IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,263

JACK TIMOTHY TOWNSEND,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF AUTHORITIES

CASES: PAGES:

Castor v. State,
365 So. 2d 701 (Fla. 1978).....5, 10

Griffin v. State,
526 So. 2d 752, 755 (Fla. 1st DCA 1988).....9

Idaho v. Wright,
497 U.S. 805, 110 S.Ct. 3139,
111 L.Ed.2d 638 (1990).....4, 10, 11

Perez v. State,
536 So. 2d 206 (Fla. 1988).....4, 7, 10

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1987).....11

State v. Townsend,
556 So. 2d 817 (Fla. 5th DCA 1990)
("Townsend I").....PASSIM

Steinhorst v. State,
412 So. 2d 322 (Fla. 1982).....5

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982).....10

Townsend v. State,
18 Fla. L. Weekly (Fla. 5th DCA January 29, 1993)
("Townsend II).....PASSIM

OTHER AUTHORITIES

Ehrhardt, Fla. Evidence, §603.1 (1992 Edition).....9

§ 90.603, Fla. Stat. (1987).....2, 5, 7
§ 90.803(23), Fla. Stat. (1987).....PASSIM
§ 90.804(1).....8

STATEMENT OF THE CASE AND FACTS

Townsend was charged with Sexual Battery on a Person Less than Twelve (12) Years of Age (R 798). Townsend filed a motion to determine the competency of the child victim (R 732). The State stipulated that the child was incompetent to testify (R 773). The State filed notices of intent to introduce hearsay testimony (R 732, 736, 743, 793, 842). A hearing was held to determine whether the child was unavailable as a witness. The trial court ruled the witness was available and the State could not admit hearsay (R 772, 773).

The State sought certiorari review of the trial court's order denying its motions to introduce hearsay statements under section 90.803(23), Florida Statutes (1987), based upon a finding that the child victim was available to testify. The Fifth District Court of Appeal granted certiorari review, quashed the order of the trial court, and remanded for further proceedings. State v. Townsend, 556 So. 2d 817 (Fla. 5th DCA 1990) ("Townsend I").

The case proceeded to trial, and Townsend was convicted as charged (R 846). He appealed to the Fifth District Court of Appeal, raising the following issues:

> 1. The trial court erred in failing to make specific factual findings regarding the admissibility of child hearsay under section 90.802(23), Florida Statutes;
>
> 2. The trial court erred in finding sufficient corroborative evidence of sexual abuse in order to admit the child's hearsay into evidence;
>
> 3. The trial court erred in admitting the specific child hearsay statements

because the time, content and circumstances of the statements do not provide sufficient indicia of reliability;

4. Dr. Medea Woods was not sufficiently qualified to give an expert opinion in the diagnosis of sexually abused children;

5. At trial Dr. Medea Woods impermissibly gave her opinion that the defendant committed a sexual battery on the child;

6. It was reversible error for Dr. Medea Woods to comment on the credibility of the child at trial;

7. The inadmissible testimony of Dr. Medea Woods constituted fundamental error.

The Fifth District Court of Appeals, *en banc*, reversed and remanded to the trial court for a new trial. Townsend v. State, 18 Fla. L. Weekly (Fla. 5th DCA January 29, 1993) ("Townsend II"). Four of the appellate judges concurred in the decision. Four concurred specially and wrote four separate opinions. The majority receded from Townsend I, holding that incompetency under section 90.603, Florida Statutes, does not render a witness unavailable under section 90.803(23), Florida Statutes, receding from Townsend I. The majority also found the procedure used in the case "may have violated" Townsend's rights under the Confrontation Clause of the Sixth Amendment.

The Fifth District certified the following question:

> DOES A FINDING OF INCOMPETENCY TO TESTIFY BECAUSE ONE IS UNABLE TO RECOGNIZE THE DUTY AND OBLIGATION TO TELL THE TRUTH SATISFY THE LEGISLATIVE "TESTIFY OR BE UNAVAILABLE" REQUIREMENT OF SECTION 90.803(23)(A)(2)?

The Fifth District also directed the trial judge to (1) revisit the issue of whether the child may be unavailable because of the likelihood of severe mental or emotional harm and make specific findings; and (2) consider whether such statements are clothed with such reliability that the defendant's right to confrontation is superfluous. Townsend II.

The State filed a Notice to Invoke Discretionary Jurisdiction. This court postponed the decision on jurisdiction and set a briefing schedule.

SUMMARY OF ARGUMENT

POINT I: The District Court erred in reversing on an issue which was not raised on appeal and not preserved at the trial level.

POINT II: A witness who is incompetent to testify is "unavailable" for purposes of section 90.803(23). The reasoning of the District Court that unvailability due to "then existing" mental or physical infirmity is flawed. Even if the reasoning is not flawed, competency is determined at the time of trial and incompetency is a "then existing" condition.

POINT III: Whether admission of the hearsay statements was appropriate because they were reliable was not preserved for appellate review and cannot form the basis for reversal. This court in Perez rejected the view that the Confrontation Clause bars the use of hearsay statements when the declarant is unavailable for cross-examination. The trial judge complied with the requirements of Idaho v. Wright in finding the time, content and circumstances showed the statements were reliable and in ruling on each individual statement. Error, if any, was harmless since any excludable statement was cumulative to statements which were admissible.

POINT IV: There is no need for written findings if incompetency makes a witness "unavailable" under section 90.803(23). The District Court had already found the witness "unavailable" under section 90.803(23) since the psychologist testified there would be substantial harm if the child testified. The factual findings of the trial court were adequate under the circumstances.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN ADDRESSING AN ISSUE NOT RAISED ON APPEAL AND NOT PRESERVED AT TRIAL.

The majority opinion of the District Court based reversal on the issue regarding incompetency under section 90.603, Florida Statutes, not satisfying the requirements of section 90.803(23) Florida Statutes, for unavailability. This issue was not raised on appeal, and the District Court had no jurisdiction to reverse on this basis.

Furthermore, the issue was not preserved at the trial level. Townsend did raise the issue of the trial judge's factual findings as to the admissibility of the hearsay statements, citing the following hearsay statements that were introduced at trial:

1. Statements by child's mother, Ronda Bordac (R 278, 283);

2. Statements by HRS social worker, Thelma Diaz (R 320-322);

3. Statements by babysitter, Kathy Nabbie (R 400-401, 403);

4. Statements by aunt, Lurinda Maria Chang-Fane (R 438-39);

5. Statement by psychologist, Dr. Medea Woods (R 478).

There was no objection to the admissibility of the statements, and this issue was not preserved for appellate review. Steinhorst v. State, 412 So. 2d 322 (Fla. 1982); Castor v. State, 365 So. 2d 701 (Fla. 1978). Neither did defense counsel object when the trial judge announced his ruling on the admissibility of the statements

(SR1[1] 3-7). The District Court should have never reversed on this issue, and this court is respectfully requested to rectify this error.

[1] There are two supplemental records which are designation "SR1" and "SR2".

POINT II

A WITNESS WHO IS INCOMPETENT TO TESTIFY UNDER SECTION 90.603, FLORIDA STATUTES, IS UNAVAILABLE TO TESTIFY UNDER SECTION 90.803(23), FLORIDA STATUTES.

The District Court erred in receding from Townsend I. The reason cited for receding from the prior decision was based on language in Perez v. State, 536 So. 2d 206 (Fla. 1988). The cited language does not support the District Court's decision. The cited language states that if a witness is incompetent to testify, his hearsay statements may still be introduced. Id. at 210-11, cited in Townsend II at 18 Fla. L. Weekly D390-91. The District Court's reliance on Perez is error. Perez holds, inter alia, that the trial judge does not have to determine competency to testify in order to allow hearsay statements under section 90.803(23). Id. at 210. Perez does not speak to the issue at hand, i.e., whether a determination of incompetency to testify necessarily includes a determination the witness is unavailable under section 90.803(23).

Section 90.603, Florida Statutes (1987) provides that a person is disqualified as a witness when the court determines that he is:

> (1) Incapable of expressing himself concerning the matter in such a manner as to be understood, either directly or through interpretation by one who can understand him.
>
> (2) Incapable of understanding the duty of a witness to tell the truth.

The parties stipulated the child victim was disqualified because she was not able to understand the duty or obligation to tell the truth because of her chronological age. Townsend I at 818. In

Townsend I, the District Court found that this infirmity satisfied the test of unavailability under the statutory definition of section 90.804(1). Section 90.803(23) incorporates the definition of "unavailability" from section 90.804(1). See section 90.803(23)b. The definition of "unavailability" in section 90.804(1) includes:

> (d) Is unable to be present or testify at the hearing because of death or because of then existing physical or mental illness or infirmity.

The District Court in Townsend II construed the language "then existing" as requiring a condition arising after the purported hearsay statements. Id. at D390. As pointed out in Judge Sharp's concurring opinion, there is no basis for such a restrictive reading of the statute. Id. at D392. Obviously, if a witness is incompetent to testify because of chronological age, he has a "then existing" physical or mental infirmity which precludes him from testifying. To say that the physical or mental infirmity must arise after the statement is made decimates the entire hearsay exception of section 90.803(23) since, as Judge Sharp observes, the statements of very young children and mentally defective children who are most vulnerable to sexual abuse would be excluded.

Even if the reasoning of the District Court was correct and the analysis of availability occurs at time of trial, competency is also determined at the time of trial and incompetency equates to unavailability. Competency focuses on the mental capacity of the witness at the time he is offered as a witness at trial rather than at the time the facts testified to occured. Ehrhardt, Florida

Evidence, §603.1 (1992 Edition, p. 326); Griffin v. State, 526 So. 2d 752, 755 (Fla. 1st DCA 1988).

The State's position is consistent with the Supreme Court decision in in which the Court found that a child who had been ruled incapable of cummunicating with the jury was "unavailable" within the meaning of the Confrontation Clause. Id., 110 S.Ct. at 3147.

Additionally, the District Court held in Townsend I that the trial court had erred in finding the child victim available under section 90.803(23). Id. at 818. The District Court recognized in Townsend II that it had held the trial court erred in concluding the child was available under section 90.803(23). In other words, the District Court in Townsend I told the trial court the child was unavailable under section 90.803(23), recognized this ruling in Townsend II, then ignored the fact that in addition to being incompetent to testify, the District Court had already ruled the child unavailable to testify under the definition of "unavailability" for section 90.803(23).

The State respectfully requests this honorable court rectify the error of the District Court by reversing the opinion in Townsend II and approving the opinion in Townsend I, or alternatively, in finding the child had already been determined by the District Court to be unavailable under section 90.803(23).

POINT III

ADMISSION OF THE HEARSAY STATEMENTS DID NOT VIOLATE TOWNSEND'S RIGHT TO CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT.

The District Court additionally found that "the procedure used in this case may have violated Townsend's rights under the Confrontation Clause of the Sixth Amendment as interpreted by the Supreme Court in Idaho v. Wright, 497 U.S. 804, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)". Townsend II, 18 Fla. L. Weekly at D391.

First, this issue was never raised in the trial court, and there was no objection to the statements either when the trial court ruled them admissible or when they were introduced. This issue was not preserved for appellate review and the District Court erred in ruling on the issue. See Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Castor v. State, 365 So. 2d 701 (Fla. 1978).

Second, this court has rejected the view that the confrontation clause bars the use of any out-of-court statements when the declarant is unavailable for cross-examination. Perez v. State, 536 So. 2d 206 (Fla. 1988). The trial court held a hearing to determine whether the time, content and circumstances of the child hearsay statements rendered them admissible (SR2 1-70). The trial judge announced his rulings on the admissibility of the hearsay statements (SR1 1-8). The trial judge made factual findings that under section 90.803(23) the time, content, and circumstances provided sufficient safeguards of reliability (R 425) Additionally, the trial judge made individual findings of reliability as to each statement (SR1 4, 5, 6). The findings met

the procedural requirements of Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

Even if it was error to admit the hearsay statements of the mother, babysitter and HRS worker, the statements of the aunt had been determined reliable[2] and the statement of Dr. Woods was admissible under the medical diagnosis statute, section 90.803(4), so error, if any, was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1987).

Although not clear whether the Confrontation Clause issue was a basis for reversal, the District Court erred in finding Townsend's rights "may have been violated".

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[2] During the testimony of the aunt the trial judge stated "this probably is more reliable than any other statements previously given" (R 425).

POINT IV

THE TRIAL JUDGE'S FINDINGS OF FACT WERE ADEQUATE UNDER THE CIRCUMSTANCES.

In reversing and remanding, the District Court directed the trial court to revisit the issue of whether the child was unavailable under section 90.803(23). Since, as argued in Point II, the witness' incompetency satisfies the requirement of "unavailability" for purpose of section 90.803(23), there is no need for written findings. Furthermore, the District Court in Townsend I told the trial court it had previously erred in finding the witness available and in misconstruing the psychologist's testimony to the contrary. The District Court reiterated this finding in Townsend II. Therefore, the trial court's findings after an extensive hearing (SR2 1-70) that the requirements of section 90.803(23) were met were adequate under the circumstances. If the District Court was implying this was a basis for reversal, the State respectfully requests this honorable court correct the District Court's error.

CONCLUSION

Based on the arguments and authorities presented herein, the petitioner respectfully requests this honorable court answer the certified question in the affirmative and reverse the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on the Merits has been furnished by U.S. Mail to James G. Kontos, 255 Grove Street, Suite A, Merritt Island, Florida 32953, this 12th day of March, 1993.

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