

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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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 REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Although the provisions of the sentencing guidelines are to be strictly construed, the principle of strict construction is secondary to the rule that the intent of the legislature must be given effect. The district court's definition of "sexual contact" is inconsistent with the plain meaning of the term and has the effect of contravening legislative intent. The fact that Spioch fondled T.G.'s penis through clothing, rather than directly touching the skin, does not preclude the scoring of sexual contact points. This was still "sexual contact" and Spioch was properly assessed points on his sentencing guidelines scoresheet for subjecting the child victim to harmful sexual conduct.

ARGUMENT

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

Since the initial brief was filed, the Fifth District Court of Appeal has receded from the opinion under review, Spioch v. State, 742 So. 2d 817 (Fla. 5th DCA 1999), and the opinion on which Spioch was based, Reves v. State, 709 So. 2d 181 (Fla. 5th DCA 1998). See, Kitts v. State, 25 Fla. L. Weekly D1102 (Fla. 5th DCA May 5, 2000) (*en banc*). In his answer brief on the merits, Spioch argues that Kitts was wrongly decided and that Spioch and Reves are correct. The crux of his argument is that Section 921.001(8), Florida Statutes (Supp. 1992) does not define the term "sexual contact," and therefore the phrase must be strictly construed in Spioch's favor. (AB 3-4).

The State acknowledges that the principle of strict construction applies to the sentencing guidelines. Flowers v. State, 586 So. 2d 1058, 1059 (Fla. 1991). However, statutes should not be construed so strictly as to emasculate the statute and defeat the obvious intent of the legislature. Sneed v. State, 736 So. 2d 1274, 1275-1276 (Fla. 4th DCA 1999); St. Surin v. State, 745 So. 2d 514, 515 (Fla. 3d DCA 1999). The principle of strict construction is subordinate to the rule that the legislative intent must be given effect. St. Surin, 745 So. 2d at 515. Moreover, the Statute should not be interpreted so narrowly as to foreclose its application to cases which, by the

plain and ordinary meaning of its words, it would apply. Sneed, 736 So. 2d at 1276 (quoting S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344, 354 (1943)). Yet, the definition which the district court has accorded "sexual contact" forecloses the application of Section 921.001(8) to fondling prosecutions under Section 800.04(1), Florida Statutes (1993), notwithstanding the fact that 921.001(8) expressly applies to prosecutions under Chapter 800.

The absence of a statutory definition does not support the district court's interpretation of the term "sexual contact." When words of common usage are used in a statute without a statutory definition, the words should be construed in their plain and ordinary sense. Sieniarecki v. State, 25 Fla. L. Weekly 5323, S325 (Fla. Apr. 27, 2000). If necessary, the plain and ordinary meaning may be ascertained by reference to a dictionary. Id. (quoting Green v. State, 604 So. 2d 471, 473 (Fla. 1992)). The word "sexual" means "of, characteristic of, or affecting sex, the sexes, the organs of sex and their functions, or sex instincts or drives." Webster's New Universal Unabridged Dictionary 1664 (Deluxe 2d ed. 1983). "Contact" means "the act of touching or meeting" or "the state of being in touch or association (with)[.]" Id. at 393. Given its plain and ordinary meaning, the term "sexual contact" applies to Spioch's act of fondling T.G.'s penis. The district court's interpretation of the term as the union of the sexual organ of one person with the oral, anal, or vaginal opening of another is an unnatural and far

too restrictive definition.

Spioch suggests that the conflict case, Vural v. State, 717 So. 2d 65 (Fla. 3d DCA 1998), rev. denied, 733 So. 2d 591 (Fla. 1999), is distinguishable because that case involved not only fondling, but also an attempt to force the victim to perform fellatio. However, the scoring of sexual contact points in Vural was based on the fondling, not on the attempted fellatio:

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.**

Id. at 67 (emphasis supplied).

Spioch also suggests that sexual contact points are not appropriate in this case because his "actions did not involve any skin to skin contact between himself and T.G.[.]" (AB 4-5). The conflict in this case arises from the Fifth District's restrictive definition of "sexual contact," not from the presence or absence of clothing between Spioch's hand and T.G.'s penis. Applying the lower court's definition of "sexual contact" would foreclose the scoring of points for any fondling prosecution, including those with skin-to-skin contact.

The fact that T.G. was clothed does not preclude a finding of sexual contact. Analogous support can be found in the battery context. Battery occurs, *inter alia*, when the defendant "[a]ctually and intentionally touches or strikes another person against the will of the other[.]" § 784.03(1)(a)1, Fla. Stat. (1999). To commit a battery, it is not necessary that the defendant touch the skin of the victim so long as he or she touches something intimately connected with the victim's body, such as clothing or an item held by the victim. Malczewski v. State, 444 So. 2d 1096 (Fla. 2d DCA), appeal dismissed, 453 So. 2d 44 (Fla. 1984); Clark v. State, 746 So. 2d 1237, 1239-1240 (Fla. 1st DCA 1999); Nash v. State, 25 Fla. L. Weekly D522 (Fla. 4th DCA Mar. 1, 2000); Williamson v. State, 510 So. 2d 335, 338 (Fla. 4th DCA 1987), disapproved on other grounds, State v. Sanborn, 533 So. 2d 1169 (Fla. 1988).

Elsewhere in the Florida Statutes, the legislature has defined sexual conduct or abuse to make it irrelevant that the contact was with the clothing instead of the skin. For instance, "sexual conduct" is defined to include "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast. . ." § 827.071(1)(g), Fla. Stat. (1999); § 847.001(11), Fla. Stat. (1999); see also, Kitts, 25 Fla. L. Weekly D1102 (noting that Section 39.01(63)(d), Florida Statutes (1997) defines "sexual abuse of a child," in relevant part, as the "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.").

Adopting the view that there was no sexual contact where the genitals were covered would lead to unreasonable results. For instance, if one handles a penis covered with a condom or if one uses a washcloth to fondle the genitals of another, that is "sexual contact" within the plain meaning of that term, even though no skin-to-skin contact occurs. The bottom line is that Spioch fondled T.G.'s penis. Even through clothing, this was "sexual contact" and Spioch deserves to have victim injury points scored against him for subjecting the child victim to this harmful sexual conduct.

CONCLUSION


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

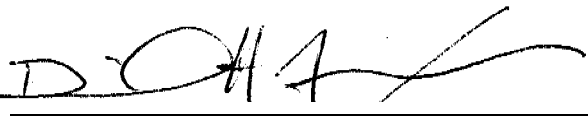
Respectfully submitted,

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


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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 5th day of June, 2000.



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