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MAY 16 2000
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

THOMAS SPIOCH,

Respondent.

S. CT. CASE NO. SC96-836
DCA CASE NO. 5D97-2616

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT AND THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

RESPONDENT'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

Susan A Fagan

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

TABLE OF CITATIONS

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SUMMARY OF THE ARGUMENT

The Fifth District correctly struck the victim injury points from the Respondent's sentencing guidelines scoresheet. The applicable Florida Statute, Section 921.001(8), Florida Statutes (1992 Supp.), was properly construed in a limited fashion by the Fifth District, in accordance with Florida Statutory Rule of Construction Section 775.021(1), Florida Statutes, not to apply to the instant factual circumstances. Accordingly, because there is no statutory or case law definition of "sexual contact" in Florida, victim injury for "sexual contact" under the sentencing guidelines, as codified in Section 921.001(8), must be narrowly construed in the instant case to the benefit of the Respondent. The decision of the Fifth District sub judice, therefore, striking the victim injury points for "sexual contact," where there was no direct physical contact by the Respondent with the victim's sexual organ, should be affirmed by this Court.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT SUB JUDICE SHOULD BE AFFIRMED BY THIS COURT.

Petitioner initially argues that, based on Section 921 .OO 1(8), Florida Statutes, (1992 Supp.), because the Respondent's charged offenses under Section 800.04(1), Florida Statutes, involved the Respondent's fondling of T. G.'s penis through T. G.'s clothing, the Fifth District was incorrect in striking the "sexual contact" victim injury points assessed by the trial court for Respondent's instant convictions. (Petitioner's initial merit brief pgs. 4-8) See also, Fla.R.Crim.Proced 3.988 (j). R 237-238, 270-276) Specifically, Petitioner contends that the ". . .[D]istrict [C]ourt determined that [sexual] contact points may only be imposed where the [sexual] contact occurs 'in a sexual battery by union without penetration."' (Petitioner's initial merit brief pg. 5) Petitioner asserts the Fifth District's opinion in Reves v. State, 709 So.2d 18 1 (Fla. 5th DCA 1998), is incorrect and has filed, as supplemental authority, the Fifth District's more recent decision in Kitts v. State, (Slip opinion 5D98-2957 dated May 5, 2000), upon the Fifth District's en banc review of its originally issued opinion in Kitts v. State, 24 Fla. L. Weekly D 2144 (Fla. 5th DCA September 17, 1999). [See Appendix A for Kitts slip opinion]

Respondent would first point out that the Fifth District only partially receded from its decisions in the instant case and from Reyes, supra. Actually, the Fifth District disapproved the holding in these decisions which interpreted Section 921.001(8) to permit the scoring of victim injury points solely for those factual circumstances involving the union of the sexual organ of one person with the oral, anal or vaginal opening of another. (Kitts slip opinion) More importantly, the Fifth District acknowledged in Kitts that "(t)here is nothing in the case law or the statutes which expressly defines sexual contact or answers the basic question here, to-wit: whether a fondling or kissing of a female breast is sexual contact." Id, pg. 2 of Kitts slip opinion. To solve this dilemma, the majority in Kitts chose to refer to other state's statutory definitions of whether female breasts were "intimate parts" included in those states. criminal statutes prohibiting specific sexual conduct. e Peterson, in his dissenting opinion in Kitts, however, correctly pointed out that the decisions cited to by the majority in Kitts ". . .all specifically mention that the legislatures of their states had defined the phrase 'sexual contact' or similar relevant terms or phrases." [Emphasis added] (Kitts Slip op. Pg. 1 of dissent) See Minnesota Ct. of Appeal v. Oanes, 543 N.W. 2d 658,661, (Minn. Ct. App., 1996); New York v. Foley, 257 A.D. 2d 243 (1999 N.Y. Slip Op. 05878, 1999 WL 399439 at *6); Wisconsin v. Dodson, 580 N.W. 2d 181, 189 (Wis. 1998); Ohio v. Riffle, 674 N.E. 2d 12 14, 12 17 (Ohio Ct. App. 1996); Strickland v. Arkansas, 909 SW. 2d

3 18,321 (Ark. 1995); and New Mexico v. Williams, 730 P. 2d 11961199 (N.M. Ct. App. 1986) As a result of Florida Statues not defining "sexual contact," the conclusion reached by Judge Peterson in Kitts was that the trial court was bound by Section 775.021(1), Florida Statutes, and Florida Case Law in Scates v. State, 603 So.2d 504 (Fla. 1992); Hollingsworth v. State, 632 So.2d 176 (Fla. 5th DCA 1994), to construe criminal statutes strictly to the benefit of the accused. More importantly, this statutory provision has been held under Florida case law as being directly applicable to the sentencing guidelines. Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991). Clearly then, Section 921.001(8), Florida Statutes, must be similarly strictly construed.

Petitioner further argues that the instant factual circumstances are equally governed by the Third District's decision in Vural v. State, 717 So.2d 65 (Fla. 3rd DCA 1998), rev. denied, 733 So.2d 591 (Fla. 1999). Respondent disagrees. As noted by the Petitioner, the Third District specifically found the Fifth District's decision in Reyes, supra, to be inapplicable. Vural, 707 So.2d at 67. This is because the factual circumstances in Vural involved, as additionally recognized by the Petitioner, a charge of attempted sexual battery where there was forced attempted felicio, Vural, 707 So.2d at 66. conduct is not what the Fifth District addressed sub judice since the Respondent's actions did not involve

any skin to skin contact between himself and T. G., and was not charged as an attempted sexual battery or sexual battery.

Petitioner next contends that, because the Florida Legislature included all of Chapter 800, without specifying a particular subsection, in Section 92 1 .00 1(8), Florida Statutes (1992 Supp.), the Florida Legislature did not intend to limit victim injury points for "sexual contact" to only oral, anal, or vaginal union with the sexual organ of another. (Petitioner's initial merit brief pg. 7) Respondent disagrees and would point out that Petitioner offers no statutory rule of construction or case law from Florida, or any other jurisdiction, to support this conclusion. Instead, Petitioner's reasoning runs afoul of the aforementioned Florida Rule of Criminal statutory construction, codified in Section 775.021(1), Florida Statutes, by Petitioner applying an overbroad, rather than a strict, construction of the statutory term "sexual contact" as used in Section 92 1 .OO 1 (8), Florida Statutes (1992 Supp.). Certainly, even Petitioner acknowledges that at least some violations prosecuted under Chapter 800 Florida would not permit the trial court to assess victim jury points for "sexual contact." (Petitioner's initial merit brief pg. 7) Thus, a strict construction of the term "sexual contact" by the trial court is warranted as Judge Peterson and Judge Thompson urge in Kitts. supra.

Petitioner's additional reliance on Florida Rule of Statutory construction that ". . .the legislature does not intend to enact legislation that is purposeless or meaningless" is misplaced. (Petitioner's initial merit brief pgs. 7-8) Contrary to Petitioner's assertion that the Fifth District's Statutory interpretation of Section 921.001(8), Florida Statutes (Sup. 1992), would render that particular statute meaningless, the Fifth District's strict interpretation merely appropriately limits the trial court's assessment of victim injury points to those factual situations where "sexual contact" occurs based on a strict and narrow definition of that term. Contrary to Petitioner's assertion, this type of statutory construction by the Fifth District does give full effect to all of the statutory provisions of Section 92 1 .OO 1(8), as written by the legislature, since the instant decision does not strike the term "sexual contact" from the statute at issue. Therefore, Petitioner's objection that the Fifth District's opinion sub judice ". . . renders the [victim injury] statute ineffectual in prosecutions for lewd and lascivious fondling under Section 800.04(1) [Florida Statutes], may be remedied only by the legislature and not by this Court or the appellate courts of this state.

In Karchesky v. State, 591 So.2d 930 (Fla. 1992), this Court also looked to the narrow confines of the then existing victim injury statute in holding that the statute did not permit the scoring of victim injury points for "penetration or contact"

separately from those assessed for nhysical trauma. Section 92 1.00 1(8) was passed by the legislature in Chapter 92-135, Secs. 1 and 4, Laws of Florida, in direct response to this Court strictly construing in Karcheskv Florida Rule of Criminal Procedure 3.70 1 (d)(7), as amended by the legislature on July 1, 1987. As such, the Florida legislature is free to specifically expand further the Fifth District's proper narrow strict construction of the statutory term "sexual contact," as used in Section 92 1.001(8), Florida Statutes (1992 Supp.), by properly amending that statute to specificallv define "sexual contact" as it wishes.

Petitioner's additional argument that the Fifth District's opinion in this case ". . .unreasonably limits the legislature's effort to fully punish those who prey upon children", is an incorrect hyperbole. The instant opinion by the Fifth District fully prosecutes the Respondent under Sections 800.04(1) and 921.001(8), within the proper limits of the well established principle of statutory construction to "strictly construe criminal statutes in favor of the accused." To allow the trial courts to define "sexual contact," as Petitioner suggests, would lead to nonuniformity in the trial court's enforcement of both statutes. decisions from other states cited infra, show that "sexual contact" or "sexual conduct" can mean various things according to the particular state statute involved. This is exactly why the legislature, not the courts, must provide the definition of "sexual contact". Until it does, only a narrowly construed interpretation of "sexual contact", as used in

Section 92 1 .0001(8), should be applied by the courts. See Foley, 257 A.D. 2d at 251.

Finally, Petitioner argues that "sexual contact" can be defined in Florida under the Fourth District's decision in Altman v. State, 25 Fla. L. Weekly D662 (Fla.. 4th DCA March 15, 2000). Respondent disagrees. The Fourth District candidly acknowledged, in Altman that ". . .it is not yet clear how the courts will ultimatelv revolve what constitutes sexual contact." [Emphasis added] Id. Moreover, the court in Altman pointed out that Mackey v. State, 5 16 So.2d 330 (Fla..1st DCA 1987) and Beasley v. State, 503 So.2d 1347 (Fla.. 5th DCA 1987) , cited to by the Petitioner, construed victim injury points for certain type of "sexual contact" under "prior law", which also predate this Court's decision in Karchesky, supra. Accordingly, this Court should affirm the instant decision rendered by the Fifth District striking the Respondent's victim injury points from his sentencing guidelines scoresheet.

CONCLUSION

Based on the arguments and authorities cited herein, Respondent requests that this Honorable Court affirm and approve the instant decision rendered by the Fifth District below striking the victim's injury points for "sexual contact" from the Respondent's sentencing guidelines scoresheet based on Section 92 1 .00 1(8), Florida Statutes (1992 Supp.).

Respectfully submitted,

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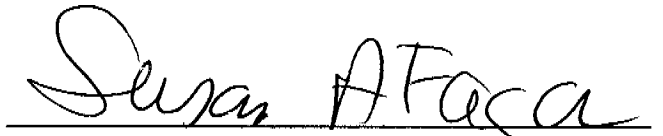
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Thomas Spioch, DC# 969352, Brevard County Detention Center, P.O. Box 800, Sharpes, FL 32959-0800, on this 15th day of May, 2000.



SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	
Petitioner,	
vs.	S. CT. CASE NO. SC96-836 DCA CASE NO. 5D97-2616
THOMAS H. SPIOCH,	
Responderit.	

APPENDIX

Kitts v. State, (Slip Opinion 5th DCA dated May 5, 2000)

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IN THE DISTRICT-COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2000

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

ROBERT L. KITTS,

Appellant,

v.

CASE NO. 5D98-2957

STATE OF FLORIDA,

Appellee.

Opinion filed May 5, 2000

Appeal from the Circuit Court
for Volusia County,
R. Michael Hutcheson, Judge.

James B. Gibson, Public Defender,
and Stephen H. Park and John M.
Selden, Assistant Public Defenders,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Patrick W.
Krechowski, Assistant Attorney General,
Daytona Beach, for Appellee.

ON MOTION FOR REHEARING EN BANC

DAUKSCH, J.

We have considered this matter en banc upon the motion of appellant. We withdraw the previous opinion and issue the following in its stead.

This is an appeal from a conviction and sentence in a lewd and lascivious act on a child case. The statute reads "A person who . . . Handles, fondles, or assaults any child

under the age of 16 years in a lewd, lascivious, or indecent manner; . . ." commits a criminal act. § 800.04(1), Fla. Stat. (1997).

The point on appeal is whether the court erred in assessing guideline sentencing points for victim injury pursuant to section 921 .0011(7)(b)2, Florida Statutes (1997).

> If the conviction is for an offense involving sexual contact that does not include sexual penetration, the sexual contact must be scored in accordance with the sentence points provided under § 921.0014 for sexual contact, regardless of whether there is evidence of any physical injury.

The evidence is that appellant kissed and fondled the breasts of a child who was under sixteen years old. He says that Reves v. State, 709 So. 2d 181 (Fla. 5th DCA 1998) controls and that, essentially, breast contact is not sexual contact.

There is nothing in the case law or the statutes which expressly defines sexual contact or answers the basic question here, to wit: whether a fondling or kissing of a female breast is sexual contact. There are relevant statutes which do include the breasts as "intimate parts" and thus are of importance to the law governing behavior, For instance section 39.01(63)(d), Florida Statutes (1997) governs child welfare proceedings and defines "sexual abuse of a child," in relevant part, as follows: "The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of either the child or the perpetrator." (Emphasis added). Similarly, Section 985.4045, Florida Statutes (1997) defines "sexual misconduct" as "fondling the genital area, groin, inner thighs, buttocks, or breasts of a person." In either event, the Legislature has clearly defined sexual conduct much more broadly than this court in Reves. Notably, the acts which led to appellant's conviction would clearly fall within either definition.

Several related statutes indicate that the Legislature, by **implication, considers the** female breast in connection with prohibited behavior. In criminaiizing as "indecent exposure" the display of "sexual organs," the Legislature provided the following exception: "A mother's breastfeeding of her baby does not under any circumstances violate this section." § 800.03, Fla. Stat. (1 993). The legislature included the breastfeeding exception elsewhere in Florida's criminal code, thereby implying that the breast can be considered the subject of lewd behavior when used for purposes other than breastfeeding. See § 800.02, Fla. Stat. (1993)(criminalizing unnatural and lascivious acts); § 800.04 ("Lewd, lascivious, or indecent assault or act upon or in presence of child"); § 847.001 ("A mother's breastfeeding of her baby is not under any circumstances 'obscene"' for purposes of statute criminalizing the dissemination of obscene literature). The fact that the legislature limited the exclusion to breastfeeding implies that the exposure or manipulation of the female breast for other than nutritive purposes is sexual or indecent. Applying the maxim *expressio unius est exclusio alterius* (the inclusion of one thing implies the exclusion of another), it can be concluded that, generally, the Legislature considers breastfeeding an appropriate public act, while the gratuitous exposure or handling of female breasts constitutes inappropriate public behavior, The impropriety in the latter case stems from the fact that the female breast is, as a matter of common sense, a sexual object (as evidenced by the fact that women in most societies clothe their upper bodies in public).

From other states, research reveals definitions, either in case law or statutes, to include inappropriate contact with the female breast to be violative of the law See, e.g., New York v. Foley, 1999 N.Y. Slip Op. 05878, 1999 WL 399439 at ● 6 **(N.Y.** App. Div. 1999)(Statute defines "sexual conduct" as "physical contact with a person's clothed or

unclothed genitals, pubic area, buttocks or, if such person be a female, breast."); Wisconsin v. Dodson, 580 N.W.2d 181, 189 (Wis, 1998)(noting that state law defines "intimate parts," for purposes of statute criminalizing sexual contact, as the "breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being"); Ohio v. Riffle, 674 N.E.2d 1214, 1217 (Ohio Ct. App. 1996)(noting that state law defines "sexual contact" as "any touching of an erogenous zone of another person, including a female's breast"); Minnesota v. Oanes, 543 N.W.2d 658,661 (Minn. Ct. App. 1996)("Because the legislature has not defined 'intimate parts' in the prostitution statutes, we must construe the words according to common usage. A woman's breasts are commonly considered a sexual and intimate part of her body. . . The legislature enacted the current criminal sexual conduct statutes before the present prostitution sections, and grouped them under the common heading "Sex Crimes," thus indicating sex crimes, including prostitution. encompass acts of touching another person's breasts under certain conditions.")(citations omitted); Strickland v. Arkansas, 909 S.W.2d 318, 321 (Ark. 1995)(affirming conviction for sexual abuse where evidence indicated that defendant fondled the victim's breast in violation of statute defining sexual contact as touching "the breast of a female"); New Mexico v. Williams, 730 P.2d 1196, 1199 (N.M. Ct. App. 1986)(Defendant properly convicted and separately sentenced for criminal sexual contact where facts showed that he touched victim's breast and statute defined protected "intimate parts" to include female breast).

Because the kissing and fondling of the child's breasts is deemed to be sexual contact it was appropriate for the circuit judge to assess points for that and no error occurred.

To the extent they conflict with this decision, we recede from Spioch v. State, 742 So. 2d 817 (Fla. 5th DCA 1999) and Reves v. State, 709 So. 2d 181 (Fla. 5th DCA 1998).

AFFIRMED.

ANTOON, C.J., COBB, SHARP, W., HARRIS, GRIFFIN, SAWAYA and PLEUS, JJ., concur.

PETERSON, J., dissents, with opinion, in which THOMPSON, J., concurs.

PETERSON, J., dissenting.

The majority is candid and admits that nowhere in the caselaw or statutes is the phrase "sexual contact" expressly defined. In *Reyes v.* State, 709 So. 2d 181, 182 (Fla. 5th DCA 1998), however, receded from today, we did conclude that: "The legislature, in requiring points for sexual contact. . . appears to be referring only to the contact occurring in a sexual battery by union without penetration." *See also, Spioch v. State, 742 So.* 2d 817 (Fla. 5th DCA 1999). Although the legislature has not expressly defined the phrase, any uncertainty resulting from the legislature's vagueness should accrue to the benefit of the defendant, not the state. § 775.021 (I), Fla. Stat, (1999) ("When , . . language is susceptible of differing constructions, it shall be construed most favorably to the accused."); *Scates v. State, 603 So.* 2d *504* (Fla. *1992); Hollingsworth v. State, 632 So.* 2d 176 (Fla. 5th DCA 1994).

I do not find the out-of-state cases mentioned by the majority to be supportive of the decision today. The opinions all specifically mention that the legislatures of their states had defined the phrase "sexual contact" or similar relevant terms or phrases. In *State of Minnesota* v. *Oanes, 543* N.W.2d 658, 661, (Minn. App., 1996), a case in which the defendant was charged with prostitution, the court noted its legislature had defined sexual contact to include, "the intentional touching by an individual of a prostitute's intimate parts." In the New York case cited by the majority, that state defined sexual conduct as "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or if such person be a female, breast." The Wisconsin legislature says a criminal sexual contact results when touching occurs on intimate parts. Ohio state law defines sexual contact as "any touching of an erogenous zone of another person, including a female breast." *Accord,*

Arkansasand New Mexico, *see* majority opinion.

The Florida legislature has not similarly defined sexual contact for purposes of scoring victim injury points on *a* sentencing guidelines scoresheet. My review of the legislative and sentencing guidelines history of the phrase "sexual contact" indicates that it evolved from the phrase "contact but no penetration," which was used first in the sentencing guidelines scoresheet, and then repeated in the statutory modification enacted subsequent to *Karchesky* v. *State,* 591 So. 2d 930 (Fla. 1992). § 921.001(8), Fla. Stat. (1992 Supp.). A sexual battery in Florida can be committed either by penetration or union. § 794.011, Fla. Stat. (1997). Union means contact according to the standard jury instruction given in sexual battery cases. Fla. Std. Jury Instr. (Crim.) 168. The supreme court, when using the phrase, "contact but no penetration," in the guidelines, and the legislature in the post-Karchesky statute, were both referring to a sexual battery committed with union (contact) but without penetration. Although the phrase "sexual contact" has been isolated from the term "penetration" in subsequent revisions of the victim injury guidelines scoring statute, none of the minor changes to the statute show any clear intent on the part of the legislature to begin scoring victim injury points for contact for other than union during sexual batteries. Ch. 93-406, § 9; Ch. 96-312, § 8; Ch. 96-388, § 50; Ch. 96-393, § 2, Laws of Fla. The only matter made clear by the legislature in the revised statute is that for some sexual battery crimes, neither penetration nor contact points should be scored, See, e.g., §§ 921.0011(7)(c) & (d), Fla. Stat. (1999).

Today, the majority has broadly defined an ambiguous statute through judicial fiat and interpreted it against the accused in violation of a primary rule of statutory construction. § 775.021 (I). We must await future cases in order to determine how far the majority will

go in expanding its definition of sexual contact to other parts of the body. The 40 points imposed on the scoresheet for victim injury contact should not have been scored. Reyes v. State, 709 So. 2d 181 (Fla. 5th DCA 1998). See *a/so Spioch v. State*, *742 So.* 2d 817, *818* (Fla. 5th DCA *1999); Wright v. State, 739 So.* 2d 1230, 1234 (Fla. 1st DCA 1999).

THOMPSON, J., concurs.