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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO, 96836

(FIFTH DCA CASE NO. 97-2616)

THOMAS HENRY SPIOCH, III,

Respondent.

______________________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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CERTIFICATE OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Thomas Spioch was convicted of twenty-three counts of lewd and lascivious assault on a minor. On appeal, Spioch argued in relevant part "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." Spioch v. State, 24 Fla. L. Wkly. D1896, D1897 (Fla. 5th DCA Aug. 13, 1999).

In an earlier case involving an attempted sexual battery, the district court had held that sexual contact points could not be assessed in the absence of penetration or union of the sexual organ of one person with the oral, anal, or vaginal opening of another. Applying that decision here, the court concluded that "neither penetration nor union occurred, so the court incorrectly assessed the victim injury points." Id.

The district court therefore reversed Spioch's sentence and remanded for resentencing. Id.

The State's motion for rehearing was denied September 16, 1999. On October 5, the State timely filed its notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

In remanding for resentencing, the district court found that sexual contact points should not have been scored for hand to penis contact. This holding directly conflicts with a decision of the Third District Court of Appeal, which held that sexual contact points should have been scored for such contact.

ARGUMENT

THE OPINION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court.

In the present case, the defendant was convicted of lewd and lascivious assault on a minor after the victim testified that the defendant had fondled the victim's penis through his clothing. The district court reversed the defendant's sentence, finding that victim injury points had been improperly scored for sexual contact. Spioch, 24 Fla. L. Wkly. at D1897.

This decision directly conflicts with Vural v. State, 717 So. 2d 65 (Fla. 3d DCA 1998), rev. denied, 733 So. 2d 591 (Fla. 1999). In Vural, the defendant "forced the victim to handle and masturbate him." Id. at 67. The court concluded that sexual contact points should have been assessed for such conduct. Id. Here, in contrast, the district court held that such points should *not* have been assessed for virtually identical conduct.

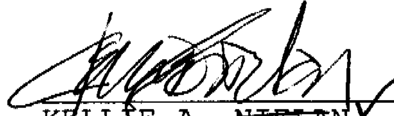
These two decisions reach contrary legal conclusions based on nearly identical facts. The decisions cannot be reconciled, and this Court should therefore exercise its discretion to resolve this conflict.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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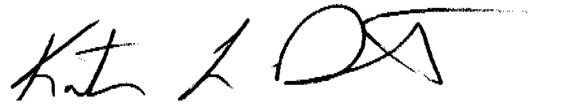
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by hand delivery to Susan A. Fagan, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 14th day of October, 1999.



Kristen L. Davenport
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. ________________

(FIFTH DCA CASE NO. 97-2616)

THOMAS HENRY SPIOCH, III,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S APPENDIX

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

THOMAS HENRY SPIOCH, III,
Appellant,

v. CASE NO. 97-2616

STATE OF FLORIDA,
Appellee.

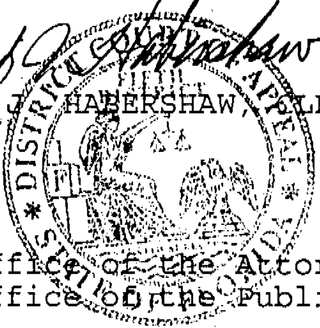
DATE: September 16, 1999

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR REHEARING, filed August 25, 1999, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

FRANK J. HABERSHAW, CLERK



cc: Office of the Attorney General, Daytona Beach
Office of the Public Defender, 7th JC

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT   JULY TERM 1999

THOMAS HENRY SPIOCH, III,

Appellant,

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

v.

CASE NO. 97-2616

L. CT. 93-18751 CFA

STATE OF FLORIDA.

Appellee.

Opinion filed August 13, 1999

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ATTORNEY GENERAL'S OFFICE
DAYTONA BEACH, FLORIDA

Appeal from the Circuit Court
for Brevard County,
Charles M. Holcomb, Judge.

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.

First, we do not agree with Spioch that his sentences are controlled by Karchesky v.

State, 591 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 921.011(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).

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 (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.

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 Alvarez 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

SHARP, W. and PETERSON, JJ., concur.

Time, Inc., 348 Mo. 1199, 1206, 159 S.W.2d 291,295 (1942).

Vassiliades v. Garfinckel's, Brooks Brothers, 492 A.2d 580, 587–88 (D.C.Ct.App.1985).

Channel 23 contends that the broadcast covered a matter of legitimate concern to the public. We agree that the subject of the broadcast-problems which some local residents had experienced with foreign plastic surgery-is a topic of legitimate public concern. However, while the topic of the broadcast was of legitimate public concern, the plaintiffs identity was not. See *Vassiliades*, 492 A.2d at 589 ("We thus find persuasive the distinction [plaintiff] draws between the private fact of her reconstructive surgery and the fact that plastic surgery is a matter of legitimate public interest."). We conclude that the plaintiff has stated a viable invasion of privacy claim, and that summary judgment should not have been entered in Channel 23's favor.

[2] We also reverse dismissal of the claims for breach of contract and promissory estoppel. These claims are alternatives for each other. *See Youngman v. Nevada Irrigation District*, 70 Cal.2d 240, 74 Cal.Rptr. 398, 449 P.2d 462, 468 (1969). The doctrine of promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice. See Restatement (Second) of Contracts § 90 (1981); *City of Cape Coral v. Water Services of America, Inc.*, 567 So.2d 510, 513 (Fla. 2d DCA 1990); *W.R. Grace & Co. v. Geodata Servs. Inc.*, 547 So.2d 919, 924 (Fla.1989); see *also Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 389 (Minn.1992) (holding that a reporter's breach of a promise of confidentiality to a source does not create a contract but is actionable under the doctrine of promissory estoppel).

The contract and promissory estoppel claims are before us after having been dismissed at the pleading stage. For present purposes we need only hold that plaintiff may plead the contract and promissory estoppel claims in the alternative. We remand for reinstatement of those claims as well.

[3] Plaintiff also asserted a claim for negligent infliction of emotional distress. The claim was properly dismissed. The source of the plaintiffs emotional distress was the disclosure of private facts, contrary to the ground rules under which the plaintiff agreed to be interviewed. It is not independently actionable under the heading of negligent infliction of emotional distress. *See Fridovich v. Fridovich*, 598 So.2d 65, 69–70 (Fla. 1992).

Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.

Erol VURAL, Appellant,

v.

The STATE of Florida, **Appellee**.

No, 97-2137.

District Court of Appeal of Florida, Third District.

July 8, 1998.

Rehearing Denied Oct. 1, 1998.

Defendant was convicted in the Circuit Court, Monroe County, Leonard Glick, J., of attempted sexual battery and battery, and he appealed. The District Court of Appeal, Dauksch, James C., Associate Judge, held that: (1) trial court had discretion to disallow testimony regarding victim's perjury on welfare application, which defendant claimed went to bias; (2) any error in disallowing such testimony was not reversible given great evidence against defendant; (3) testimony by other women was sufficient to show motive, common scheme and design; but (4) defendant's sentence could not reflect assessment of additional points for severe injury, where offense did not involve actual penetration.

Conviction affirmed, sentence vacated, remanded.

1. Witnesses 🔑367(1)

Trial court had discretion to disallow testimony regarding victim's perjury on welfare application, which defendant claimed went to bias, in prosecution of defendant for attempted sexual battery and battery.

2. Criminal Law 🔑1170.5(1)

Any error in trial court's disallowing testimony regarding victim's perjury on welfare application, which defendant claimed went to bias, was not reversible, in prosecution of defendant for attempted sexual battery and battery, where evidence against defendant was great, and attempt at impeachment would have been ineffective to cause different verdict.

3. Criminal Law 🔑371(12), 372(7)

Testimony offered against defendant convicted of attempted sexual battery and battery, by other women indicating that activities with others were quite similar as to time of day of occurrences, lack of witnesses in his offices, sexual touchings and kissing, and other relevant similarities, was admissible Williams evidence showing motive, common scheme and design.

4. **Assault and Battery 🔑100**

Defendant's sentence for attempted sexual battery could not reflect assessment of additional points for severe injury, where offense did not involve actual penetration. West's F.S.A. §§ 794.011, 921.0011(7).

Mel Black, Miami, for appellant.

Robert A. Buttcrworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., LEVY, J., and DAUKSCH, Associate Judge.

DAUKSCH, JAMES C., Associate Judge.

This is an appeal from convictions for attempted sexual battery and battery.

Appellant, a lawyer, made an after-hours appointment at his office with the victim to discuss her legal problem. After some minutes discussing the legal problem, appellant stood up, pulled the victim toward him, kissed her on the mouth and tried to place her hand on his groin. As she resisted, appellant exposed his penis and forced the victim to handle and stroke it. He then attempted to reach into her pants and touch her groin area. Finally, he tried to get his penis in her mouth. She was able to break away and leave.

[1, 2] Appellant raises various points in his appeal. First, he says he was denied the right to establish that the victim had a motive to lie. The purported motive involved her living with a man while claiming entitlement to welfare benefits and failing to disclose that fact on her welfare application. Appellant questioned the victim regarding this fact. The victim said the man "stayed" there but denied he lived there. Appellant asked the judge to enforce a subpoena served on the man but the judge refused. The judge said in his ruling

> . [F]rankly, the issue of whether or not he lived at the Clever home prior to their marriage seems to me to be pretty solid in everybody's mind that yes, he did even though she quibbled with you as far as the terminology;. .
>
> I mean, it's clear in this jury's mind she recognizes she faces prosecution for possible perjury by eliminating his name from the application for welfare and if you are trying to point out the issue that she is testifying or has some bias because she doesn't fear prosecution or she received some sort of a deal you established that. she signed the document. You have established that she did not tell the whole truth in the document and she has pretty well established that she understands what could happen. There has been no deal and she doesn't fear prosecution. .

It was within the sound discretion of the judge to disallow this testimony and we find no abuse of that discretion. However, even if error occurred, no reversible error occurred because the evidence against appellant was so great that this attempt at impeachment most certainly would have been ineffective to cause a different verdict.

[3] Next, he says improper Williams Rule evidence was introduced against him.

Williams v. State, 110 So.2d 654 (Fla.1959). Without going into the sordid details, the other women who testified about what he did to them offered classic Williams Rule evidence to show motive, common scheme and design. His activities with the others were quite similar as to time of day of the occurrences, lack of witnesses in his offices, sexual touchings and kissing, and other relevant similarities. No error occurred in admitting this evidence which refuted appellant's assertion that the victim consented to the affronts. To quote *Williams* directly this evidence was admissible ". because it demonstrated a plan or pattern followed by the accused in committing the type of crime laid in the indictment," and "[i]t was relevant to meet the anticipated defense of consent." 110 So.2d at 663.

Appellant's complaint about the recordation of his conversations with police investigators is without substance because the statute allows secret recording by policemen and their operatives. § 943.03(2)(c) Fla. Stat. 1995; *State v. Hershkowitz,* 714 So.2d 545 (Fla. 3d DCA 1998).

141 By cross-appeal the appellee asserts the sentencing judge erred in refusing to assess points for victim injury. Appellant was properly convicted of attempted sexual battery because he tried to force her to perform fellatio. The statute defines sexual battery as "oral Penetration by, or union with the sexual organ of another . " § 794.011 Fla. Stat. (1995). The sentencing statute requires that additional points be assessed against one convicted in a case involving sexual contact. § 921.0011(7) Fla. Stat. (1995). The statute says that if the offense involves actual penetration then "severe injury" points are assessed, but if only "sexual contact" occurs then "moderate injury" points are assessed, in a lesser number. Here, appellant forced the victim to handle and masturbate him. That is sexual contact and Points must be assessed for that. We have considered *Reyes v. State,* 709 So.2d 181 (Fla. 5th DCA 1998), and do not consider it to affect this decision. We must vacate the sentence and remand for a proper sentence.

Conviction affirmed, sentence vacated, remanded.

McARTHUR DAIRY, INC., Appellant,

v.

Fernando RODRIGUEZ, Appellee.

No, 97-399.

District Court of Appeal of Florida,
Third District.

July 8, 1998.

Rehearing Denied Sept. 2, 1998.

Debtor's Principal stockholder filed motion to dismiss and enter satisfaction of consent judgment obtained against him by debtor's unsecured creditor. The Circuit Court, Dade County, Gisela Cardonne, J., granted motion, and unsecured creditor appealed. The District Court of Appeal, Levy, J., held that general release of claims against principal stockholder, executed in bankruptcy proceedings by unsecured creditors committee, did not vacate previous consent judgment.

Reversed.

Bankruptcy ⚷3032.1

General release executed, as part of settlement in Chapter 11 case, by unsecured creditors committee, releasing any "claims" against debtor's principal stockholder, did not vacate previous consent judgment obtained by individual unsecured creditor against stockholder as debtor's guarantor.

Jay M. Gamberg and Adrienne Maidenbaum, Hollywood, for appellant.

Markus & Winter and Stuart A. Markus and Robert O. Schwarz, Miami, for appellee.