitioner's record did not reflect that he had the requisite prior offenses. Petitioner also raised the unconstitutionality of the habitual offender statute as presented in Johnson v. State, 589 So.2d 1370 (Fla.

1st DCA 1991), which case was decided approximately twelve (12) days after Petitioner's sentence. Neither of the points on this issue that Petitioner raised on appeal were presented to the trial court.

The Second District Court of **Appeal** Per Curiam Affirmed Petitioner's direct appeal. The opinion stated: See Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992); Jamison V. State, 583 So.2d 413 (Fla. 4th DCA 1991), rev. denied, 591 So.2d 182 (Fla. 1991); contra Johnson V. State, 589 So.2d 1370 (Fla. 1st DCA 1991). Coon, supra. Thus, the question is simply whether Petitioner's sentencing on September 3, 1991, as an habitual felony offender under Section 775.084, Fla. Stat. (1989) (R11-15, 308) was constitutionally precluded because Section 1 of Chapter 89-280 of the Laws of Florida slightly revised this statute in violation of the Single Subject Rule of Article 111, Section **Six** of the Constitution of the State of Florida.

Should this Court determine Petitioner's issue regarding admissible evidence of child erotica is reviewable, Respondent includes arguments and citations to authorities refuting this claim.

SUMMARY OF THE ARGUMENT

I. Petitioner did not raise this issue before the trial court. Petitioner improperly raised the issue of whether Chapter 89-280, Laws of Florida, violated the single subject rule in Art. 111, §6 of the Florida Constitution at the time of his offense for the first time before the Second District Court of Appeal.

The trial judge did not err in sentencing Petitioner as an habitual felony offender. The Second District Court of Appeal correctly found the habitual felony offender statute was not unconstitutional and at the least not unconstitutional as applied to Petitioner on September 3, 1991, long after any constitutional infirmities were corrected by the statute's re-enactment on May 2, 1991.

11. The trial court did not err in admitting the child erotica evidence that was seized at Appellant's home when he was arrested on a child pornography charge. Appellant claimed he had no intent to illegally possess the pornography, but the child erotica was directly linked to him and was evidence that Appellant's intent was not pure.

ARGUMENT

ISSUE 1

WHETHER CHAPTER 89-280, LAWS OF FLORIDA VIOLATES THE ONE SUBJECT RULE OF THE FLORIDA CONSTITUTION MAKING PETITIONER'S SENTENCE ILLEGAL.

Petitioner contends that his sentence as an habitual felony offender is illegal because Chapter 89-280, Laws of Florida, which amended Section 775.084, violates the one subject rule. In Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), the statute was found to be unconstitutional for crimes committed between October 1, 1989, and May 2, 1991, when the statute was re-enacted. Respondent notes Petitioner's crime was committed on February 16, 1991, but, Petitioner was not convicted and sentenced until September 3, 1991. The habitual felony offender statute is merely a "sentencing tool" and therefore, the trial court did not err in following a sentencing statute that was constitutional before and after Petitioner's trial on August 22-23, 1991. King v. State, 597 So.2d 309, **314** (Fla. 2d DCA 1991), rev. denied, 602 So.2d 942 (Fla. 1992).

Respondent further adopts and hereby incorporates by reference the arguments on this issue found in Savoury v. State, Case No. 79,715, Brief of Respondent on the Merits, Issue I.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF CHILD EROTICA THAT WAS IN PETITIONER'S POSSESSION.

The trial court did not err in allowing the State to introduce the child erotica into evidence which was in Appellant's possession when he was arrested for child pornography. (R160-61, 165-77, 217-18, 221-24) Appellant testified in his defense and explained to the jury his reasons for buying a child pornography magazine. (R236-45) Appellant said he wanted to "take a bite out of crime." (R238, 247-48) Appellant admitted on cross-examination that all the child erotica was his or was in his possession. (R251-54)

Defense counsel presented a motion in limine to exclude the child erotica. (R56) The magazine "Schoolgirls" was the only item of child pornography in this case and the basis for Appellant's criminal charge. (R1-2) The State argued as follows:

> MR. HOUCHIN [State Attorney]: Judge, the State position is this. We've got Mr. Coon charged with possession of child pornography. Undoubtedly the defense is going to be that he didn't have a bad intent when he possessed this pornography. He technically possessed it, but he did it for some reason other than a bad criminal intent.
>
> **The state of** mind is going to be the key here. Mr. Coon throughout the interview talked about children and sexually exploiting children. This investigation didn't start out with the idea of selling Mr. Coon a magazine containing child pornography. There's a technical definition of child pornography. Special Agent Danna is here who can give testimony, or we can simply read the statute.

But as the investigation progressed, Mr. Coon and Special Agent Danna did start talking about some magazines. Mr. Coon, Your Honor, wanted to ***see*** some magazines and then wanted to buy some magazines, and later in fact did buy some magazines.

Our contention -- Or a magazine. I'm sorry. Looked at some magazines and bought a magazine.

Our contention is this -- that he had a state of mind of wanting child pornography. And Special Agent Danna can testify; and it's on the tapes.

Child pornography, the true, real hardcore pornography, is hard to come by. Mr. Coon did the next best thing. Before he could lay his hands on the hardcore things, he made--he fabricated what Special Agent Danna classifies as child erotica. Wherein, he would take nude photographs of adults, paste the heads of children on them, particularly heads of children, missing children from milk cartons; and then take other sexual objects and paste onto the photographs or something. And basically make a scene where it appears as though a child is engaged in some type of sexual conduct or lewd exhibition.

It all goes to state of mind, that-he-is-wanting kind of thing. And he's using a substitute, next best thing until he can actually lay his hands on it. In fact he took it outside so that Special Agent Danna could view it. "Let me show you what I got; you can take pictures of what I got. Now, let me see what you've got."

It's kind of like a person who is charged with possession of a sawed-off shotgun and he's saying: Well, the shotgun shells aren't relevant. Of course they're relevant to connect to the ultimate crime. Or for that matter a diagram or drawing of how to saw off a shotgun and make it illegal is not relevant to the charge that the person ultimately possessed such a weapon.

We think the state of mind is relevant. And instead of prejudicing the jury with what it is actually, is to show a true picture of the defendant.

(R56-58)

A State witness explained the difference between child erotica and child pornography during a pretrial hearing. (R61-62) The trial court viewed the child erotica items belonging to Appellant and ruled them admissible. (R78-79) The State had tapes and evidence of the undercover investigation where Appellant talked specifically of his plans against children. (R113-15, 122-23, 131-35, 137-46, 149,-54,216-17)

The child erotica evidence was seized from Appellant at the time of his arrest or within a few days from his home. (R160-161, 177, 217-26, 235-36) The trial court stated that Appellant's counsel could present argument on this evidence. (R209) The State made brief references to the child erotica. The state attorney said:

> The defendant is not charged with possession of this small mountain of erotica over here--the baby doll and the photographs and the collages and all--the drawings and all that kind of stuff.
>
> So why is it here before you. It's here before you to show the defendant's state of mind. Because that's really the basis of the defense--I'm a good guy; I want to take a bite out of crime; they picked on me; who knows why they picked on me. I'm just the unlucky soul. State of mind.

(R277)

> He made up this erotica. He says he did it all in one day--one day. Look at it. Can you imagine the cutting and the pasting and the searching for pictures. And the drawings--look at those complex drawings. I guess he just happened to have all that stuff laying around, but put together real quick to keep Al Danna on the hook.

> But he didn't show that stuff to Danna to keep him on the hook prior to the illegal act taking place though, did he. He didn't do that. Because as Danna is getting closer and closer to him and gaining **his** confidence, more **and** more of this person's true self is coming out. It's a gradual process.

(R280)

> The defendant's state of mind. If this erotica does not give one a look into this man's state of mind, then **it's** hard **to** imagine what would. Take it back there and look at it. It obviously is not something that's done in a hurry like he told you. It gives a true picture into what's going on in this man's head.
>
> And how was that explained to you by the experts the defense says--recognizes also. **Child** pornography, **is hard** to **obtain**, the real thing. Fortunately--the Schoolgirls I had here a moment ago--fortunately it's very difficult to obtain nowadays. Not so much in years past, but nowadays it is.
>
> And people use this erotica which they create themselves and do the next best thing until they can lay their hands upon the real thing. And it's used for sexual gratification. Just like **the** Schoolgirls magazine was giving him a sexual thrill while he was sitting in the car looking at it.

(R283)

These statements do not appear **as** "overzealousness" r "misconduct." State v. DiGuilio, 491 So.2d 1129, **1139** (Fla. **1986**)

Appellant's counsel made one reference to the **child** erotica evidence and said it "is not against the law to have." (R285-86) Defense counsel did not request a special instruction on this evidence and did not object to the State's closing statements, or provide any corrections or additions to the jury instructions. (R300) Generally, without an objection noted, the issue is not

preserved for appeal. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). "Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

The child erotica was seized during Appellant's arrest or shortly thereafter. It was relevant in corroborating all of the witnesses' testimony as to the series of events as they happened and could not be separated from the crime charged. If it was error to admit this evidence, it was harmless. DiGuilio, supra.

Appellant's defense of lack of intent to possess the child pornography in this case, his claim of trying to work with the police in busting child pornographers and his explanation to use marked purchase money were all refuted by Appellant's possession of a great deal of child erotica which was evidence of his intent. Admitting that evidence was not so inflammatory and prejudicial that it destroyed Appellant's right to a fair trial. Straight v. State, 397 So.2d 903, 909 (Fla. 1981); cert. denied, 454 U.S. 1022, 1012 S.Ct. 556, 70 L.Ed.2d 418 (1981). The child erotica was evidence of Appellant's acts that refuted Appellant's theory. Walker v. State, 495 So.2d 1240 (Fla. 5th DCA 1986). The child erotica was evidence that Appellant had "a central and almost obsessive object [at] his attention." Schmitt v. State, 590 So.2d 404, 411 (Fla. 1991). The admission did not confuse the issues, unfairly prejudice Appellant, or mislead the jury. 890.403, Fla. Stat. (1989).

The child pornography magazine entered into evidence contained the more gruesome pictorials. (R140,142) The child

erotica evidence was also "demonstrably material in reconciling or tending to reconcile, [the] disputed fact" of Appellant's intent. Albritton v. State, 221 So.2d 192, 196 (Fla. 2d DCA 1969) (Held that where defendant claimed injuries resulted from various minor accidents, inflammatory and repulsive exhibit would not be admissible unless it would throw light upon a vital issue in the case). Like Appellant, the defendant in Mills v. State, 462 So.2d 1075 (Fla. 1985), claimed prejudice in admitting a picture of the skeletal remains of his victim. The Supreme Court found the photograph relevant to establish how long the victim had been dead and to help explain the lack of medical evidence that the victim had received a blow to the skull. Citing to Straight, supra and Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982), the court stated "that even gruesome or inflammatory photographs may be admitted if they are relevant." Id. at 1080.

In this case, the child pornography and the child erotica were inseparably linked and the child erotica was relevant to show Appellant did have the requisite intent to possess the illegal material. King v. State, 545 So.2d 375, 378 (Fla. 4th DCA 1989), rev. denied 551 So.2d 462 (Fla. 1989). The trial court was correct in admitting the evidence.

CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, this Court should affirm the decision of the Second District Court of Appeal in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to JULIUS AULISIO, ESQ., Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33830 on this 5th day of November, 1992.

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