IN THE SUPREME COURT OF FLORIDA

KEVIN W. PENDER, et al.,

Petitioners,

v. CASE NO. 89,619

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The facts of this case were set forth in detail in the opinion below. To briefly summarize, this Court remanded this case to the district court for reconsideration of a Richardson error in light of the new harmless error analysis developed for such cases. On remand, the district court found that the State's failure to produce a photograph was harmless beyond a reasonable doubt. The court based its decision on the fact that the record reflected the photograph couldn't have been helpful to the defense even if produced before trial. Pender v. State, 21 Fla. L. Wkly. D2302 (Fla. 5th DCA Oct. 25, 1996).

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction of this case. Neither of the cases cited by Pender expressly and directly conflict with the decision of the court below.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION OF THIS CASE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

In this case, Pender first argues that the district court's decision conflicts with the opinion in State v. Schopp, 653 So. 2d 1016 (Fla. 1995). There, this Court set forth the test for determining when a Richardson error is harmless -- when it is clear that the discovery violation could not have materially hindered defense preparation.

Contrary to Pender's argument, the district court did not reject the Schopp test, but applied it to the facts of this case, finding that the failure to produce the photograph could not have hindered the defense and was therefore harmless beyond a reasonable doubt. There is no conflict with Schopp.

Pender next argues that the district court's decision conflicts with the opinion in Tarrant v. State, 668 So. 2d 223 (Fla. 4th DCA 1996). There, the court found that the State's failure to disclose the defendant's taped statement until the morning of trial was not harmless, as counsel was effectively denied the opportunity to fully investigate the possibility of suppressing the defendant's incriminating admissions. The extra time offered by the trial court was insufficient to overcome the possibility of a material change in the defense trial preparation and strategy.

The facts in this case are very different. The district court found that the disclosure of the photograph would have made no material difference to the defense under the circumstances. Given the fact that the 9-year-old victim had chlamydia, a sexually transmitted disease, the only real issue at trial was not whether the victim had been abused, but by whom. The photograph could have done nothing to support or impeach the State's evidence in this regard, as was further evidenced by defense counsel's decision not to avail himself of the opportunity to question the doctor about the photograph. This decision does not conflict with Tarrant.

The district court's decision properly applied Schopp's harmless error test to the circumstances of this case, and there is

no express and direct conflict with either of the cases cited by Pender. While Pender obviously disagrees with the district court's interpretation of the record and its conclusion as to the effect of the error, this disagreement does not form a basis for review by this Court.

This Court should therefore decline to accept jurisdiction of this case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished to Noel Pelella, Assistant Public Defender, by delivery to the Public Defender's Basket at the Fifth District Court of Appeal, this 8th day of January, 1997.

Kristen L. Davenport
Counsel for Respondent

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RESPONDENT'S APPENDIX

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Second, the arresting officer failed to mention the statement in any report filed in this case. Looking at the discovery provided by the State, there is no reason for the defense to take the deposition of the arresting officer. To place such a burden on the defense in order to claim prejudice when the State fails to properly comply with discovery would encourage, even require, defense to take many needless depositions at a cost to the taxpayers and a delay to the system.

REVERSED. (PETERSON, C.J., and ANTOON, J., concur.)

* * *

Criminal law—Discovery—In trial for sexual battery on child less than twelve, state's failure to produce colposcopic photograph taken by physician who examined victim was harmless error

KEVIN WALTER PENDER and CLARENCE PENDER, Appellants, v. STATE OF FLORIDA, Appellee. 5th District. Case Nos. 93-1832 & 93-1942. Opinion filed October 25, 1996. Appeal from the Circuit Court for Orange County, Belvin Perry. Judge. Counsel: James B. Gibson, Public Defender. and Noel A. Pelella and James T. Cook, Assistant Public Defenders, Daytona Reach, for Appellants. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport and Mark S. Dunn. Assistant Attorneys General, Daytona Beach, for Appellee.

(PER CURIAM.) This is the second appearance of this case before this court,[1] which has been remanded to us for reconsideration in light of the Supreme Court of Florida's decision in *Schopp v. State*, 653 So. 2d 1016(Fla. 1995)[2] that the failure to conduct a Richardson hearing is subject to a harmless error analysis. We affirm the convictions because we find that the discovery violation we identified, the failure to provide a copy of a colposcopic photograph to the defendant, was harmless beyond a reasonable doubt.

It was undisputed that the nine-year-old victim in this case had chlamydia, a sexually transmitted disease. This was established through clinical testing, and Dr. Tokarski testified that the only way the child could have gotten the disease was through sexual contact. The defendants essentially conceded that the victim had had sexual contact with someone—the question was with whom. Dr. Tokarski's testimony was actually helpful to the defendants since she established the child had chlamydia; both defendants had tested negative for chlamydia. The failure to produce the colposcopic photograph could only have been harmful error if it could have negated the identity of the defendants as perpetrators or if it could have helped impeach the child victim's credibility. The former is obviously impossible and, as to the latter, the most the actual photograph could have accomplished was to negate Dr. Tokarski's testimony that she found scarring consistent with sexual contact. In other words, if the photograph had shown *no* genital abnormality for a nine-year-old, this may have been somewhat impeaching of the child's testimony concerning her repeated abuse. This same fact was otherwise established, however, through Dr. Tokarski's testimony that the child's hymen was intact. As stated, however, it was undisputed that the child was the victim of some sexual contact. The fact that defense counsel did not avail himself of the opportunity, offered by the judge, to question Dr. Tokarski about the photograph further confirms the unimportance of what it depicted under the facts of this case.

AFFIRMED. (PETERSON, C.J., DAUKSCH and GRIFFIN, JJ., concur.)

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[1] *Pender v. State*, 647 So. 2d 957 (Fla. 5th DCA 1994), *review granted*, 654 So. 2d 920 (Fla. 1995).

[2] *State v. Pender*, 661 So. 2d 304 (Fla. 1995).

* * *

Criminal law—Lewd and lascivious assault—In prosecution for lewd and lascivious assault upon child under 16, trial court erred in admitting testimony from the child that defendant said he had been in prison for molesting another child—Although defendant's alleged statement to the child that he was previously imprisoned for fondling another child may have been relevant to explain why the child feared defendant and why he delayed reporting the fondling to his mother, the statement should not have been admitted because its probative value was outweighed by unfair prejudice—Although the evidence may have been relevant to prove defendant's state of mind, probative value was outweighed by inflammatory nature of the evidence and unfair prejudice

JOHN THOMAS FARRELL, Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 95-1047. Opinion filed October 25, 1996. Appeal from the Circuit Court for Volusia County, Edwin P. B. Sanders, Judge. Counsel: James B. Gibson, Public Defender and Nancy Ryan, Assistant Public Defender, Daytona Beach. for Appellant. Robert A. Butterworth, Attorney General, Tallahassee. and Timothy D. Wilson, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) John Thomas Farrell appeals his conviction for lewd and lascivious assault upon a child under 16 years of age, a violation of section 800.04(4), Florida Statutes (1991). Although Farrell raises four points on appeal, we find one dispositive. The trial court erred when it admitted testimony from the child that Farrell said he had been in prison for molesting another child. This was far more prejudicial than probative, and its admission was not harmless error. We reverse his conviction and sentence, and remand for a new trial.

Farrell was accused by a minor, D.C., of fondling him on his private parts through his clothing. D.C. testified that this occurred on numerous occasions over several months at Farrell's home, in Farrell's car, while they were walking in the woods and while they were swimming. Farrell and his family had been friends with the child and his mother for several years. The families usually ate together on Thursday evenings, and the Farrells drove D.C. and his mother to Shands hospital in Gainesville, where D.C. was being treated for a variety of medical problems. The mother could not drive and relied upon the Farrells to drive the child to his medical appointments.

The child suffered unfortunate disabilities, including ear infections, juvenile diabetes and kidney problems. According to his mother, he acted "crazy" when his blood sugar was "out of whack." At one point he tried to commit suicide and had been seeing a counselor. His mother testified that, because of his learning disabilities, he did not understand the concept of numbers and became confused about the sequence of events. He knew that something happened, she testified, but he could not say how many times or when.

The alleged abuse came to light as he and his mother prepared for a trip to Shands with the Farrells. D.C. told his mother he did not want to go with Farrell. The mother pressed him for a reason and he told her about the fondling. Initially, the mother did not report the matter to the police because the child was afraid of being ridiculed at school. After talking to the child's counselor, who said that she would report the accusation if the mother did not, the mother reported the allegations to the police and Farrell was arrested.

Prior to trial, Farrell filed a motion in limine in which he sought to exclude any reference to his having previously served time in prison for any offense, and any evidence that Farrell had been in prison for child molestation. The court denied the motion.

Evidence of other crimes is often so intimately intertwined in a crime that it cannot be separated out, but must be admitted to show the context of the crime. *See e.g. Griffin v. State*, 639 So. 2d 966 (Fla. 1994). __ U.S. __, *cert. denied*, 115 S. Ct. 1317, 131 L. Ed. 2d 198 (1995); *Correll v. State*, 523 So. 2d 562 (Fla.), *cert. denied*, 488U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988); **Denmark v. State**, 646 So. 2d 754 (Fla. 2d DCA 1994). Nevertheless, although Farrell's alleged statement to D.C. that he was previously imprisoned for fondling another child may have been relevant to explain why the child feared Farrell and why he delayed reporting the fondling to his mother, the statement should not have been admitted because its probative