IN THE SUPREME COURT OF FLORIDA

ETIRZA EVERSLEY,

Petitioner

vs. Case No. 92,624

STATE OF FLORIDA,

Respondent

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

No conflict has been presented between any of the cases cited by Petitioner and the opinion of the Second District Court of Appeal. In each of the cases cited to invoke this Court's jurisdiction, either archaic laws no longer in effect were relied on, (Bradley v. State, infra) or the facts were dissimilar because a third party superseding act occurred, (Hodges v. State, infra) or there was a blatant insufficiency in the testimony and evidence so that the State failed to meet its burden upon the charges filed which were leveled at psychological damage as well as creating the onset of a rare disease itself, (Boyce v. State, infra). No such scenarios are present in the instant case and the analysis supplied by the Second District Court of Appeal presents no conflict whatsoever with any opinion of this Court; rather it presents adherence to the law as previously applied to similar cases by this Court.

ARGUMENT

ISSUE I

WHETHER THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL IN STATE v. EVERSLEY, CASE NO. 96-04693 CONFLICTS WITH THE DECISIONS IN BRADLEY v. STATE, 84. SO. 677 (FLA. 1920); HODGES v. STATE, 661 SO.2D 107, (3RD DCA 1995) REV. DEN. 670 SO.2D 940 (FLA. 1996); AND BOYCE v. STATE, 638 SO.2D 98 (4TH DCA 1994).

In its opinion, the Second District Court of Appeal concluded that there was sufficient evidence to support the jury's determination of guilt on both manslaughter by culpable negligence and aggravated (felony) child abuse and therefore reversed the order of the trial court granting the post verdict judgment of acquittal on the manslaughter count, and reducing the aggravated child abuse to misdemeanor child abuse. The court noted that causation was the pivotal issue at trial; Petitioner arguing that pneumonia, rather than her omission or failure to act caused Isaiah's death, noting there was conflicting testimony over the strain of pneumonia that Isaiah had contracted, with differing statistics regarding the likelihood that he would die as a result, but specifically finding that at minimum, based upon the experts at trial he had a 75% chance for survival if treated.

The opinion of the Second District found that the trial court erred in relying on Bradley v. State, 84 So.2d 677 (Fla. 1920) which held that a parents failure to provide medical care for a child suffering from an injury or illness is not the legal cause of

a child's death and precludes a charge of manslaughter. The Second District held that Bradley was not applicable to the facts of this case because it was premised upon the 1906 manslaughter statute, and the state of the law regarding child abuse and neglect has changed drastically since the turn of the century as our legislature has enacted extensive child abuse regulations criminalizing acts of brutality upon, as well as neglect of, children. The Second District found that Florida law now specifically recognizes that the failure to obtain medical assistance for a sick child is an act subject to criminal penalties citing s. 824.04, Fla. Stat. The Second District went on to find that Petitioner's failure to provide the medical attention needed contributed to Isaiah's death because she knew he was "not breathing right" and when she went to a clinic, the staff directed her to go immediately to the emergency room and when she did she became impatient because there were one or two people ahead of her and she left and went home. The opinion noted that Petitioner acknowledged that she was aware that if she had informed the staff at the emergency room that her child was ill and was sent by a doctor from the clinic, she would have been taken first. The opinion in Bradley, supra, held that "it was not capable of being proven that if the child had medical attention, it would have recovered" Bradley, supra at 679. The Second District Court of Appeal noted in its opinion that medical science has significantly

progressed and various experts below testified that Isaiah had at minimum a 75% chance of survival depending on the strain of pneumonia he had contracted. The court concluded that Petitioner's withholding of medical care eliminated any chance for recovery.

Petitioner has shown absolutely no conflict between the opinion of the Second District Court of Appeal and the cases she cites for that assertion of conflict. In Hodges v. State, 661 So.2d 107 (3rd DCA 1995) rev. den.670 So.2d 940 (Fla. 1996) Hodges and two friends from a naval base in Key West were involved in a heated altercation with a crowd of local residents. Hodges had a gun concealed under his clothing. An individual in the crowd, Andre Thompson decided to arm himself as well, but the opinion leaves the impression that he did not see Hodges' weapon before deciding to arm himself. When Hodges finally pulled his weapon out and fired into the air to disperse the crowd, Thompson, seeking refuge, dropped to the ground and the semi-automatic weapon he had armed himself with went off, accidently killing his friend, Creighton Miller. The trial court denied Hodges' motion for judgment of acquittal on the charge of manslaughter by culpable negligence, and he was convicted. The District Court looked at the causative link between the death and the culpable negligence, and determined that although the "but-for" test would result in a finding that Hodges' initial firing caused Thompson to drop to the ground and the subsequent accidental firing of Thompson's firearm,

the court went on to determine that Thompson's accidental firing was in fact an independent superseding event for which Hodges could not be found criminally liable.

The facts in Hodges are obviously not analogous to those in the instant case where a doctor and nurse told Petitioner in no uncertain terms that her child who was grunting in order to get air into his lungs needed assistance they could not provide at the clinic and to get him to the emergency room immediately. The chain of events in Hodges is not analogous to the instant case where a superseding act of another cut off liability or responsibility. The disease Isaiah had is not analogous to Thompson's accidental firing of the weapon. If Petitioner took Isaiah to the hospital where he received substandard care or a doctor committed malpractice in treating him, Hodges might be analogous. However, absent such a scenario no conflict can be squeezed from Hodges for jurisdictional purposes.

In Boyce v. State, 638 So.2d 98 (4th DCA 1994) also cited by Petitioner to establish conflict jurisdiction before this Court, the Appellant's child, R. B., suffered from a rare disease, encopresis which is the involuntary or deliberate soiling of one's pants. In Boyce, Counts I and II alleged that the Appellants' physical and or verbal abuse caused the disease from stress, and Counts VI and VII alleged Appellants' failure to have R.B. evaluated to ascertain the cause of the continuing condition caused

R.B. to suffer permanent psychological damage. The District Court reversed the jury verdict of guilty on all counts finding insufficient evidence to support the verdict. At trial, a psychologist testified as to Counts VI and VII that this disease could cause permanent psychological damage, but he never examined R.B., and therefore there was no testimony to support the charges that there was permanent psychological damage. As to Counts I and II, a pediatrician testified he found no actual cause for R.B.'s encopresis so there was no proof at all to establish those charges either. The court found the element of the child abuse statute which requires the causing great bodily harm or permanent disability was not established and the State's evidence was insufficient and a judgment of acquittal should have been granted. This case does not in any way stand for any proposition that conflicts with the opinion of the Second District Court of Appeal under scrutiny herein. It is a fact specific case where the State failed to meet its burden of proof and nothing more. The Petitioner in the instant case is not alleged to have caused Isaiah's illness. She is charged with ignoring it. His death was proven beyond a reasonable doubt. The cause of death was as well. Therefore the very issues presented in Boyce differ from those under consideration herein which precludes a possibility of conflict.

Petitioner next urges conflict between the instant opinion of the Second District Court of Appeal and Bradley v. State, 84 So. 667 (Fla. 1920). The trial court relied upon this relic in granting Petitioner relief below, and the Second District Court of Appeal correctly reversed, holding that the law had changed from that in effect and interpreted by this Court in 1920. It is important to establish at the outset that the Second District Court of Appeal did not overrule this Court's opinion in Bradley as urged by Petitioner. The Second District applied a different law from that applied by the court 78 years ago. Because the subject matter is similar does not mean the statutory provisions interpreted and applied by the court addressing that conduct are the same and must be applied in conformity with a case addressing similar conduct but under the provisions of a different law. There is no doubt today, that manslaughter by culpable negligence includes the failure to obtain medical assistance for a child. In Hermanson v. State, 604 So.2d 775 (Fla. 1992), this Court overruled the opinion of the Second District Court of Appeal affirming a felony child abuse and third degree murder verdict based on the failure to obtain medical assistance for a child. This Court's decision revolved around the certified question as to whether Florida's spiritual treatment proviso was a statutory defense to criminal prosecution. This Court found that a due process issue evolved ... a parent relying on the spiritual treatment proviso

would not know when crossing the line from spiritual treatment into criminal behavior. This Court confined its opinion to that issue alone, leaving untouched that portion of the opinion of the Second District recognizing that under proper circumstances prosecution for manslaughter would lie for the failure of a parent to provide medical treatment for a child, confining its insight in its opinion to the due process issue.

This Court has similarly ruled that omission of a duty to a child is equivalent to an act in determining that aggravated child abuse can be committed through a failure to act. Nicholson v. State, 600 So.2d 1101 (Fla. 1992).

CONCLUSION

Based on the foregoing arguments, citations of authority, and references to the record, Petitioner has failed to establish the opinion under attack is in conflict with an opinion of this Court and the opinion of the District Court of Appeal was so clearly correct in its analysis and result, this Court need not exercise its power of discretionary review.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul Helm, Assistant Public Defender, P. O. Box 9000-Drawer PD, Bartow, Florida 33830 this 1ST day of April, 1998.

OF COUNSEL FOR RESPONDENT