047

IN THE SUPREME COURT OF FLORIDA

QUARRY JONES,

Petitioner,

vs. CASE NO: 81,970

STATE OF FLORIDA

Respondent.
_____/

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA

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CASES CITED:

STATEMENT OF THE CASE AND FACTS

Amici hereby adopt and incorporate by reference the Statement of the Case and Facts set forth in the Initial Brief of Petitioner.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction over this cause to correct the error of the Fifth District Court of Appeal in this and a number of other cases brought pursuant to § 800.04, Fla. Stat.[1] This statute, better known as Florida's "statutory rape law," has been upheld in each of these cases by the Fifth and Second Districts against challenges that it violates the right to privacy, insofar as it criminalizes consensual sexual activity where one or both partners is under age 16. These decisions are in conflict with this Court's decision in In re T.W., 551 So.2d 1186 (Fla. 1989), and must be reversed.

In In re T.W. and other cases, this Court has interpreted the right to privacy broadly. It has also held unequivocally that the right to privacy applies to minors. There can be little doubt that the right to privacy applies to the decision to engage in consensual sexual activity -- just as it applies to other personal decisions concerning marriage, childbearing and abortion. Of course, nonconsensual activity can be and has been criminalized, and is fully punishable under other existing Florida statutes. By outlawing consensual sexual activity, the State is attempting to impose its view of morality

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[1] Rodriguez and Williams v. State, Sup. Ct. Case no. 81,992, which was consolidated with this case below, is also pending before this Court. Cook v. State, 18 Fla. L. Weekly D1584 (Fla 5th DCA July 9, 1993), Marshall v. State, 18 Fla. L. Weekly D1585 (Fla. 5th DCA July 9, 1993), and Schofield v. State, 18 Fla. L. Weekly D1662 (Fla 2d DCA July 23, 1993), all follow the decision below. Marshall v. State is also pending before this Court. (Sup. Ct. case no. 82,192).

upon its citizens. However, these citizens have the constitutional right to make private decisions, including decisions about their own sexuality, as they see fit. Protecting young people from their own private decisions because the State regards them as immoral is constitutionally impermissible.

ARGUMENT

Introduction

The issue presented in this case is whether persons under the age of 16 are protected by the Florida Constitution from the threat of criminal prosecution when they decide to engage in consensual sexual activity. There can be no dispute that such persons do, in fact, engage in such activity. Under current law, however, they do so only at the risk of being charged, convicted and sentenced as felons.[2] Amici do not suggest that nonconsensual sexual assault or battery on a person of any age should go unpunished. Nonconsensual sexual activity is not at issue in this case. Nor does this case raise the issue of whether defendants may be subjected to enhanced penalties for committing the crime of sexual battery on a minor. This case asks the much more limited question of whether the State may outlaw the decision to engage in consensual sexual activity, when that decision is made by persons under the age of 16. Clearly, under Article I, Section 23 of the Florida Constitution and this Court's prior holdings, it may not. The decision by persons -- whether or not they have attained age 16 -- to engage in consensual sexual activity is protected by Florida's right to privacy.

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[2] § 800.04, Fla. Stat., defines the crime of "Lewd, lascivious, or indecent assault or act upon or in the presence of a child," a second degree felony, to include: "actual . . . sexual intercourse . . ." It goes on to state that "Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section."

I. THIS COURT SHOULD ACCEPT JURISDICTION OVER THIS CASE

In this case and many others,[3] the Fifth District Court of Appeal (now joined by the Second District) has abdicated its responsibility to follow the precedents of this Court, in hopes of persuading this Court to revisit those precedents and narrow their reach. This Court should accept jurisdiction over these cases and correct the error left by the lower courts' decisions. In particular, the Fifth District has expressly contravened this Court's long line of decisions interpreting Florida's constitutional right to privacy, Art. I, § 23, Fla. Const., culminating in In re T.W., 551 So. 2d 1186 (Fla. 1989). This error was quite deliberate -- in its decision in the consolidated Jones v. State and Rodriguez and Williams v. State, 18 Fla. L. Weekly D1375 (Fla. 5th DCA June 4, 1993), the court stated:

> Because of the importance of this issue beyond the boundaries of this court and because we may have read less into In re T.W. than intended by the Supreme Court, we certify the issue of these appeals to the Florida Supreme Court as one of exceptional importance.

Because the lower court's opinion raises an issue of exceptional importance, conflicts with this Court's prior holding in In re T.W., and expressly declares valid a state statute, this Court should exercise jurisdiction pursuant to Rule 9.030(a)(2).

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[3] See footnote 1, p.2, supra.

II. MINORS ARE PROTECTED BY THE RIGHT TO PRIVACY GUARANTEED BY THE FLORIDA CONSTITUTION.

The Florida courts have recognized again and again that our constitutional protections are not limited to persons who have attained the age of majority. Absent a compelling interest to the contrary, minors generally are entitled to the same constitutional protections as adults. See, e.g., In re T.W., 551 So. 2d 1186, 1191-93 (Fla. 1989); W.J.W. v. State, 356 So. 2d 48, 50 (Fla. 1st DCA 1978); Day v. Nationwide Mutual Insurance Co., 328 So. 2d 560, 562 (Fla. 2d DCA 1976). This Court squarely decided this issue in In re T.W., in the context of a parental consent statute for minors seeking abortions:

> The next question to be addressed is whether this freedom of choice extends to minors. We conclude that it does, based on the unambiguous language of the amendment: The right of privacy extends to "[e]very natural person." Minors are natural persons in the eyes of the law and "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights."

Id. at 1193 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 74, 96 S. Ct. 2831, 2843, 49 L.Ed.2d 788 (1976)).

III. ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION PROTECTS THE DECISION TO ENGAGE IN CONSENSUAL SEXUAL ACTIVITY.

The Florida Constitution's guarantee of the right to privacy protects a broad range of personal decisions. Indeed, Art. I, § 23 extends far more broadly than the corresponding provisions of the U.S. Constitution. There can be no doubt that

it extends to private decisions regarding consensual sexual activity.

Under our federalist system, the Florida Constitution protects citizens' individual rights independent of the United States Constitution. Traylor v. State, 596 So. 2d 957, 962 (Fla 1992). While states may not place greater restrictions on fundamental rights than allowed by the federal Constitution, they may adopt broader protections of those rights than the corresponding federal provisions supply. Id. at 961; Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). "In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling." Traylor, 596 So. 2d at 962.

Article I of the Florida Constitution, entitled "Declaration of Rights", contains "a broad spectrum of enumerated and implied liberties that conjoin to form a single overarching freedom: They protect each individual within our borders from the unjust encroachment of state authority -- from whatever official source -- into his or her life." Id. at 963. Moreover,

> [e]very particular section of the Declaration of Rights stands on an equal footing with every other section. They recognize no distinction between citizens. Under them every citizen, the good and the bad, the just and the unjust, the rich and the poor, the saint and the sinner, the believer and the infidel, have equal rights before the law.

Boynton v. State, 64 So. 2d 536, 552-53 (Fla. 1953). This Court must "give independent import" to every constitutional provision, and it must "construe each provision freely in order to achieve the primary goal of individual freedom and autonomy." Traylor,

596 So. 2d at 962-63. In this case, individual freedom and autonomy must be read to encompass the decision to engage in consensual sexual activity.

In 1980, Florida amended its Constitution to add to the Declaration of Rights the right of privacy, guaranteeing every natural person the right to be let alone and to be free from government intrusion into his or her private life. Art. I, § 23, Fla. Const. See, e.g., Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989); Rasmussen v. South Florida Blood Service, 500 So. 2d 533 (Fla. 1987); Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985). The breadth of this protection cannot be overstated:

> The citizens of Florida opted for more protection from governmental intrusion when they approved Article I, Section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, Section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Winfield, 477 So. 2d at 548.

The right to privacy is founded on the guarantee that an individual has a fundamental right to lead a private life according to his or her own beliefs, free from unreasonable

government intrusions. Wons, 541 So. 2d 96. The right to privacy consistently has been interpreted by the Florida Supreme Court to include the "decision-making or autonomy zone of privacy interests of the individual." Winfield, 477 So. 2d at 546. See also In re: T.W., 551 So. 2d 1186; Rasmussen, 500 So. 2d 533.

The protection of decisional privacy "encompasses an enormously broad and diverse field of personal action and belief," Rasmussen, 500 So. 2d at 536, including personal matters concerning: (1) child rearing; (2) family relationships; (3) marriage; (4) procreation; and (5) medical decisions. In Re: T.W., 551 So. 2d at 1191-92; Wons, 541 So. 2d at 97; Winfield, 477 So. 2d at 546. See also In re Florida Board of Bar Examiners, 358 So. 2d 7, 10 (Fla. 1978) ("Governmental regulation in the area of private morality is generally considered anachronistic . . ") (quoting The Florida Bar v. Kay, 232 So. 2d 378, 379-81 (Fla. 1970)). In fulfilling its responsibility to construe each constitutional provision to "achieve the primary goal of individual freedom and autonomy," this Court must read Art. 1, § 23 to guarantee individuals the right to be free from government interference in the bedroom, including the decision to engage in consensual sexual activity.

Indeed, this Court effectively reached this conclusion when it found, in In re T.W., that

> [o]f all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when and how one's body is to become the vehicle for another human being's creation; second, when and how - this time

> there is no question of "whether" one's body is to terminate its organic life.

Id., at 1192 (quoting L. Tribe, American Constitutional Law 1337-38 (2d ed. 1988)).

Here, the challenged statute impermissibly interferes with the decision to engage in consensual sexual activity when that decision is made by one under the age of 16. These personal decisions clearly fall within the zone of autonomy interests protected by the Florida Constitution. Because the challenged statute implicates the fundamental right to privacy, the statute is subject to strict scrutiny. The compelling interest standard applies, and requires the State to prove that the statute serves a compelling state interest and accomplishes its goal through the least intrusive means. Winfield, 477 So. 2d at 547. Since it was announced by the Florida Supreme Court in Winfield, this standard has been repeatedly reaffirmed in Rasmussen, 500 So. 2d at 535; Wons, 541 So. 2d at 98; and In re: T.W., 551 So. 2d at 1192. It "is a highly stringent standard, emphasized by the fact that no government intrusion in the personal decisionmaking cases . . . has survived." Id.

IV. SECTION 800.04, FLA. STAT., IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING A COMPELLING STATE INTEREST.

The state has asserted that the purpose underlying the challenged statute is to "protect young people." (State's Brief, 5th DCA, pp. 13-15.) This effort to impose the legislature's view of morality on young women and men is precisely what Art. I, §23 of the Florida Constitution protects against. While the

state's interest in protecting minors is a "worthy" objective, In re T.W., 551 So.2d at 1195, it is not sufficiently compelling to justify this substantial intrusion into young people's right to privacy. "Unlike the Federal Constitution, however, which allows intrusion based on a "significant" state interest, the Florida Constitution requires a "compelling state interest in all cases where the right to privacy is implicated." Id.

This Court went on to note that Florida does not recognize this interest as being sufficiently compelling to justify a parental consent requirement where personal decisions on matters other than abortion are concerned. Id. These include a pregnant minor's decision regarding her own medical treatment, § 743.065, Fla. Stat., a minor's decision regarding medical care for an existing child, id., and a minor's decision to place a child for adoption, In re T.W., 551 So.2d at 1195; Pugh v. Barwick, 56 So.2d 124 (Fla. 1952). Similarly, minors are permitted to marry if both are the parents of a child, or if the woman is pregnant. §§ 741.045(2) and (3), Fla. Stat. "Although the state does have an interest in protecting minors, 'the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions.'" Id. (quoting Ivey v. Bacardi Imports Co., 541 So.2d 1129, 1139 (Fla. 1989)). See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 61 U.S.L.W. 4587, 4594 (June 8, 1993)("a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to

that supposedly vital interest unprohibited") (citations omitted).

Even if the state's interest in "protecting young women" is deemed compelling, the challenged statute does not represent the least restrictive means of achieving that objective. If the state's goal is to protect persons who are emotionally immature from commencing sexual relationships, then the statute is underinclusive. Surely a great many people over age 16 -- indeed, over age 21 -- do not possess the emotional maturity to embark on a sexual relationship. Florida does nothing to protect those persons. Moreover, the statute is also overinclusive by forbidding those persons under age 16 who are mature from entering into such relationships, as they have the right to do under the Florida Constitution. Because the statute is no narrowly tailored, it cannot satisfy the compelling interest test. Id.

The State already protects persons -- whether under 16 or over 16 -- who are forced to engage in sexual activity without their consent. Chapter 794 of the Florida Statutes defines the crime of sexual battery on persons under the age of 12, and on persons 12 years of age or older. In cases of sexual battery on persons 12 years of age or older, the victim's lack of consent is an element of the crime. § 794.011, Fla. Stat. Where the victim is under 12, lack of consent is not an element of the crime. § 794.011(2), Fla. Stat. Thus, the legislature has created a rebuttable presumption that persons under 12 are not capable of

consenting.[4] However, unlike § 800.04, § 794.011 contains no limitation on using the victim's consent as a defense. Moreover, § 794.011(6), Fla. Stat., states that: "Evidence of the victim's mental incapacity or defect is admissible to prove that the consent was not intelligent, knowing or voluntary . . ." Thus, for emotionally immature persons who are incapable of consenting, this mental state may be introduced to establish lack of consent. Other existing statutes fully achieve the State's interest without infringing on young people's constitutional right to make private decisions about their own sexuality.

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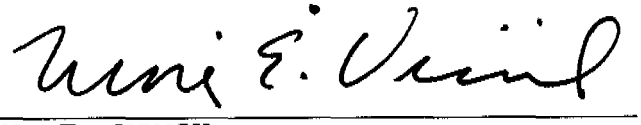
[4] There is no constitutional reason why the legislature could not increase the age at which this presumption applies to persons older than 12.

CONCLUSION

This Court has been very clear in its decisions interpreting Florida's constitutional right to privacy. That right, which definitively applies to minors, protects individual freedom and autonomy. Individual freedom must be read to include private decisions regarding sexual activity. Because the Fifth District failed to recognize this, its decision must be reversed.

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. mail this 23d day of August, 1993 to James R.Wulchak, Chief, Appellate Division, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, Joan Fowler, Esquire, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Blvd., West Palm Beach, FL 33401-2299, and Mr. Quarry Jones, #344375, P.O. Box 1360, Jasper, FL 32052

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