

IN The SUPREME COURT OF FLORIDA

047
FILED
THOMAS D. HALL
MAY 30 2000

CLERK, SUPREME COURT
BY _____

JIM L. WADE,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT

CASE NO.: SC00-214

LOWER TRIBUNAL NO.: 2098-00408

PETITIONERS BRIEF ON MERITS

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL, 2ND DISTRICT
STATE OF FLORIDA

JIM L. WADE / H04015

PRO-SE

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TABLE OF CITATIONS

CASES:

MCKENDRY V. STATE (2)(4)(6)
641 SO. 2D 45 (FLA. 1994)

STATE V. COGSWELL (5)(6)
521 SO. 2D 1081 (FLA. 1988)

UNITED STATES V. BATCHELDER (5)(6)
442 U.S. 114, 99 S. CT. 2198, 60 L. ED 2ND 755 (1979)

ADAMS V. CULVER, (5)
111 SO. 2D 665 (FLA. 1959)

STATUTES:

SECTION 847.0135 (2)(5)(7)

SECTION 821.071(5) (2)(5)

PELIMINARY STATEMENT

IN THIS BRIEF THE PETITIONER JIM L. WADE, WILL BE REFERRED TO AS THE DEFENDANT. THE RESPONDENT WILL BE REFERRED TO AS THE STATE.

STATEMENT OF CASE AND FACTS

IN THE 10TH DISTRICT CIRCUIT COURT OF POLK COUNTY, FLORIDA, THE STATE CHARGED THE DEFENDANT WITH POSSESSION OF CHILD PORNOGRAPHY §27.071 (5) AND POSSESSION WITH INTENT TO PROMOTE §27.071 (4).

AT THE CLOSE OF THE STATES CASE DEFENDANT MOVED TO DISMISS COUNTS 1 THROUGH 57 OF THE INFORMATION WHICH ALL INVOLVED THE USE OF A COMPUTER TO POSSESS CHILD PORNOGRAPHY.

THE MOTION WAS DENIED BY THE CIRCUIT COURT. THE TRIAL COURT ERRED IN NOT DISMISSING THE CHARGES, WHICH WERE BASED ON COMPUTER GRAPHIC FILES. WADE WAS FOUND GUILTY OF ALL CHARGES AND SENTENCED DECEMBER 22, 1997 TO STATE PRISON. ON JANUARY 5, 1998 AN APPEAL WAS FILED WITH THE 2^D. DISTRICT COURT OF APPEALS. ON JANUARY 12, 2000, THE APPEALS COURT GAVE A RULING ON DEFENDANTS APPEAL. TWO COUNTS OF POSSESSION WITH INTENT TO PROMOTE WAS OVERTURNED AND THE BALANCE OF THE CHARGES WAS UPHOLD.

THIS WAS IN DIRECT CONFLICT OF THIS COURTS DECISION IN McKendry v. STATE 641 SO. 2^D 45 (FLA. 1994).

ON JANUARY 24, 2000 A NOTICE TO INVOKE DISCRETIONARY JURISDICTION WAS

Filed with The 2d. DISTRICT COURT OF APPEALS. ON JANUARY 28, 2000 A JURISDICTIONAL BRIEF WAS FILED WITH THE FLORIDA SUPREME COURT. ON MAY 3, 2000 AN ORDER ACCEPTING JURISDICTION WAS handed down by This court.

Summary OF The ARGUMENT

The APPELLATE COURT SAID The PROSECUTOR HAS discretion TO determine which STATUTE TO CHARGE WITH.

MORE PROPERLY Relied McKENDRY V. STATE, 641 SO.2d 45 (FLA. 1994) which COVERS SPECIFIC VERSUS GENERAL STATUTES.

SO, APPELLATE COURT IS IN EXPRESS DIRECT CONFLICT WITH THIS COURTS OPINION AND McKendry, ON THE SAME POINTS OF LAW.

ARGUMENT POINT ONE

The APPELLATE COURT REJECTED THE DEFENDANT'S CLAIM THAT THE DEFENDANT SHOULD HAVE BEEN CHARGED UNDER Sec. 847.0135 FLA. STAT. (1995) WHICH DEALS SPECIFICALLY WITH COMPUTERS AND CHILD PORNOGRAPHY RATHER THAN Sec. 827.075 (5) FLA. STAT. WHICH PROHIBITS CHILD PORNOGRAPHY IN GENERAL.

IN REACHING ITS CONCLUSION THE APPELLATE COURT RELIED ON STATE V. COGSWELL, 521 So. 2d. 1081 (FLA. 1981) TO DETERMINE THAT THE STATE ATTORNEY HAD THE OPTION TO DECIDE UNDER WHICH STATUTE TO CHARGE THE DEFENDANT.

IN THE STATES BRIEF TO THIS COURT, THE STATE HAS ALSO CITED UNITED STATES V. BATCHELDER 442 U.S. 114, 99 S. CT. 2198, 60 L. ED. 2ND 755 (1979) IN WHICH TO BASE THEIR CLAIM.

THE APPEALS COURTS DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURTS DECISION IN McKendry V. STATE, 641 So. 2d 45 (FLA. 1994) WHICH HOLDS THAT A SPECIFIC STATUTE ALWAYS CONTROLS OVER A STATUTE COVERING THE SAME SUBJECT IN MORE GENERAL TERMS, ID. AT 46; SEE ALSO ADAMS V. CULVER, 111 So. 2d 665 (FLA. 1959).

A CLOSE EXAMINATION OF COGSWELL AND BATCHELDER DEALS WITH SENTENCING, WHEN TWO CHARGES ARE IDENTICAL DOES THE PROSECUTOR HAVE THE DISCRETION TO SENTENCE YOU UNDER ONE OR THE OTHER. IN BATCHELDER THE COURT CLEARLY STATES WHEN YOU HAVE OVERLAPPING CRIMINAL PROVISIONS AND ONE CLEARLY DEFINES THE CONDUCT PROHIBITED AND PUNISHMENT AUTHORIZED THAT IS THE PROVISION USED TO FALL UNDER THE DUE PROCESS CLAUSE.

McKENDRY IS MORE ON POINT WITH THE INSTANT CASE BECAUSE IT DEALS WITH STATUTES THAT COVER THE SAME SUBJECT MATTER, WHEN ONE STATUTE DEALS SPECIFICALLY WITH THE SUBJECT MATTER WHILE THE OTHER DEALS MORE GENERALLY WITH THE SUBJECT MATTER. WE ARE CLEARLY DEALING WITH THE SUBJECT MATTER AND NOT SENTENCING AS THE STATE HAS ~~NOTED~~ IN THEIR CASE.

THE APPELLATE COURTS RELIANCE ON COGSWELL HAS CREATED AN EXPRESS AND DIRECT CONFLICT ON THE SAME POINT OF LAW WITH THIS COURT'S DECISION IN McKENDRY.

CONCLUSION

THE JUDGEMENT OF THE CIRCUIT COURT SHOULD BE REVERSED. THE CIRCUIT COURT SHOULD BE ORDERED TO CHARGE THE DEFENDANT UNDER THE SPECIFIC STATUTE 847.0135.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing

BRIEF on The MERITS has been furnished via

U.S. Mail on this 25th day of MAY, 2000, to

the office of CLERK OF COURTS / FLORIDA SUPREME COURT /

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