Orig 97

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
NOV 13 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RICHARD SECCIA, :

Petitioner, :

v. : CASE NO. 94,138

STATE OF FLORIDA, :

Respondent. :

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MARK E. WALKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0973009
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

RICHARD SECCIA,

Petitioner,

v. CASE NO. 94,138

STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

Following a trial by jury, petitioner was convicted of sexual battery upon a child younger than age 12 and for lewd, lascivious or indecent act upon a child. Petitioner appealed his convictions to the First District Court of Appeal, arguing that the trial court erroneously found that the child-victim was competent to testify. He also challenged the sentencing guidelines scoresheet used to determine his sentence for the lewd-act conviction. The First District affirmed his convictions. As for the sentencing issue, the First District rejected petitioner's claim but certified conflict with Mizell v. State, 23 Fla. L. Weekly D1978 (Fla. 3d DCA Aug. 26, 1998). Petitioner now seeks discretionary review in this Court pursuant to article V, section 3(b)(4) of the Florida Constitution.[1]

[1] The record consists of four volumes, including two volumes of trial transcript. The two volumes of trial transcript

II. STATEMENT OF FACTS

By information filed October 3, 1995, the State charged petitioner with one count of sexual battery upon a child younger than age 12, by placing his mouth upon the child's penis (Count I), and three counts of handling, fondling or making an assault upon the same child in a lewd, lascivious or indecent manner by touching the child's penis (Counts II-IV). (I-4-5). Count IV of the information was subsequently nol prossed and petitioner was first tried by jury on February 12-13, 1996, on one count of capital sexual battery and two counts of lewd act upon a child.

Before the child-victim testified, the trial court conducted a competency hearing. The record of that hearing reflects the following:

> BY THE COURT:
>
> . . . .
>
> Q Do you know what it means to tell - - to have to tell the truth?
>
> A Yes.
>
> Q Do you know you are supposed to tell the truth all the time?
>
> A Yes.
>
> Q Yes?
>
> A Yeah.

---

have been renumbered as Volumes II and III. The fourth volume is labeled as "Supplemental Volume I," but will be cited herein as Volume IV. References to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parentheses.

Q Do you know what it means to lie and not tell the truth?

A Yes.

Q Let me ask you if you don't tell the truth what might happen to you? Do you know?

A No.

Q Do you think you would be in a lot of trouble if you don't tell the truth?

A Yes.

. . . .

BY [DEFENSE COUNSEL]:

Q Let me ask you again . . .; Do you know why it's important to tell the truth today?

A No.

. . . .

BY THE COURT:

. . . .

Q You do know, though, that when you are down here that you have to tell us the truth, right? Do you understand that?

A Yes.

Q And do you also understand that if you don't tell the truth you will get in lots of trouble, right?

A Yes.

. . . .

Q And when you talk to us today you are going to tell the truth; Is that right?

A Yes.

Seccia v. State, 689 So. 2d 354, 355-56 (Fla. 1st DCA 1997)

(hereinafter "Seccia I"). The trial court ruled that the child-victim was competent to testify.

The jury found petitioner guilty as charged on all three counts. (I-24-26). The trial court sentenced petitioner to life on count I, 58 months on Counts II and III to run concurrently with each other as well as the sentence imposed on Count I. (I-29-36). With respect to Counts II and III, the applicable scoresheet reflects that 18 victim injury points were added for sexual contact. (I-37).

Petitioner appealed, arguing that (1) the trial court erred in allowing the alleged victim to testify because the child was not competent to testify, and (2) the evidence adduced at trial was legally insufficient to prove two separate lewd acts. The First District held that "[t]he evidence, viewed in a light most favorable to the state, established only one lewd, lascivious or indecent act[,]" and therefore reversed "the second lewd-act conviction, and remand[ed] with directions that the trial court enter a judgment of acquittal as to that charge." Seccia I, 689 So. 2d at 357. The First District also reversed and remanded for a new trial on the remaining charges "[b]ecause the trial court abused its discretion when it found that the alleged child victim was competent to testify without first conducting an adequate competency examination." Id. at 354.

Petitioner was retried on one count of capital sexual battery and one count of lewd act upon a child on July 7-8, 1997. Prior to taking the child-victim's testimony at the second trial,

the trial court conducted another hearing to determine whether the child-victim was competent to testify. The record of that hearing reflects the following:

[BY THE STATE]:

. . . .

Q Okay. Now, do you know the difference between a truth and a lie?

A Yes.

Q Is it a good thing or a bad thing to tell a lie?

A A bad thing.

. . . .

Q Okay. Now, what about if you tell a lie in the courtroom, is that good or bad?

A Bad.

Q And how bad is it to tell a lie in the courtroom?

A Real bad.

Q And are you supposed to tell the truth in a courtroom?

A Yes.

. . . .

[BY DEFENSE COUNSEL]:

. . . .

Q Now, Samuel, what happens if you tell a lie in the courtroom?

A Maybe the person that you're talking about will get out of jail.

Q Would get out of jail?

A Yes.

Q Would anything happen to you if you told a lie in the courtroom?

A I don't know.

Q You don't know?

A No.

. . . .

[BY THE STATE]:

. . . .

Q Now, if you told a lie here in the courtroom today would that be good or bad?

A Bad.

Q Would you get in trouble?

A Yes.

[BY THE COURT]:

. . . .

THE COURT: So if you were to tell me that dinosaurs are still alive would that be the truth or a lie?

WITNESS: A lie.

THE COURT: And you wouldn't say that in court, would you?

WITNESS: No.

THE COURT: And why do you think it's wrong to tell a lie?

WITNESS: I won't tell a lie.

THE COURT: You wouldn't tell a lie, right?

WITNESS: No.

THE COURT: But why do you think it's wrong

to tell a lie?

WITNESS: Because something bad could happen.

THE COURT: And do you understand that something bad could happen to you if you tell a lie?

WITNESS: Yes.

THE COURT: And you know that your mom and dad can punish you when you do wrong at home, right?

WITNESS: Yes.

THE COURT: Who would punish you if you did wrong in the courtroom?

WITNESS: The judge.

THE COURT: Is there anybody here named Judge?

WITNESS: No.

THE COURT: Well, who is the Judge?

WITNESS: You.

THE COURT: I'm the judge?

WITNESS: Yes.

THE COURT: Do you like my red robe?

WITNESS: Red robe?

THE COURT: What color is my robe?

WITNESS: Black.

THE COURT: That's right. And do you understand that you will be punished by the Judge if you tell a lie in court?

WITNESS: Yes.

(II-30-41). The trial court again ruled that the child-victim

was competent to testify. (II-44-45).

The jury found petitioner guilty as charged on both counts. (I-91-92; III-223-24). The trial court sentenced petitioner to life with a minimum mandatory of 25 years on Count I and to six years on Count II, the sentences to run concurrently. (I-96-102, 126-27). With respect to Count II, the applicable scoresheet reflects that 40 victim injury points were added for sexual penetration. (I-103).

Petitioner again appealed, arguing in pertinent part: (1) the trial court abused its discretion in finding the child-victim competent to testify, and (2) the trial court erred by including victim injury resultant from a capital felony before the court for sentencing on the scoresheet prepared for a non-capital felony also pending before the court for sentencing. As for Issue I, petitioner argued that (1) on his first appeal the First District reversed his convictions and sentences because the competency examination failed to establish that the child-victim had the "moral sense of the obligation to tell the truth," (2) the questions posed to the child-victim at the competency hearing conducted during his second trial could not be distinguished in any substantive way from the questions posed at the competency hearing conducted during his first trial, and (3) based on the reasoning set forth in Seccia I the First District should again reverse his convictions and sentences and remand for a new trial. The First District affirmed petitioner's convictions and sentences. With respect to Issue I, the First District reasoned:

> The child, who was nearly eight years old at the time of the second trial, demonstrated that he knew the difference between the truth and a lie. He also stated that it was wrong to tell a lie, particularly in court, because "something bad" could happen; that one is punished when one lies; that one has an obligation to tell the truth, particularly in court; and that the judge would punish him if he did not tell the truth in court. Finally, he promised to tell the truth. Based upon the child's responses (which were considerably more positive, and less equivocal, than those given during the first trial) to the questions asked, and considering the child's age, we are unable to say that the trial court's finding constituted an abuse of discretion.

Seccia v. State, 23 Fla. L. Weekly D2346, D2346 (Fla. 1st DCA Oct. 12, 1998)(hereinafter "Seccia II"). As for the sentencing issue, the First District stated:

> Appellant's third and final argument is that the trial court erred when it scored victim injury points attributable to the capital sexual battery on the guidelines scoresheet prepared for the lewd act conviction. The state correctly responds that this issue has not been preserved for review because it was not raised before the trial court by either a contemporaneous objection or a motion pursuant to Florida Rule of Criminal Procedure 3.800(b) and, assuming that it is error, it is not fundamental. See, e.g., Williams v. State, 697 So. 2d 164 (Fla. 1st DCA), review denied, 700 So. 2d 689 (Fla. 1997); Neal v. State, 688 So. 2d 392 (Fla. 1st DCA), review denied, 698 So. 2d 543 (Fla. 1997). We decline appellant's invitation to address this issue as one involving ineffective assistance of counsel because to do so would effectively nullify the preservation requirement contained in section 924.051, Florida Statutes (1997). We do, however, certify apparent conflict with the recent decision in Mizell v. State, 23 Fla. L. Weekly D1978 (Fla. 3d DCA Aug. 26, 1998) (correcting a sentencing error which was apparent on the face of the record but had not been preserved on the

> ground that the failure to preserve the error constituted ineffective assistance of counsel which might be raised on direct appeal).

Id. at D2346-47.

Petitioner timely filed a notice to invoke discretionary jurisdiction. This appeal follows.

III. SUMMARY OF THE ARGUMENT

ISSUE I: Under Florida statutes, victim injury resultant from one or more capital felonies before a court for sentencing is not to be included upon any scoresheet prepared for non-capital felonies. In the case at bar, petitioner was convicted of a capital felony, sexual battery upon a child younger than 12 by placing his mouth upon the child's penis, and a non-capital felony, a lewd act upon the same child. Petitioner's scoresheet on the lewd-act conviction reflects that 40 points were added for sexual penetration. Petitioner's scoresheet is incorrect on its face because it includes victim injury resultant from a capital felony on a scoresheet prepared for a non-capital felony.

Notwithstanding the fact trial counsel failed to lodge a contemporaneous objection, this sentencing error was properly raised on direct appeal as (1) ineffective assistance of trial counsel apparent on the face of the record, and (2) fundamental error -- a sentence which patently fails to comport with statutory limitations. Accordingly, this Court should quash the decision below insofar as it relates to petitioner's sentence on the lewd-act count and remand with appropriate directions.

ISSUE II: On petitioner's first appeal, the First District reversed his convictions and sentences and remanded for a new trial because the competency examination failed to establish that the child-victim had the "moral sense of the obligation to tell the truth." The questions posed to the child-victim at the competency hearing conducted during petitioner's second trial

cannot be distinguished in any substantive way from the questions posed at the competency hearing conducted during petitioner's first trial. The child-victim did not demonstrate that he had the moral sense of the obligation to tell the truth at either hearing. Accordingly, based on the reasoning set forth in Seccia I, this Court should quash the First District's decision in Seccia II and remand with appropriate directions.

IV. ARGUMENT

I. WHETHER THE TRIAL COURT ERRED BY INCLUDING VICTIM INJURY RESULTANT FROM A CAPITAL FELONY BEFORE THE COURT FOR SENTENCING ON THE SCORESHEET PREPARED FOR A NON-CAPITAL FELONY ALSO PENDING BEFORE THE COURT FOR SENTENCING AND WHETHER THIS SENTENCING ERROR WAS PROPERLY RAISED ON DIRECT APPEAL ABSENT A CONTEMPORANEOUS OBJECTION.

Petitioner was convicted of one count of sexual battery upon a child younger than age 12, by placing his mouth upon the child's penis, and one count of handling, fondling or making an assault upon the same child in a lewd, lascivious or indecent manner by touching the child's penis. The trial court sentenced petitioner to life on the capital sexual battery count and to 72 months on the lewd-act count. In sentencing petitioner on the lewd-act count, the trial court relied on a scoresheet reflecting a sentencing range of 45.3 to 75.5 months. (I-103-04). Notwithstanding the fact that petitioner was charged with a lewd act upon a child for touching the child's penis, the scoresheet reflects that 40 points were added for sexual penetration instead of 18 points for sexual contact. (I-103).[2]

---

[2] Following petitioner's first trial, the trial court sentenced petitioner to 58 months, not 72 months, on each of the lewd-act counts. (I-33-34). The 58 month sentence was based on a scoresheet that reflects 18 points for sexual contact, not 40 points for sexual penetration. (I-37). Petitioner's scoresheet from the first trial also included additional points not assessed against petitioner following his second trial. More specifically, 8.4 points were added for the conviction on a second lewd-act count -- a conviction which the First District subsequently reversed and remanded with directions that the trial court enter a judgment of acquittal as to that count. (I-37,

Capital felonies are not scored under the guidelines. § 921.001(4)(b)(2), Fla. Stat. (Supp. 1994). More specifically, capital felonies are not scored as primary offenses, see Anderson v. State, 550 So. 2d 488, 489 (Fla. 4th DCA 1989) and Gray v. State, 640 So. 2d 186, 195 (Fla. 1st DCA 1994), or as additional offenses. Norris v. State, 503 So. 2d 911, 912 (Fla. 5th DCA 1987). It only follows that victim injury resultant from a capital felony before the court for sentencing should not be scored on the scoresheet prepared for a non-capital felony also pending before the court for sentencing.

Such a conclusion is buttressed by section 921.0011(7), Florida Statutes (Supp. 1994), which provides: "If the conviction [read: "which is scored"] is for an offense involving sexual contact which does not include sexual penetration, the sexual contact must be scored as moderate injury."[3] Excluding prior record, the only conviction scored on petitioner's scoresheet was

---

58). If the trial court had not erroneously added points for sexual penetration following petitioner's second trial, petitioner's sentencing range would have been 28.8 months to 48 months -- well below the 72 months actually imposed by the trial court.

[3] Petitioner was charged with committing the offenses at issue "on or between the 1st day of August, 1995, and the 12th day of September, 1995." (I-4). Under the applicable statute, 18 points could be assessed for moderate injury and 40 points for severe injury. See § 921.0014(1), Fla. Stat. (1993). Section 921.0014 was subsequently amended to score 80 points for sexual penetration and 40 points for sexual contact. § 921.0014(1), Fla. Stat. (1995). The 1995 amendments to section 921.0014, apply to "offenses committed on or after October 1, 1995." See Ch. 95-184, § 6, at 1694, Laws of Fla.

the lewd-act conviction. (I-103). Petitioner was charged with lewd act upon a child by touching the child's penis -- an offense involving sexual contact which does not include sexual penetration.[4] Under section 921.0011, the sexual contact should have been scored as moderate injury -- 18 points as opposed to 40 points for sexual penetration.

This Court amended the Florida Rules of Criminal Procedure recognizing that such is the appropriate reading of the sentencing statutes:

> Victim injury resultant from one or more capital felonies before the court for sentencing is not to be included upon any scoresheet prepared for non-capital felonies also pending before the court for sentencing.

Fla. R. Crim. P. 3.703(d)(9).[5] In short, petitioner's scoresheet

---

[4] It bears noting that "one cannot be convicted of a lewd and lascivious act committed upon a child under 12 years of age for conduct that also constitutes the crime of sexual battery." Jozens v. State, 649 So. 2d 322, 323 (Fla. 1st DCA 1995). That is, by definition, petitioner's lewd-act conviction could not have been based on sexual contact involving sexual penetration.

[5] This version of Rule 3.703, "applies to offenses committed on or after October 1, 1995." See Fla. R. Crim. P. 3.703(a). However, as this Court has recognized, this version of Rule 3.703 was adopted "to implement statutory revisions made during the 1995 legislative session." Amendments to Florida Rules of Criminal Procedure re Sentencing Guidelines, 660 So. 2d 1374, 1374 (Fla. 1995). None of the revisions made during the 1995 legislative session, save the revision noted in footnote three, relate to assessment of victim injury points. See Ch. 95-184, § 6, at 1678-79, Laws of Fla. That is, this version of Rule 3.703 implements the exact statutory language upon which petitioner relies for the proposition that the victim injury resultant from a capital felony before the court for sentencing should not be scored on the scoresheet prepared for a non-capital felony also pending before the court for sentencing.

is incorrect on its face as a matter of law.

The only rub is whether petitioner properly raised this issue absent a contemporaneous objection. (I-123-32). The First District held that

> Appellant's third and final argument is that the trial court erred when it scored victim injury points attributable to the capital sexual battery on the guidelines scoresheet prepared for the lewd act conviction. The state correctly responds that this issue has not been preserved for review because it was not raised before the trial court by either a contemporaneous objection or a motion pursuant to Florida Rule of Criminal Procedure 3.800(b) and, assuming that it is error, it is not fundamental. See, e.g., Williams v. State, 697 So. 2d 164 (Fla. 1st DCA), review denied, 700 So. 2d 689 (Fla. 1997); Neal v. State, 688 So. 2d 392 (Fla. 1st DCA), review denied, 698 So. 2d 543 (Fla. 1997). We decline appellant's invitation to address this issue as one involving ineffective assistance of counsel because to do so would effectively nullify the preservation requirement contained in section 924.051, Florida Statutes (1997). We do, however, certify apparent conflict with the recent decision in Mizell v. State, 23 Fla. L. Weekly D1978 (Fla. 3d DCA Aug. 26, 1998) (correcting a sentencing error which was apparent on the face of the record but had not been preserved on the ground that the failure to preserve the error constituted ineffective assistance of counsel which might be raised on direct appeal).

Seccia II, 23 Fla. L. Weekly at D2346-47. In so holding, the First District erred.

It is a fundamental principle of constitutional law that a criminal defendant is entitled to the effective assistance of trial counsel. Amend. VI, U.S. Const.; Art. I, § 16, Fla. Const. Petitioner readily concedes that, "[g]enerally, ineffective

assistance of counsel is a collateral matter which should be addressed through a motion for post-conviction relief." Stewart v. State, 420 So. 2d 862, 864 n.4 (Fla. 1982). However, such a claim is cognizable on direct appeal where the facts upon which the claim is based are evident on the face of the record. Id. at 864; see also Harris v. State, 580 So. 2d 243, 245 (Fla. 1st DCA 1991); Wilson v. State, 531 So. 2d 1012, 1013 (Fla. 2d DCA 1988); Gordon v. State, 469 So. 2d 795, 797 (Fla. 4th DCA 1985); Whitaker v. State, 433 So. 2d 1352 (Fla. 3d DCA 1983).

In the case at bar, petitioner maintains that trial counsel was ineffective because she did not object to a scoresheet that is incorrect on its face. The pertinent scoresheet is part of the record. (I-103). Hence, the record here is sufficient. If trial counsel failed to properly preserve an error so obvious, his performance meets both the deficiency and prejudice prongs of the test set forth in Strickland v. Washington, 455 U.S. 668 (1984). See Mizell v. State, 23 Fla. L. Weekly D1978, D1978-79 (Fla. 3d DCA Aug. 26, 1998)(correcting a sentencing error which was apparent on the face of the record but had not been preserved on the ground that the failure to preserve the error constituted ineffective assistance of counsel which might be raised on direct appeal).

This Court need not concern itself with the certified conflict between Mizell and Seccia II, however, because under this Court's recent decision in Mancino v. State, 714 So. 2d 429, 433 (Fla. 1998), this issue was properly raised on direct appeal.

Consistent with this Court's opinion in Amendment to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 775 (Fla. 1996), the First District recognizes that "unpreserved sentencing errors which are fundamental may be addressed for the first time on appeal." Nelson v. State, 23 Fla. L. Weekly D2241, D2241-42 (Fla. 1st DCA Oct. 1, 1998) (en banc); but see Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998)(holding that no sentencing error may be considered on direct appeal unless such error has been preserved for review)(en banc). Illegal sentences necessarily constitute fundamental error. See Sanders v. State, 698 So. 2d 377, 378 (Fla. 1st DCA 1997). In Mancino, this Court concluded: "A sentence which patently fails to comport with statutory or constitutional limitations is by definition "illegal." 714 So. 2d at 433.

In the case at bar, petitioner's sentence on the lewd-act count patently fails to comport with statutory limitations -- sexual penetration points were scored contrary to statute. Under Mancino, petitioner's sentence on the lewd-act count was illegal and thus cognizable on direct appeal.

In short, the trial court erred by including victim injury resultant from a capital felony before the court for sentencing on the scoresheet prepared for a non-capital felony also pending before the court for sentencing. Notwithstanding the fact trial counsel failed to lodge a contemporaneous objection, this sentencing error was properly raised on direct appeal as (1) ineffective assistance of trial counsel apparent on the face of

the record, and (2) fundamental error. Accordingly, this Court should quash the decision below insofar as it relates to petitioner's sentence on the lewd-act count and remand with appropriate directions.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE CHILD-VICTIM WAS COMPETENT TO TESTIFY INASMUCH AS THE COMPETENCY EXAMINATION FAILED TO ESTABLISH THAT THE CHILD-VICTIM HAD THE MORAL SENSE OF THE OBLIGATION TO TELL THE TRUTH.

The issue before this Court is whether the trial court failed to conduct an adequate competency examination during petitioner's second trial and thus abused its discretion by finding the child-victim competent to testify. Petitioner maintains that the trial court abused its discretion because the competency examination conducted during petitioner's second trial failed to establish that the child-victim had the "moral sense of the obligation to tell the truth."

Before the child-victim testified at the first trial, the trial court conducted a competency hearing. The record of that hearing reflects the following:

> BY THE COURT:
>
> . . . .
>
> Q Do you know what it means to tell - - to have to tell the truth?
>
> A Yes.
>
> Q Do you know you are supposed to tell the truth all the time?
>
> A Yes.
>
> Q Yes?
>
> A Yeah.
>
> Q Do you know what it means to lie and not tell the truth?

A Yes.

Q Let me ask you if you don't tell the truth what might happen to you? Do you know?

A No.

Q Do you think you would be in a lot of trouble if you don't tell the truth?

A Yes.

. . . .

BY [DEFENSE COUNSEL]:

Q Let me ask you again . . .; Do you know why it's important to tell the truth today?

A No.

. . . .

BY THE COURT:

. . . .

Q You do know, though, that when you are down here that you have to tell us the truth, right? Do you understand that?

A Yes.

Q And do you also understand that if you don't tell the truth you will get in lots of trouble, right?

A Yes.

. . . .

Q And when you talk to us today you are going to tell the truth; Is that right?

A Yes.

Seccia I, 689 So. 2d at 355-56. The trial court ruled that the child-victim was competent to testify.

The First District reversed and remanded for a new trial

concluding that the trial court abused its discretion when it found the child-victim competent to testify. The First District reasoned as follows:

> In Griffin v. State, 526 So. 2d 752 (Fla. 1st DCA 1988), this court said:
>
> > [W]hen a child's competency is at issue, the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) **whether the child has a moral sense of the obligation to tell the truth.**
>
> Id. at 753 (citing Lloyd v. State, 524 So. 2d 396 (Fla. 1988). Concluding that the examination of the child conducted in the trial court had been insufficient to establish "whether the child was capable of observing, recollecting, and narrating facts, and **whether the child had a moral sense of the duty to tell the truth**" (id. at 755), we reversed and remanded for a new trial.
>
> In Wade v. State, 586 So. 2d 1200 (Fla. 1st DCA 1991), we again reversed and remanded for a new trial because the trial court's examination of the alleged child victim had been insufficient to establish that the child had either the ability to observe and recollect facts or **a moral sense of the obligation to tell the truth. We noted that, although the questions asked had "suggest[ed] the child knew what a lie is and that it is bad," that was insufficient because "knowing the difference between the truth and a lie does not impute a moral obligation or sense of duty to be truthful."** Id. at 1204. The recent decisions in Z.P. v. State, 651 So. 2d 213 (Fla. 2d DCA 1995); Hammond v. State, 660 So. 2d 1152 (Fla. 2d DCA 1995); and Fuller v. State, 669 So. 2d 273 (Fla. 2d DCA), review denied, 675 So. 2d 929 (Fla. 1996); are to the same effect.
>
> We are unable to distinguish in any substantive way the questions posed to the

> child-witnesses in the foregoing cases from those posed in this case. Accordingly, we conclude that the trial court committed error when it permitted the child to testify. The state argues that, if error occurred, it was harmless. We are unable to accept this argument because, without the child's testimony, the corpus delicti of the offenses would not have been established. Accordingly, appellant is entitled to a new trial.

Seccia I, 689 So. 2d at 356-57 (emphasis added). In short, the First District reversed petitioner's convictions and sentences and remanded for a new trial because the competency examination failed to establish that the child-victim had the "moral sense of the obligation to tell the truth." In so holding, the First District recognized that "knowing the difference between the truth and a lie does not impute a moral obligation or sense of duty to be truthful." Id. at 356 (quoting Wade v. State, 586 So. 2d 1200, 1204 (Fla. 1st DCA 1991)). Inasmuch as the child-victim testified that he understood he could "get in lots and lots of trouble" if he failed to tell the truth, the First District also implicitly recognized that such an understanding does not impute "a moral sense of the obligation to tell the truth." See id.

Prior to taking testimony at the second trial, the trial court conducted another hearing to determine whether the child-victim was competent to testify. The record of that hearing reflects the following:

> [BY THE STATE]:
>
> . . . .
>
> Q Okay. Now, do you know the difference between a truth and a lie?

A Yes.

Q Is it a good thing or a bad thing to tell a lie?

A A bad thing.

. . . .

Q Okay. Now, what about if you tell a lie in the courtroom, is that good or bad?

A Bad.

Q And how bad is it to tell a lie in the courtroom?

A Real bad.

Q And are you supposed to tell the truth in a courtroom?

A Yes.

. . . .

[BY DEFENSE COUNSEL]:

. . . .

Q Now, Samuel, what happens if you tell a lie in the courtroom?

A Maybe the person that you're talking about will get out of jail.

Q Would get out of jail?

A Yes.

Q Would anything happen to you if you told a lie in the courtroom?

A I don't know.

Q You don't know?

A No.

. . . .

[BY THE STATE]:

. . . .

Q Now, if you told a lie here in the courtroom today would that be good or bad?

A Bad.

Q Would you get in trouble?

A Yes.

[BY THE COURT]:

. . . .

THE COURT: So if you were to tell me that dinosaurs are still alive would that be the truth or a lie?

WITNESS: A lie.

THE COURT: And you wouldn't say that in court, would you?

WITNESS: No.

THE COURT: And why do you think it's wrong to tell a lie?

WITNESS: I won't tell a lie.

THE COURT: You wouldn't tell a lie, right?

WITNESS: No.

THE COURT: But why do you think it's wrong to tell a lie?

WITNESS: Because something bad could happen.

THE COURT: And do you understand that something bad could happen to you if you tell a lie?

WITNESS: Yes.

THE COURT: And you know that your mom and dad can punish you when you do wrong at home,

right?

WITNESS: Yes.

THE COURT: Who would punish you if you did wrong in the courtroom?

WITNESS: The judge.

THE COURT: Is there anybody here named Judge?

WITNESS: No.

THE COURT: Well, who is the Judge?

WITNESS: You.

THE COURT: I'm the judge?

WITNESS: Yes.

THE COURT: Do you like my red robe?

WITNESS: Red robe?

THE COURT: What color is my robe?

WITNESS: Black.

THE COURT: That's right. And do you understand that you will be punished by the Judge if you tell a lie in court?

WITNESS: Yes.

(II-30-41). The trial court again ruled that the child-victim was competent to testify. (II-44-45).

Petitioner again appealed his convictions, arguing that: (1) on his first appeal the First District reversed his convictions and sentences because the competency examination failed to establish that the child-victim had the "moral sense of the obligation to tell the truth," (2) the questions posed to the child-victim at the competency hearing conducted during his

second trial could not be distinguished in any substantive way from the questions posed at the competency hearing conducted during his first trial, and (3) based on the reasoning set forth in Seccia I the First District should again reverse his convictions and sentences and remand for a new trial.

The First District did not squarely address the issue. Instead, the First District affirmed petitioner's convictions reasoning:

> The child, who was nearly eight years old at the time of the second trial, demonstrated that he knew the difference between the truth and a lie. He also stated that it was wrong to tell a lie, particularly in court, because "something bad" could happen; that one is punished when one lies; that one has an obligation to tell the truth, particularly in court; and that the judge would punish him if he did not tell the truth in court. Finally, he promised to tell the truth. Based upon the child's responses (which were considerably more positive, and less equivocal, than those given during the first trial) to the questions asked, and considering the child's age, we are unable to say that the trial court's finding constituted an abuse of discretion.

Seccia II, 23 Fla. L. Weekly at D2346. The district court erred.

While the child-victim was asked more questions at the second competency hearing, the questions posed to the child-victim at the two competency hearings cannot be distinguished in any substantive way. At both competency hearings, the child-victim arguably demonstrated that (1) he understood the difference between the truth and a lie, and (2) he understood that he could be punished if he lied in court. Moreover, the child-victim promised to tell the truth at both hearings. Under

V. CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner respectfully requests that this Court quash the decision of the First District Court of Appeal and remand with appropriate directions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Stephen R. White, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 13 day of November, 1998.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Mark E Walker

MARK E. WALKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0973009
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER