IN THE SUPREME COURT OF FLORIDA

STEVEN JEROME ANDERSON,

Petitioner,

v. CASE NO. 84,345

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PHIL PATTERSON
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 444774

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PRELIMINARY STATEMENT

Petitioner, Steven Jerome Anderson, was the defendant in the trial court, and the appellant below. He will be referred to in this brief as petitioner or by his proper name. Respondent, the State of Florida, was the prosecution in the trial court, and the appellee below. Respondent will be referred to herein as the state.

The record on appeal will be referred to by use of the symbol "R," the trial transcript by use of the symbol "T," and the brief filed by the state by use of the symbol "BS," each followed by the appropriate page number.

All emphasis is supplied unless the contrary is indicated.

ARGUMENT

FIRST ISSUE PRESENTED

WHETHER HEARSAY TESTIMONY RELATING TO STATEMENTS MADE BY AN INCOMPETENT WITNESS CONSTITUTE LEGALLY SUFFICIENT PROOF AS THE SOLE EVIDENCE OF THE COMMISSION OF A CRIMINAL OFFENSE WHERE THE TRIAL COURT HAS MADE NO FINDING AS TO THE RELIABILITY OF THE HEARSAY STATEMENTS, AND THE STATE PRESENTED NO EVIDENCE TO CORROBORATE THEM?

The state erroneously claims that "petitioner contends that although the state's evidence was sufficient to support a guilty verdict, some of it was improperly admitted and thus was `unreliable'; and, because the state's remaining evidence was insufficient to establish his guilt, his motion for judgment of acquittal should have been granted" (BS-6). Petitioner has never claimed the state's evidence was sufficient to support a guilty verdict.

The state's entire case consisted of uncorroborated hearsay testimony taken from a declarant that the court found did not know the truth from a lie. Petitioner has consistently maintained that "uncorroborated hearsay testimony, standing alone, is legally insufficient to sustain a criminal conviction," citing State v. Moore, 485 So. 2d 1279 (Fla. 1986). (See, Petitioner's Initial Brief on the Merits, page 15). Petitioner maintains that position.

Without explicitly actually arguing it, the state also suggests that State v. Townsend, 635 So. 2d 949 (Fla. 1994), prohibits appellate review of this claim since trial counsel failed to object the the admission of the prosecutrix's hearsay

statements (BS-5). Petitioner's first issue is not whether the court erred by failing to hold a section 90.803(23) evidentiary hearing. The issue at bar concerns the sufficiency of the evidence. That issue was properly preserved by petitioner's motion for judgement of acquittal below. (T 119-120). Nevertheless, for the sake of completeness, petitioner will address the state's Townsend claim.

The state's reliance on Townsend, supra, is misplaced. In Townsend, supra, the state filed notice of intent to introduce an alleged child-victim's hearsay testimony. Thereafter, the trial judge conducted a hearing pursuant to section 90.803(23) to determine whether the child's hearsay statements were sufficiently reliable to allow the admission of those statements at trial. In determining which statements were admissible, the trial judge listed each statement to be considered and summarily concluded, without explanation or factual analysis, that the circumstances surrounding most of the statements showed them to be trustworthy.

This Court ruled that, to avoid violating the defendant's confrontation and due process rights, a child's hearsay statements are admissible "only after a determination has been made that the testimony is clearly reliable." Id. at 951. Id. at 951. The Court concluded, however, that the judge's failure to make adequate findings of reliability was not fundamental error and that a timely objection was necessary to reserve that issue for appellate review. Id. at 959.

By comparison, in the instant case, the court held no hearing, and made no determination that the hearsay statements were made under circumstances that insured they were reliable. That is the fundamental difference between this case and Townsend, supra. The failure of the Townsend court to enter an order regarding its findings is far less likely to result in an innocent man being convicted of a despicable crime than the situation, as in the instant case, where the court holds no hearing at all. Stated differently, the Townsend court's failure to enter the requisite order impacts primarily on the right to appellate review whereas the lower court's failure to hold the requisite hearing impacts directly on the question of guilt.

Fundamental error is error that amounts to a denial of due process, Castor v. State, 365 So. 2d 701 (Fla. 1978), and goes to the foundation of the case or goes to the merits of the cause of action. Clark v. State, 363 So. 2d 331 (Fla. 1978). Petitioner contends the lower court's failure to conduct the prescribed hearing to determine whether the child's hearsay statements were reliable before those statements were allowed in evidence was fundamental error, Castor v. State, supra, Clark v. State, supra, and is thus, reviewable on appeal.

Again, however, the issue is whether uncorroborated hearsay statements made by a declarant who was incompetent because she did not know the truth from a lie constitutes sufficient evidence to sustain a conviction and prison sentence. Petitioner, relying on this Court's opinion in State

v. Moore, supra, maintains that it is not. Therefore, the remedy is discharge. Id. See also, Williams v. State, 560 So. 2d 1304 (Fla. 1st DCA 1990); Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988); Sapio v. State, 19 Fla. L. Weekly D2076 (Fla. 5th DCA, Sept. 30, 1994).

Respondent, relying on Lockhart v. Nelson, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), claims the remedy is to give the state another chance to try to present legally sufficient evidence to convict petitioner. Petitioner respectfully disagrees, and maintains that Lockhart v. Nelson, supra, is inapplicable to the case at bar.

In Lockhart, the accused entered a plea to burglary and theft charges. The state thereafter sought an enhanced term of imprisonment based on the contention that Lockhart had four prior felony convictions. Lockhart argued he had been pardoned for one of those conviction, but the court ignored his claim and imposed a sentence in accordance with the prosecutor's wishes. On appeal it was discovered that the governor had indeed pardoned Lockhart for one of the offenses upon which the state relied to enhance his sentence.

The United States Supreme Court ultimately held that the state was not precluded from sentencing Lockhart de novo because the error requiring reversal was based on a trial court error in the admission of evidence rather than on the presentation of an insufficient case requiring acquittal.

Petitioner maintains that the case at bar is distinguishable from Lockhart, because here, the state

presented insufficient evidence to convict him, and that requires that he be acquitted. That is, petitioner's conviction rests entirely on uncorroborated hearsay evidence, and that evidence - whether properly admitted or not - is legally insufficient to sustain a criminal conviction. State v. Moore, supra. Stated differently, all the evidence the state presented below, including the improperly admitted hearsay testimony, still did not rise to the level of legally sufficient evidence to support a conviction. Thus, because the state was allowed to present their entire case, and because the evidence they presented was legally insufficient to support petitioner's conviction, Id., this court must discharge petitioner from further liability for this offense.

The state also claims it presented evidence that corroborated the child's story that petitioner rubbed his winkie on her behind (BS-14). In support of that claim, the state points out that Sharon DeVita, the child, and her father went to the pier to see if the "bad man" (child's undisclosed hearsay statement to Ms. DeVita) was still there; that when petitioner saw the trio approaching him he reached into a garbage can and retrieved a bottle which he held at his side, and that he acted nervous as if he knew he had done something wrong (BS-14).

Petitioner respectfully asserts the state's so-called corroborating evidence does not corroborate the child's claim that petitioner rubbed "his winkee" on her. The fact petitioner was on the pier does not tend to prove he committed

a crime. The fact petitioner obtained a bottle and acted nervous does not either. Especially when the totality of the evidence is considered. That is, petitioner reached for a bottle as Mr. Turner, who was very angry and upset (T-77) approached him at a fast pace (T-79) with his pit bull terrier (T-87). Simply put, the state is grasping for straws with the argument that this co-called corroborates the child's claim about petitioner.

Still grasping, the state now, for the first time, claims that the hearsay statements were admissible as excited utterances (BS-12). There is one major flaw in this claim. There is no evidence concerning the duration of time between event and the making of the statements. The child had been on the pier from 15-30 minutes before she was called by her mother to return home (T-68). This is not a situation where the child immediately ran home and reported an incident to an adult. The girl did not leave the pier until she was called home by Ms. DeVita (T-68). Furthermore, according to Ms. DeVita, most of the details reported by the girl were in response to questioning by her father and DeVita (T-70).

Likewise, the statements made to the CPT member were made almost a day after the event, and thus, without an afirmative showing to the contrary, do not qualify as excited utterances. See, Holmes v. State, 642 So. 2d 1387 (Fla. 2d DCA 1994). The state failed to produce any evidence below to show that the statements to the CPT worker were admissible as excited utterances. Id.

The state failed to present sufficient evidence that the child's statements were in fact excited utterances. In State v. Jano, 524 So. 2d 660, (Fla. 1988), this Court noted that the most important of the many factors entering into the determination that a statement is admissible in evidence as an excited utterance is the time factor. Id. 662. The Court held that for a statement to qualify as an excited utterance, it must have been made before there was time to contrive or misrepresent the facts. The Court concluded that the party seeking to introduce hearsay testimony under the excited utterance exception carried the burden of showing the time period between the events and the statements. Id. at 663.

It is evident that since the state did not argue the statements were admissible as excited utterances in the trial court, the record is not sufficiently developed to support that conclusion now.

Last, the state claims that petitioner has reaped a benefit by intentionally not objecting to the hearsay statements used to convict him because he can now claim on appeal that he was improperly convicted (BS-18). It appears as if the state believes petitioner intentionally allowed damning evidence to be presented against him without objection simply so he could try to vindicate himself on appeal. The logic to such a claim simply escapes the undersigned.

The fact is, petitioner moved for a judgment of acquittal at the close of the state's case. He argued that the state had not presented sufficient competent evidence to send the case to

the jury. Rather, he argued, the case rested entirely upon uncorroborated hearsay testimony from an incompetent declarant (T-120).

Petitioner was entitled to a judgment of acquittal based upon his argument then, see, State v. Moore, supra, and he remains entitled to discharge. Id. Given all the evidence the state presented at trial, there was still insufficient evidence to send the case to the jury. Id.

This Court must now free petitioner from the nightmare through which he has been put.

SECOND ISSUE PRESENTED

PETITIONER WAS DENIED THE RIGHT TO CONFRONT HIS ACCUSER WHEN THE COURT ALLOWED THE STATE TO PRESENT HEARSAY TESTIMONY PURSUANT TO SECTION 90.803(23), FLORIDA STATUTES, WITHOUT COMPLYING WITH THE STATUTORY CRITERIA ESTABLISHED TO INSURE THE HEARSAY WAS RELIABLE.

Respondent, citing State v. Townsend, 635 So. 2d 949 (Fla. 1994), again claims petitioner is procedurally barred from raising this claim because he did not object to the court's failure to conduct a hearing to determine the admissibility of the hearsay statements before they were presented to the jury (BS 19-20).[1]

As petitioner set out in the First Issue Presented, Townsend is clearly distinguishable from the instant case. That is, in Townsend, the court conducted a hearing, heard testimony, and concluded that the hearsay sought to be

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[1]This Court should not overlook the fact that neither the court nor the prosecuting attorney complied with the procedural safeguards written into Section 90.803(23) either. See, Salter v. State, 500 So. 2d 184, 186 (Fla. 1st DCA 1986). If there is any truth to the notion that a prosecutor's concern "in a criminal prosecution is not that it shall win a case, but that justice shall be done," United States v. Modica, 663 F. 2d 1173, 1181 (2d Cir. 1981) cert. denied, 450 U.S. 989, 102 S. Ct. 2269, 73 L.Ed.2d 1284 (1982), then the state, and perhaps the trial court, should be equally responsible for the inexplicable lack of compliance with the foundational requirements of Section 90.803(23). This exception to the rule against allowing hearsay testimony is a new, and not firmly rooted, exception. Perez v. State, 536 So. 2d 206 (Fla. 1988). Given the reaction the public (and therefore jury) has to this type of offense, (and testimony) it is imperative that the statutory safeguards be strictly complied with before a child's hearsay statements be admitted in evidence.

introduced by the state was admissible pursuant to Section 90.803(23). The court simply failed to enter an adequate written order detailing its findings.

In the case at bar, the court conducted no hearing, heard no testimony, and made no findings whatsoever. It is the complete lack of evidence that the hearsay statements were reliable that distinguishes the instant case from Townsend. At least in Townsend it can be said the court made a factual determination, albeit not adequately reduced to writing, that the hearsay statements were made under circumstances that indicated they were reliable and thus, admissible.

In the instant case, hearsay testimony was the only evidence that petitioner committed a lewd act. Given society's strong reaction to alleged child sex offenses, the court's failure to make a determination that the child's statements were made under circumstances that indicated they were reliable before those statements were presented to the jury undermined the basic reliability of the verdict and constituted fundamental error. Clark v. State, 363 So. 2d 331 (Fla. 1978). The interests of justice present a compelling demand for this Court to grant petitioner a new trial. See eg., Ray v. State, 403 So. 2d 956, 960 (Fla. 1981).

Petitioner will rely on the reasoning, arguments, and citations of authority, set out in the First Issue Presented, to rebut the state's claims that the child's statements were admissible as excited utterances, and that there was evidence

to corroborate the child's story that petitioner "rubbed his "winkie" on her behind.

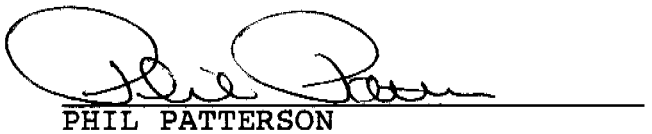
CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, this Court should quash the opinion of the district court, reverse petitioner's conviction, vacate the sentence imposed, and discharge him from furtherliability for this offense.

In the alternative, this Court should quash the decision of the district court, and remand to the trial court for a new trial.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

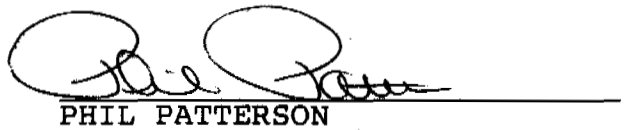


PHIL PATTERSON
Assistant Public Defender
Fla. Bar No. 444774
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Amelia Beisner, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Petitioner, STEVEN JEROME ANDERSON, #223344, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 23rd day of January, 1995.



PHIL PATTERSON