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SUPREME COURT OF FLORIDA

Case No. 82,189

JAMES HALLBERG,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

JURISDICTIONAL BRIEF OF JAMES HALLBERG

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STATEMENT OF THE FACTS AND OF THE CASE

James Hallberg appealed to the Second District Court of Appeal his convictions and sentences for five counts of committing a lewd act upon a child and three counts of engaging a child in sexual activity. The District Court of Appeal affirmed the convictions but reversed the sentences. Motions for rehearing and certification were timely filed and denied, whereupon both parties timely and, apparently, contemporaneously filed notice of intent to invoke this court's discretionary jurisdiction. The state's notice has been assigned case number 82,172.

James Hallberg was a junior high school teacher, and during 1987-88, S.S. was one of his students. (App. 4) Hallberg was scheduled to teach a class the following year and S.S. was again scheduled to be one of his students. (App. 5) The course was to be an honors class which Hallberg had never taught before, and he asked S.S. to help him prepare for the class. (App. 5) S.S. claimed that on visits to her home during the summer, between the school years, Hallberg committed the acts for which he was convicted. (App. 6-14) Some of the alleged lewd acts for which Hallberg was convicted were the same alleged acts for which he was convicted for engaging a child in sexual activity by a person in a position of custodial or familial authority. (App. 2-3)

SUMMARY OF THE ARGUMENT

The District Court opinion conflicts with opinions of other district courts on what constitutes being "in a position of

familial or custodial authority." Unlike the other district courts, the Second District in this case has eliminated any requirement of close family relationships but has made the term "custodial" applicable to all teachers.

The District Court's opinion conflicts with a decision of the Supreme Court and of another district court requiring careful scrutiny of claims by alleged victims of sexual battery when the alleged victim is the only witness. The District Court makes the issue of the alleged victim's credibility entirely an issue for the jury.

Although no case was found specifically describing teachers as state officers, the functions of teachers are controlled by state statute, and teachers meet some of the criteria for "state officers" mentioned in nonjurisdictional cases. Assuming teachers are state officers, the District Court's opinion that school teachers by virtue of their employment stand in a position of custodial authority to their students obviously affects every single school teacher in the state.

Without using the term "double jeopardy" the District Court opinion construes the double jeopardy clause of the United States Constitution to include only the "Blockburger" test and does not even consider the "same conduct" test.

ARGUMENT

I. The District Court opinion conflicts with opinions of other districts regarding the definition of "custodial or familial."

In its opinion in this case, the Second District stated at

page 18, "[W]e reject appellant's argument and its implication that the term 'custodial' as used in the statute, has a necessary linkage to the term 'familial.'" This holding is in direct conflict with every other district court opinion interpreting the meaning of "person who stands in a position of familial or custodial authority to a child" under Section 794.041, Florida Statutes.

The First District has rendered two opinions on this issue. In Coleman v. State, 485 So. 2d 1342 (Fla. 1st DCA 1986), that district announced that the legislature intended "by its use of the word 'familial or custodial', to include within the statute's proscription any person maintaining a close relationship with children of the ages specified in the statute, and who lived in the same household with such children." Id. at 1345. That same district court, without expressly receding from the interpretation in Coleman, later applied the statute to a defendant who did not reside in the victim's home because "the circumstances were such as easily to characterize the relationship as one establishing 'close family-type ties'." Stricklen v. State, 504 So. 2d. 1248, 1250 (Fla. 1st DCA 1986). According to the Stricklen opinion, Stricklen "assum[ed] responsibility for [the victim's] care practically every weekend." Id. It is apparent from Coleman and Stricklen that the First District interprets the term "familial or custodial authority" to require the defendant and the victim either to reside in the same home or to have close family-type ties. In the opinion in this case, the Second District rejected that interpretation by

holding that there is no necessary linkage between the terms "custodial" and "familial." In fact, the Second District quotes a part of the Coleman standard and indicates that "later cases eliminated the additional Coleman factor that such a 'custodial' person need live in the same household as the children." (App. 19) But the Second District's opinion does not acknowledge the fact that the "later cases" involved "family type ties."

The Second District relied on Collins v. State, 496 So. 2d. 997 (Fla.5th DCA 1986) as one of the cases "eliminating" the requirement that the defendant live in the same household as the child. The Second District seems to equate the elimination of the residence requirement as an elimination of any familial-type connection. However, even in Collins, the Fifth District was careful to point out that "the defendant had daily contact with the victim's mother, and, in fact, the mother of the child knew, and approved, that the child was in the care of the defendant on the day the crime was committed." Id. at 999. Thus, on its facts, Collins does not recede from the First District's interpretation that there is indeed a linkage between the words "custodial" and "familial."

In Vandiver v. State, 578 So. 2d. 1145 (Fla. 4th DCA 1991), the Fourth District, without providing a definition for the terms in question, reversed a conviction for offenses that actually occurred in the defendant's home while the child was staying there temporarily. Citing Coleman as its authority, the Fifth District refused to apply the definition to the facts of the case before it

and, in fact, referred to the offense as "familial sexual battery." Id. at 1147. (emphasis added).

The Third District reviewed the Coleman, Stricklen, and Collins cases and also referred to the offense under consideration as "familial sexual battery." Bierer v. State, 582 So. 2d. 1230, 1231, 1232 (Fla. 3rd DCA 1991). The Third District believed the statute was applicable to Mr. Bierer because "the defendant exercised parental-type supervision of the neighborhood child on a daily basis at his home. On the authority cited, we conclude that such an arrangement constitutes care within the broad familial context." Id. at 1232. (emphasis added).

In the present case, the Second District in effect rejected the "familial" circumstances of every single case in which the other district courts had been called upon to apply the statute to a criminal prosecution. Instead, the Second District relied upon D.A.O. v. Department of Health and Rehabilitative Services, 561 So. 2d. 380 (Fla. 1st DCA 1980), for a broader interpretation of Section 794.041, although D.A.O. that was not a criminal case. That case is not on point as are the others, and by rejecting any connection between the words "familial" and "custodial" in Section 794.041, the Second District has departed from the holdings of the other district courts of appeal. Thus, this court has conflict jurisdiction of the case.

II. The District Court's opinion conflicts with a decision of this court and the decision of another district court on the standard of review in certain sex offenses.

The Second District court recognized at page 15 of its opinion

that this court in Thomas v. State, 167 So. 2d. 309 (Fla. 1964), and the First District in Robinson v. State, 462 So. 2d. 471 (Fla. 1st DCA 1984), stand for the rule that "where the sole witness in a sexual battery case is the victim, that testimony should be carefully scrutinized to avoid an unmerited conviction." The District Court, however, found that "that is in fact an issue of credibility which is for the trier of fact to determine." (App. 15). In other words, the Second District held that the alleged victim's testimony in such cases need not be "carefully scrutinized" by the courts. Thus the Second District deviated from a decision of this court and a decision of another district, and this court now has conflict jurisdiction over this case.

III. The District Court opinion affects an entire class of state officers.

Rule 9.030(a)(2)(A)(iii), Florida Rules of Appellate Procedure, in conformance with the state constitution, provides for this court's discretionary jurisdiction over cases affecting state officers. The petitioner has been unable to locate any cases clarifying the term "state officer" for purposes of discretionary jurisdiction other than those focusing on the word "state" as opposed to the word "officer." E.g., Hakam v. City of Miami Beach, 108 So. 2d. at 608 (Fla. 1959). In other contexts there are definitions which are extremely hard to decipher. E.g. Advisory Opinion to Governor, 1 So. 2d. 636, 638 (Fla. 1941).

In this case, the District Court relied in part for its determination that a teacher is in a position of custodial authority by reference to state statutes, specifically, Section

232.27, Florida Statutes, which defines the authority of a teacher. Every teacher in this state who is subject to Section 232.27 is now deemed to be a person in a position of custodial or familial authority to that teacher's students as a result of the District Court's opinion. Accordingly, assuming that teachers are "state officers," the Second District's opinion clearly affects an entire class of state officers and this court, therefore, has discretionary jurisdiction to review the Second District's decision.

IV. The District Court's opinion construes the meaning of the double jeopardy clause of the Fifth Amendment.

The Second District has construed the double jeopardy clause of the Fifth Amendment to the United States Constitution as being satisfied by application of the Blockburger test. Blockburger v. United States, 284 U.S. 299 (1932). (App. 25) The court does not specifically mention the Fifth Amendment or double jeopardy, but discusses "lesser included offenses" in the context of the Blockburger case which was a test adopted by the United States Supreme Court in 1932. In construing the Fifth Amendment's double jeopardy clause exclusively under Blockburger, the Second District ignored another test, the same conduct test set forth in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed. 2nd 548 (1990). By its construction of the constitutional provision, the District Court has established grounds for this court to exercise its jurisdiction under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

CONCLUSION

This court has discretionary jurisdiction over this case and should exercise it.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Susan Dunlevy, Assistant Attorney General, 2002 N. Lois Avenue, Tampa, Florida by US Mail this 16 day of August, 1993.

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