SUPREME COURT OF FLORIDA

Case No. 82,189

JAMES HALLBERG,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE FACTS AND OF THE CASE

The state has given an extensive statement of the facts, not all of which the petitioner agrees with. However, it would be counter-productive to submit a third statement, particularly in light of page limitations. Certain differences in perception of the record will be addressed in the argument.

SUMMARY OF THE ARGUMENT

The state's custodial authority argument is bottomed upon a misconception that some of the alleged offenses did not occur during summer vacation and that Hallberg was present in the home during the summer with the knowledge and consent of S[redacted]'s parents. Furthermore, the state's argument that Hallberg was exercising a teacher's authority at that time runs contrary to the statutory citation relied upon by the state which refers to authority "in the classroom and in other places in which he is assigned to be in charge of students." These alleged incidents did not occur in a classroom or in any other place in which Hallberg was assigned to be in charge of students. Furthermore, the mere fact that a person is a teacher does not make that individual a person in position of familial or custodial authority, for reasons set forth in the initial brief.

The state's double jeopardy argument is based upon an illogical position that an element of an offense contemplating the nonexistence of something can be applied under the Blockburger test. The state's logic gets bogged down in a hopeless combination of "not's."

The state's own argument on the sufficiency of the evidence shows the applicability of the cases relied upon by Hallberg. Furthermore, the state's argument is based upon a misconception of certain issues, such as the availability of alternate routes from a classroom to the principal's office and the lockability of classrooms from inside. The state also attempts to reconcile its evidence by veiled suggestions that the gender of certain witnesses determines their credibility.

This court has denied review of the state's sentencing issue and should continue to deny such review. But even if review is granted, the court's original decision that victim injury did not include sexual contact or penetration was correct. Furthermore, the case the state relies upon in seeking repudiation of that decision came to this court in a very different procedural context in which the legislature had stated its legislative intent before this court acted. The state is now trying to get this court to repudiate its own decision because the legislature has announced its legislative intent after this court has reached its decision and seven years after a lower court decision upon which this court based its conclusion.

ARGUMENT

I. The three counts of engaging a child in sexual activity by a person in familial or custodial authority must be reversed because Hallberg did not stand in such a relationship to the alleged victim.

The state's own argument implicitly establishes the validity of Hallberg's position on this issue. The state cites Section 232.27, Florida Statutes, for the proposition that a teacher has

authority to control and discipline students "assigned to him" and keep order "in the classroom and in other places in which he is assigned to be in charge of students." Clearly and unequivocally, the alleged offenses were alleged to have occurred between June 1 and August 31. During that summer vacation time, students were not "assigned" to Hallberg and he was not "in the classroom" or "in other places in which he [was] assigned to be in charge of students."

The state greatly confuses the matter by arguing at page 35 of its brief that "at the time of at least two of the charged offenses in issue, Petitioner did not have legal control over S[redacted] ... inasmuch as school was not in session and these offenses did not occur on school premises or at a school function or during transportation to or from any such function." The confusion by the state is compounded by its statement on page 36 that "at least the most serious offenses occurred" in Sarah's home. What is confusing is that the state seems to be arguing at this late date and in this third court in which this case has been presented that the alleged offenses occurred somewhere other than in the home. That argument simply is bogus. All eight offenses were alleged to have occurred between June 1 and August 31, 1988. (R 1170-76). Although school may have begun before the end of August, there was no allegation or even suggestion of any sexual activity between Hallberg and S[redacted] after the last alleged incident in the home before school started in the fall. Accordingly, since all offenses were said to have happened between June 1, 1988, and the start of school the

following year, none of these charges arose anywhere but at S[redacted]'s home. By the state's own charges and proof, these incidents occurred, if at all, at a time and place where Hallberg was not assigned to be in charge of students. Accordingly, by its own language, the state's argument that he was in a position of custodial authority at that time falls flat on its face.

The state even argues that at the time "S[redacted] was scheduled to be a student in one of Petitioner's classes during the upcoming school year ..." If the school year has not started, Hallberg's role as a teacher pursuant to statute and assignment has not yet begun.

The most egregious misconception of the facts is set forth in the state's summary of the argument (page 32), where the state alleges "that he had prior involvement with her outside school hours, at which time she was in his physical custody and control, and that he had access to her house at times when she was there alone, which access was with her parents' knowledge and consent on the basis of his teacher-student relationship with her ..." This statement, quite simply, is erroneous. S[redacted] testified that a couple of weeks after school was out, Hallberg came to her home unexpectedly. Some of the alleged offenses were alleged to have occurred at that time. (R 304-05). He came to her home for the last time in July or early August. (R 306). The other alleged offenses allegedly occurred during that visit. (R 308-313). Her mother, rather than consenting to his presence, walked in on them unexpectedly. (R 315).

The truth is that Hallberg was not in a position of custodial or familial authority because these incidents occurred during the summer when he was not even a teacher and anything he did was outside the scope of his authority as a teacher and because, as set forth in the initial brief of the petitioner, a teacher is not in a position of custodial or familial authority simply by virtue of being a teacher.

II. Three counts of lewd act on a child are lesser included offenses of the three counts of engaging a child in sexual activity, so the multiple punishments imposed upon Hallberg constitute double jeopardy.

The state's double jeopardy argument suffers from the same fatal defect as the opinion of the second district. That defect is in trying to conceptualize an element of an offense as the nonexistence of something. This logic makes us hopelesssly chase ourselves in circles trying to understand multiple uses of the word "not". For example, from pages 37-38 in the state's brief:

> On the other hand, lewd assault upon a child under Section 800.04(2) requires that the act committed be defined as sexual battery under Section 794.011(1)(h), Florida Statutes (1987), but yet not constitute the crime of sexual battery, whereas Section 794.041(2) does not require that the proscribed "sexual activity" (defined as "sexual battery" is defined in Section 794.011(1)(h)) not constitute the crime of sexual battery. (emphasis added; emphasis in the original omitted).

Hallberg stands on the logic set forth in his double jeopardy argument in his initial brief.

III. The conviction should be reversed for denial of requested lesser offense instructions.

Hallberg stands on the argument under this issue in his

initial brief.

IV. When properly scrutinized, the testimony of the alleged victim is insufficient to support the jury verdict.

As in the first issue above, the state's own argument on this issue establishes the validity of Hallberg's position under Thomas v. State, 167 So.2d 309, 310 (Fla. 1964), and Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984). The extensive argument by the state, rather than showing the clarity of the evidence, shows that it did not meet the Thomas requirement that the evidence of guilt be reasonable and not in any wise contradictory. Furthermore, the state has misconstrued some of the evidence. One point greatly confused by the state is the matter of the lock on Hallberg's classroom. (It will be recalled that S[redacted] testified that Hallberg called her into his classroom and locked the door behind him.) In one sentence, the state says that S[redacted]'s "testimony that Petititoner locked his classroom door before fondling her was not refuted." (page 41). But in the very next sentence, the state admits, "Granted the door had to be locked by a key placed on the lock on the hall side of the door .... There is something missing in this syllogism. Furthermore, it entirely omits the fact that one of the witnesses, the high school principal, testified that there was a fire regulation that prevented schools from locking classroom doors from the inside. (R 439).

The state's attempt to reconcile S[redacted]'s "testimony that she had to walk past Petititioner's classroom every Friday" with the testimony "of three or four other witnesses that there were alternate routes to the office ..." is equally illogical. (state's

brief, 40). Simply put, S[redacted]'s testimony is inconsistent with the testimony of the other witnesses as the state's own language establishes. Furthermore, the state argues that there is no inconsistency because no one was cross-examined on this issue. Although the absence of cross-examination is of no consequence to begin with, if the state needed cross examination, now is not the time to assert the right.

The state also argues (page 41) what can only be characterized as a conclusion that "three male administrators" should be disbelieved because they're male and because they were "refuted by a female teacher." This argument is unconvincing in the extreme. Moreover, it is offensive to claim, albeit implicitly, that one's gender affects one's credibility.

Finally, where the state lacks logic, it makes up for it by using shock words, such as "rape." Hallberg is confident this court will not be diverted by arguments based on gender and the use of inflammatory verbiage.

V. It was reversible error to deny Hallberg's motion for new trial based on newly discovered evidence.

Hallberg stands on his argument under this issue in his initial brief.

VI. The district court correctly found Hallberg's sentences to be improper.

First of all, the court has denied discretionary review of this issue in case number 82,172 and has denied consolidation of the state's petition for review in that case with the petition for review in the present case. Accordingly, the court should now

strike this issue.

The state's position on the sentencing issue is that this court was "misguided" in its interpretation of legislative intent in Karchesky v. State, 591 So.2d 930 (Fla. 1992). (state's brief, 44). The state relies on this court's decision in State v. Lanier, 464 So.2d 1192 (Fla. 1985), and the legislature's statement in Chapter 92-135, Laws of Florida, that it "intended and still intends that victim injury includes sexual contact or penetration in the calculation of a guidelines sentence ...". The state now argues that Lanier warrants repudiation of Karchesky. That argument is invalid.

A review of Lanier shows the poverty of the state's position on this issue. The implication of the state's argument is that if this court interprets a statute and the legislature later repudiates that interpretation, the court should go back and repudiate the case in which it made its original interpretation. Lanier does not stand for that proposition. In Lanier, the third district interpreted a statute and certified a question to this court with regard to the statute. While that case was before this court for review, the legislature amended the statute and stated what its original intention had been. Thus, this court had the benefit of the legislature's statement of its original intent when this court made its decision.

The present case is very unlike the situation in Lanier. Karchesky was decided in 1992. It is that 1992 decision that the state seeks the court to repudiate. This court, unlike in Lanier,

did not have the benefit of the legislature's statement of its intent when it decided Karchesky. Furthermore, in reaching its decision in Karchesky, this court relied upon a 1985 case from the second district, Thompson v. State, 483 So.2d 1 (Fla. 2d DCA 1985). Between 1985 and 1992 the legislature did not move to repudiate Thompson. Accordingly, the situation here, as a procedural matter, is very different from what it was in Lanier. Furthermore, after Thompson was decided, the legislature implicitly approved Thompson by continuing to enact sentencing guidelines legislation without clarification or repudiation of Thompson.

Besides the inapplicability of Lanier, the state may well have missed the point in Karchesky. The state's argument ignores the fact that the rules and this court's opinions, as promulgated from time to time, repeatedly contained language requiring physical injury or trauma. This court's opinion in Karchesky cites five such instances limiting victim injury points to instances of physical injury or trauma. Id. at 932. This language is irreconcilably inconsistent with the legislature's after-the-fact protests of its original intent. Thus, the state's argument falters both because the legislature's subsequent statement of intent is inconsistent with the recurring language of the various enactments over a period of time and because of the logic of this court's decision in Karchesky, which finds the scoresheet's use of sexual contact and penetration inconsistent with the numerous promulgations limiting victim injury points to instances involving physical trauma.

This court's decision in Karchesky is well considered and correct. Furthermore, the later enactment of legislation suggesting that the decision in Karchesky was erroneous cannot be used under Lanier to go back and vacate a principle in an already decided case. Finally, principles of judicial economy and stare decisis legislate against any change of Karchesky. The legislature has spoken, the rules are now changed to include points for sexual contact and penetration, and nothing is to be gained by going back and reversing Karchesky. Such a repudiation would result in a whole host of new litigation and an engendering of disrespect for this court's decisions.

CONCLUSION

The convictions should be reversed as requested in the initial brief on the merits.

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 7 day of March, 1994.

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