IN THE SUPREME COURT OF FLORIDA

JAMES HEUSS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 86,544
Fourth DCA Case No. 92-0737

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward, Florida, and Appellant in the Fourth District Court of Appeal. Respondent was Appellee, below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF CASE AND FACTS

Petitioner, JAMES HEUSS, was prosecuted for two counts of sexual battery on a child and one count of lewd assault on a child in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. [Appendix A, original opinion of the Fourth District Court of Appeal. Heuss v. State, 20 Fla. L. Weekly D660 (Fla. 4th DCA March 15, 1995)]. After two mistrials, a jury found Petitioner guilty of Count I, sexual battery of a child under 12 years of age, as to Child A; Count II, sexual battery of a child under 12 years of age, as to Child B; and Count III, lewd assault, as to Child C [Appendix A].

In its original opinion [Appendix A], the Fourth District agreed with Petitioner's contention that the trial court erroneously admitted the testimony of Child A's mother and that of two deputy sheriffs who related hearsay statements made by each of the three child-victims, the contents of which all claimed that Petitioner had sexually abused the victims. Citing, Hopkins v. State, [1] the Fourth District found that the trial court erred in admitting the child hearsay because its findings of the statements' reliability, pursuant to §90.803(23), Fla. Stat., were legally insufficient recitations of the statute's boilerplate language. Following Hopkins, supra, the Fourth District then did a harmless error analysis and held that the hearsay evidence's admission did not harmfully effect the jury's verdict beyond a reasonable doubt, because 1) the child hearsay was merely cumulative of the properly admitted evidence; 2) such evidence provided sufficient competent evidence to make a prima facie case of sexual abuse; and 3) Child B's allegations were supported by evidence of a tear to her hymenal membrane.[2] [Appendix A].

Petitioner's moved for rehearing on March 23, 1995 [Appendix B]. The Fourth District, in granting rehearing [Appendix C. Heuss v. State, 20 Fla. L. Weekly D1908 (Fla. 4th DCA September 23, 1995)], conceded that its harmless error analysis was done sua sponte, since

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[1] 632 So. 2d 1372, 1376-7 (Fla. 1994).

[2] While the nurse who found the tear testified that it was unlikely that Child B caused the tear herself, she also stated that it was inconclusive evidence of sexual abuse.

Respondent had failed to brief and argue the harmless error issue. While recognizing that Ciccarelli v. State, 531 So. 2d 129 (Fla. 1988), and Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990), hold to the contrary, the Fourth District interpreted Ciccarelli as not imposing a limitation on an appellate court's jurisdiction to review the trial record for harmless error when the State fails to raise and prove that issue. The Fourth District held that the State's failure to assert and prove harmless error does not bar an appellate court, at its option, from considering, sua sponte, that a complained of error was harmless. Moreover, the Fourth District found neither legal precedent nor public policy to support a contrary result [Appendix C].

On September 22, 1995, Petitioner filed his notice of invoking this Court's discretionary jurisdiction with the Fourth District Court of Appeal (See Appendix D).

SUMMARY OF THE ARGUMENT

This court has jurisdiction over the instant cause because the Fourth District's holding on rehearing that Ciccarelli, supra, does not limit an appellate court's jurisdiction to sua sponte review a trial record for harmless error when the State fails to allege and prove that issue beyond a reasonable doubt is expressly and directly in conflict with decisions of the First District Court of Appeal in Johnson v. State, 595 So. 2d 132, 135-6 (Fla. 1st DCA 1992); Perkins v. State, 585 So. 2d 390, 392 (Fla. 1st DCA 1991); Taylor v. State, supra.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL, WHICH HOLDS THAT AN APPELLATE COURT MAY SUA SPONTE CONSIDER AN ERROR HARMLESS WHERE THE STATE FAILS TO ALLEGE, ARGUE AND PROVE HARMLESS ERROR, AS IT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL.

Under Article V, Section 3(b)(3) of the Florida Constitution, this Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. "Conflict" jurisdiction is properly invoked when: 1) the district court announced a rule of law which conflicts with a rule previously announced by the Supreme Court or by another district, or 2) the district court applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Thus, in order for two court decisions to be in express and direct conflict for purposes of invoking this Court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv), the decision should speak to the same point of law, in factual contexts of sufficient similarity to compel the conclusion that the results in each case would have been different had the deciding court employed the reasoning of the other court. See Mancini, supra.

Petitioner seeks to establish this Court's "conflict" jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Constitution alleging that the decision below [Appendix C] expressly and directly conflicts with decisions of the First District in Johnson v. State, 595 So. 2d 132, 135-6 (Fla. 1st DCA 1992)[Appendix E]; Perkins v. State, 585 So. 2d 390, 392 (Fla. 1st DCA 1991)[Appendix F]; Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990)[Appendix G].

In Ciccarelli v. State, supra, this Court held that, "if the state has not presented a prima facie case of harmlessness in its argument, the [appellate] court need go further." Id. at 131. The Fourth District interpreted this passage to mean that an appellate court may, at its option,

sua sponte consider error harmless, absent the State raising, arguing and proving an error harmless beyond a reasonable doubt (Appendix C).

In Ciccarelli, supra, this Court insisted that the State shoulder and sustain the burden of proving harmless error, and in accord with State v. DiGuilio, 491 So. 2d 1129, 1138-9 (Fla. 1986), held that the harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. Id. at 130-131.

The Fourth District's instant decision (Appendix C) expressly and directly conflicts with decisions of the First District, which, pursuant to Cicarrelli and DiGuilio, hold that where the State fails to allege that an error was not harmful beyond a reasonable doubt, an appellate court either "cannot" or is "unable" to consider and deem the complained of error as being harmless and reversal is required. Johnson v. State, supra at 135-6 (holds that where error is present, the burden is on the State to prove, beyond a reasonable doubt, that the error was harmless and when the State fails to argue harmless error the appellate court "cannot" view the complained of error as harmless); Perkins v. State, supra at 392 (holds that an appellant court is "unable" to view error harmless where the state fails to argue harmless error, but only contends that there was no error); Taylor v. State, supra at 143-4 (holds that where the State fails to argue harmless error, it fails to carry its burden of proof and an appellate court is "unable" to view the error as harmless).

Not only does an appellate court's sua sponte harmless error analysis free the State from its procedural burdens of proof and persuasion, See DiGuilio, supra, it also denies an appellate his right to be put on notice that an error may be harmless and to respond by arguing to the contrary in his reply brief. Petitioner suggests that a ban against sua sponte harmless error review is necessary to protect an appellant's procedural due process rights and rights to effective assistance of appellate counsel.

Fourth District's instant decision expressly and directly conflicts with decisions of another district courts of appeal on the same question of law. This Court's conflict jurisdiction

is properly petitioned for the purpose of invoking this Court's discretionary jurisdiction. This Court should, therefore, grant this petition for discretionary review and vacate the decision of the Fourth District in this cause.

CONCLUSION

This court should accept jurisdiction pursuant to Article V, § 3(b)(3), Fla. Const. and order briefs on the merits from both parties.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 27th day of September, 1995.

IAN SELDIN
Counsel for Respondent