OA 08-29-00

ORIGINAL

FILED
DEBBIE CAUSSEAUX
APR 26 2000
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC96836

THOMAS HENRY SPIOCH, III,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 0618550

DAVID H. FOXMAN
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 0059013
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, Florida 32118
(904) 238-4990

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED:

TABLE OF AUTHORITIES (continued)

CASES CITED (continued):

OTHER AUTHORITIES CITED:

STATEMENT OF THE CASE AND FACTS

Respondent Thomas Henry Spioch, III, was charged by information with, inter *alia*, twenty-three counts of lewd and lascivious act upon a minor. (R.270-276).[1] Each count alleged that Spioch fondled the child victim's penis through his clothing. (R.273-276). At trial, the child victim, T.G., testified that the crimes began in June, 1992, when he was fourteen years old and ended in September, 1993, when he was fifteen. (Tr.35-69,169). T.G. was a member of the Coast Guard Explorers, a group in which Spioch was an adult advisor. (Tr.35-37,201). Although he disputed the number of incidents, Spioch confessed to having a sexual relationship with the child. (Tr.149-157). At trial, Spioch testified that T.G. was the sexual aggressor and that T.G. seduced a reluctant Spioch and all but forced him to continue engaging sex acts over the charged time period, despite Spioch's preference not to engage in such acts with a child of T.G.'s age. (Tr.189-227).

The jury found Spioch guilty of each of the lewd act charges. (R.280-281, 284-304). The trial court adjudicated Spioch guilty of twenty-one of the lewd act convictions and sentenced him to consecutive fifteen-year terms on each. (R.57,240-247). The court withheld adjudication for two of the counts and sentenced Spioch to time served. (R.240,244-245). On

---

[1]The State also charged Spioch with five counts of sexual activity with a child by a person in familial or custodial authority. (R.270-272). Those charges were ultimately nol prossed . (R.161).

his sentencing guidelines scoresheet, he received twenty victim injury points for sexual contact on each of the twenty-one lewd act adjudications, resulting in 420 total victim injury points. (R.237). The trial court sentenced Spioch to twenty-one consecutive fifteen-year prison terms. (R.57,242-247).

On appeal, the Fifth District Court of Appeal reversed Spioch's sentence, holding that the trial court improperly scored victim injury points for sexual contact:

> Spioch further contends that the acts to which the victim testified, Spioch's fondling of the victim's penis through the victim's clothing, do not qualify for victim injury points. We conclude that Spioch has adequately preserved this issue. See Pinacle v. State, 654 So. 2d 908 (Fla. 1995). In Reyes v. State, 709 So. 2d 181 (Fla. 5th DCA 1998), the trial court assessed 18 points for victim injury, or sexual contact, based on the defendant's having fondled the female victim's breast during the commission of the attempted sexual battery. This court reversed the sentence holding that "contact" meant the union of the sexual organ of one person with the oral, anal or vaginal opening of another. Thus, this court held, in the absence of physical trauma, victim injury points are appropriately assessed only in cases involving sexual battery, either by penetration or union. Cf. Vural v. State, 717 So. 2d 65 (Fla. 3d DCA 1998), rev. denied, 733 So. 2d 591 (Fla. 1999). In the instant case, neither penetration nor union occurred, so the court incorrectly assessed the victim injury points.

Spioch v. State, 742 So. 2d 817, 817-818 (Fla. 5th DCA 1999). The State moved for rehearing, which was denied September 16, 1999. (Appellate court record, p.6-13). The State timely filed its notice to invoke on October 5, 1999. (Appellate rec., p.20-21).

SUMMARY OF ARGUMENT

The district court's opinion limiting the scoring of sexual contact points to instances of oral, anal, or vaginal union with the sexual organ of another involves an unreasonably restrictive interpretation of the statute. Although the statute expressly applies to all lewd and lascivious act prosecutions, the opinion has the effect of rendering the statute inapplicable in most such prosecutions, including this one. Accordingly, the opinion below should be quashed.

ARGUMENT

THE TRIAL COURT PROPERLY ASSESSED SEXUAL CONTACT POINTS ON SPIOCH'S SENTENCING GUIDELINES SCORESHEET FOR FONDLING THE VICTIM'S PENIS THROUGH HIS CLOTHING.

The issue in this case is whether a defendant may be assessed sexual contact points on his or her sentencing guidelines scoresheet for hand-to-penis contact. This Court should quash the opinion below and hold that sexual contact points are properly awarded for such behavior.

The scoring of victim injury points is a matter of discretion for the sentencing judge. Waller v. State, 716 So. 2d 836 (Fla. 5th DCA 1998); Ely v. State, 719 So. 2d 11 (Fla 2d DCA 1998); McDonald v. State, 520 So. 2d 668 (Fla. 1st DCA 1988). A court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable. Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)(quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)). A court's ruling on a discretionary matter will be upheld unless no reasonable person would take the view adopted by the court. Quince v. State, 732 So. 2d 1059, 1062 (Fla. 1999).

On over twenty occasions between June, 1992 and September, 1993, Spioch fondled the child victim T.G.'s penis through his clothing in violation of Section 800.04(1), Florida Statutes (1991 & 1993). Both the 1991 and 1993 versions of 800.04(1) proscribe the handling or fondling of any child under the age of sixteen in a lewd, lascivious, or indecent manner. Effective April 8, 1992, the legislature passed new legislation mandating

the scoring of victim injury points where a defendant has been convicted of violating chapter 800. Ch. 92-135, § 1 & 4, Laws of Fla; Marcado v. State, 735 So. 2d 556, 557 (Fla. 3d DCA 1999). As amended in 1992, the statute read:

> For purposes of the statewide sentencing guidelines, if the conviction is for an offense described in chapter 794, chapter 800, or s. 826.04 and such offense includes sexual penetration, the sexual penetration must receive the score indicated for penetration or slight injury, regardless of whether there is evidence of any physical injury. **If the conviction is for an offense described in chapter 794, chapter 800, or s. 826.04 and such an offense does not include sexual penetration, the sexual contact must receive the score indicated for contact but no penetration, regardless of whether there is evidence of any physical injury.**

§ 921.001(8), Fla. Stat. (Supp. 1992)(emphasis supplied).

In Reyes v. State, 709 So. 2d 181 (Fla. 5th DCA 1998), the Fifth District held that victim injury points for sexual contact could not be scored where the defendant committed an attempted sexual battery on the victim by fondling her breast and making a sexually suggestive comment. In reaching this conclusion, the district court determined that contact points may only be imposed where the contact occurs 'in a sexual battery by union without penetration." Id. at 182. In using the term "union," the district court was referring to the statutory definition of the offense of sexual battery: "'Sexual battery' means oral, anal, or vaginal penetration by, or union with the sexual organ of another or the anal or vaginal penetration of another by any other object[.]" § 794.011(1)(h), **Fla. Stat. (1995).**

Although Reves was decided in the context of the sexual battery statute, the district court applied it in the instant case and found that it precluded the scoring of sexual contact points for the lewd acts Spioch committed on T.G.:

> Spioch further contends that the acts to which the victim testified, Spioch's fondling of the victim's penis through the victim's clothing, do not qualify for victim injury points. . . . In Reves v. State, 709 So. 2d 181 (Fla. 5th DCA 1998), the trial court assessed 18 points for victim injury, or sexual contact, based on the defendant's having fondled the female victim's breast during the commission of the attempted sexual battery. This court reversed the sentence holding that "contact" meant the union of the sexual organ of one person with the oral, anal or vaginal opening of another. Thus, this court held, in the absence of physical trauma, victim injury points are appropriately assessed only in cases involving sexual battery, either by penetration or union. Cf. Vural v. State, 717 So. 2d 65 (Fla. 3d DCA 1998), rev. denied, 733 So. 2d 591 (Fla. 1999). In the instant case, neither penetration nor union occurred, so the court incorrectly assessed the victim injury points.

Spioch v. State, 742 So. 2d 817, 817-818 (Fla. 5th DCA 1999).

Despite the Fifth District's reliance upon Vural, that case does not support the conclusion that sexual contact points are inappropriate here. On the contrary, the Vural court determined that contact similar to that at issue here was sexual contact that must be scored under the guidelines:

> Here, appellant forced the victim to handle and masturbate him. That is sexual contact and points must be assessed for that.

Vural, 707 So. 2d at 67. The Vural court found Reves inapplicable. 707 So. 2d at 67.

By limiting the scoring of sexual contact points to instances of union, the opinion below has the effect of precluding victim injury points for most violations of Section 800.04(1), Florida Statutes (1993), which prohibits the handling, fondling, or assaulting of any child under the age of sixteen in a lewd, lascivious, or indecent manner. Most of chapter 800 is devoted to prohibiting sex crimes which do not involve sexual battery and therefore most of the chapter describes acts which do not include the union of sexual organs. See, §§ 800.02, 800.03, 800.04(1), 800.04(2), 800.04(4), Fla. Stat. (1993). If the legislature only intended to assess sexual contact points when there is oral, anal, or vaginal union with the sexual organ of another, there would have been no reason for it to draft Section 921.001(8) to include all of chapter 800. Instead, if the legislature had intended to restrict the assessment of sexual contact points to acts of sexual battery, it could easily have restricted the assessment of such points to violations of Section 800.04(3), Florida Statutes (1993), which prohibits an act defined as sexual battery under Section 794.011(1) (h) upon any child under the age of sixteen.

It is a rule of statutory construction that the legislature does not intend to enact legislation that is purposeless or meaningless. Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996) (quoting Sharer v. Hotel Corp. of America, 144 So. 2d 813, 817 (Fla. 1962)). Accordingly, courts should avoid readings that would render part of a statute meaningless and, whenever

possible, should give full effect to all statutory provisions. Id. (quoting Forsythe v. Lonsboat Kev Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992)). Thus, courts must choose that interpretation of statutes and rules which renders their provisions meaningful. Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999)(quoting Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986)). The opinion under review violates these principles of statutory construction because it renders the statute ineffectual in prosecutions for lewd and lascivious fondling under Section 800.04(1).

The opinion also violates the settled principle that it is not a judicial function to add words to statutory language. See, National Airlines, Inc. v. Division of Employment Security of Florida Department of Commerce, 379 So. 2d 1033, 1035 (Fla. 3d DCA 1980); see also, Sarasota Herald-Tribune Co. v. Sarasota County, 632 So. 2d 606, 607 (Fla. 2d DCA 1993). The district court has effectively rewritten Section 921.001(8) to require a showing of union as a predicate to the scoring of sexual contact points. As a general rule, a term not expressly defined in the statute should be given its plain and ordinary meaning. Metropolitan Dade Co. v. Green, 596 So. 2d 458 (Fla. 1992); Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997); Smith v. U.S., 508 U.S. 223, 228 (1993). Given its plain meaning, the term "sexual contact" is broader than oral, anal, or vaginal union with the sexual organ of another. A reasonable person

would understand the term "sexual contact" to include the hand-to-penis contact that occurred in this case.

As this Court has recognized, the Florida Legislature "has established an unquestionably strong policy interest in protecting minors from harmful sexual conduct." Jones v. State, 640 So. 2d 1084, 1085 (Fla. 1994); J.A.S. v. State, 705 So. 2d 1381, 1385 (Fla. 1998). The legislature has commendably set out to enforce this policy by calling for victim injury points where there is sexual contact but no penetration. The award of these points recognizes that such contact, while not always causing physical injury, often inflicts great emotional and psychological trauma. The opinion in this case unreasonably limits the legislature's effort to fully punish those who prey upon children.

Recent case law has called into question the continuing validity of Reves, the decision which underlies Spioch. See, Kitts v. State, 24 Fla. L. Weekly D2144 (Fla. 5th DCA Sept. 17, 1999). Kitts was convicted of committing a lewd and lascivious act for kissing and fondling the victim's breasts. Id. The Fifth District affirmed the award of sexual contact points, finding that the holding in Reves "can be interpreted narrowly to say that it applies only to a sexual battery case." Kitts. The court found that "the legislature has clearly defined sexual conduct much more broadly than this court in Reves." Kitts. Judge Peterson, who authored Reves, dissented on the ground that Reves precluded the award of sexual contact points. Kitts, at

D2145. The Fifth District has not yet issued mandate in Kitts, and appears to be considering Kitt's motion for rehearing en banc. In a specially concurring opinion, one judge of the Fifth District has stated that, under Kitts, sexual contact points were properly scored for the defendant's act of rubbing the child victim's vagina through her clothing. See, Hush v. State, 751 So. 2d 718 (Fla. 5th DCA 2000)(Harris, J., concurring).

In March of this year, the Fourth District decided Altman v. State, 25 Fla. L. Weekly D662 (Fla. 4th DCA Mar. 15, 2000), in which Altman was convicted of three lewd assaults for kissing the child victim and one lewd act for rubbing his crotch against the victim's crotch and buttocks while both were clothed. Although the court did not reach the merits of the issue, it noted that under prior case law, points for sexual contact could be assessed more broadly than Id.es allows. For this proposition, the court cited Mackev v. State, 516 So. 2d 330 (Fla. 1st DCA 1987), which affirmed the award of sexual contact points for fondling the child victim "about the crotch," and Beaslev v. State, 503 So. 2d 1347, 1349 (Fla. 5th DCA 1987), aff'd, 518 So. 2d 917 (Fla. 1988), which affirmed the award of such points where the defendant opened the victim's legs and started to pull down her bathing suit and shorts.

This Court should disapprove Reves, quash Spioch, and hold that the award of sexual contact points is not limited to instances of oral, anal, or vaginal union with the sexual organ of another.

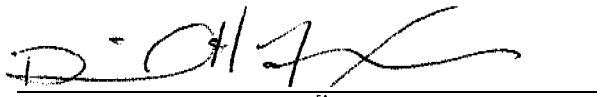
CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Honorable Court disapprove Reyes, quash Spioch, and approve Vural.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550

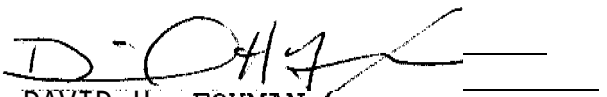


DAVID H. FOXMAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0059013
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this document is 12-point Courier New, a font that is not proportionally spaced.



DAVID H. FOXMAN
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been furnished by inter-office delivery to Susan A. Fagan, Esquire, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 25th day of April, 2000.

DAVID H. FOXMAN
ASSISTANT ATTORNEY GENERAL

Thomas Henry SPIOCH, III, Appellant,

v.

STATE of Florida, Appellee.

No. 97-2616.

District Court of Appeal of Florida, Fifth District.

Aug. 13, 1999.

Rehearing Denied Sept. 16, 1999.

Defendant was convicted in the Circuit Court, Brevard County, Charles M. Holcomb, J., on 23 counts of lewd and lascivious assault on a minor, and he appealed. The District Court of Appeal, Thompson, J., held that: (1) victim injury points could not be assessed absent evidence of sexual penetration or contact, and (2) counts for which adjudication was withheld should have been included in sentencing scoresheet.

Reversed and remanded.

1. Criminal Law ⇐1246

Victim injury points could be assessed based on sexual penetration or contact, even in absence of physical trauma, where sex offenses occurred after effective date of statute allowing for imposition of such points based on finding of sexual penetration or contact. West's F.S.A. § 921.001(8).

2. Criminal Law ⇐1246

Victim injury points could not be assessed against defendant in sentencing portion of prosecution for lewd and lascivious assault on a minor, absent evidence of sexual penetration or contact. West's F.S.A. § 921.001(7).

3. Criminal Law ⇐1246

"Sexual contact," for purposes of assessment of victim injury points, is union of the sexual organ of one person with the anal or vaginal opening of another. West's F.S.A. § 921.001(7).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐1244

Counts for which adjudication is withheld should be included in sentencing scoresheet. West's F.S.A. RCrP Rule 3.701.

5. Criminal Law ⇐1244

Counts of sex offenses for which adjudication was withheld should have been included in defendant's sentencing scoresheet. West's F.S.A. RCrP Rule 3.701.

James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

THOMPSON, J.

Thomas Henry Spioch, III, appeals his sentence, contending that the court erred in imposing victim injury points. The state cross-appeals the sentence of time served for two of the twenty-three convictions for lewd and lascivious assault on a minor. We reverse the sentence because the court erred in assessing victim injury points.

[1] First, we do not agree with Spioch that his sentences are controlled by *Karchesky v. State*, 691 So.2d 930 (Fla. 1992), which precluded the imposition of victim injury points in the absence of physical trauma. The testimony of both the victim and Spioch himself (who contended that the victim was the aggressor) established that the series of crimes began after the effective date of section 921.001(8), Florida Statutes (Supp.1992), which abrogated *Karchesky*, and which provided for the assessment of victim injury points in cases involving penetration or sexual "contact." *See also*, § 921.001(7), Fla. Stat. (1993).

[2, 3] Spioch further contends that the acts to which the victim testified, Spioch's fondling of the victim's penis through the

victim's clothing, do not qualify for victim injury points. We conclude that Spioch has adequately preserved this issue. See *Pinacle v. State, 654* So.2d 908 (Fla.1995). In *Reyes v.* State, 709 So.2d 181 (Fla. 5th DCA 1998), the trial court assessed 18 points for victim injury, or sexual contact, based on the defendant's having fondled the female victim's breast during the commission of the attempted sexual battery. This court reversed the sentence holding that "contact" meant the union of the sexual organ of one person with the oral, anal or vaginal opening of another. Thus, this court held, in the absence of physical trauma, victim injury points are appropriately assessed only in cases involving sexual battery, either by penetration or union. *Cf. Vural v. State, 717* So.2d *65* (Fla.App. 3d DCA 1998), *rev. denied,* 733 So.2d 591 (1999). In the instant case, neither penetration nor union *occurred,* so the court incorrectly assessed the victim injury points.

[4, 5] We do not agree with the state that the court erred in sentencing Spioch to time served for two of the twenty-three convictions. The permitted guidelines sentence was 27 years to life, and Spioch's cumulative sentence was 315 years, which is regarded as a life sentence, *see Alva rez v. State,* 358 So.2d 10 (Fla.1978). We do agree, however, that, counts for which adjudication is withheld should be included in the scoresheet. Rule 3.701 Florida Rules of Criminal Procedure defines a conviction as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended." On remand, in re-calculating Spioch's sentence, the trial court will include counts 22 and **23** on the scoresheet.

REVERSED and REMANDED

W. SHARI' and PETERSON, JJ., concur.

STATE of Florida, Appellant,

v.

A.B.M., Appellee.

No. 98-03526.

District Court of Appeal of Florida, Second District.

Aug. 13, 1999.

Petitioner sought sealing of criminal records. The Circuit Court, Hillsborough County, Chet A. Tharpe, J., granted petition, and state appealed. The District Court of Appeal, Fulmer, Acting C.J., held that petitioner, who failed to obtain certificate of eligibility from Department of Law Enforcement for one case, was not entitled to have records sealed for that case.

Affirmed in part; reversed in part

1. **Criminal Law** ⇨1226(2)

Petitioner, who failed to obtain certificate of' eligibility from Department of Law Enforcement, was not entitled to sealing of her nonjudicial criminal history records. West's F.S.A. § 943.059.

2. Criminal **Law** ⇨1226(2)

Obtaining certificate of eligibility from Department of Law Enforcement for sealing nonjudicial criminal history records is valid condition precedent to obtaining order sealing such records. West's F.S.A. § 943.059.

3. **Criminal Law** ⇨1226(2)

Provision, of' statute requiring petitioner to obtain certificate of eligibility from Department of Law Enforcement for scaling nonjudicial criminal history records, which gives court discretion to "order the sealing of a criminal history record