IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC03-511 &SC03-512 (CONSOLIDATED)

(Fourth District Court of Appeal Case No. 4D02-3457)

STATE OF FLORIDA

Appellant

vs.

BRUNEL HOSTY

Appellee

ON DIRECT APPEAL FROM
THE FOURTH DISTRICT COURT OF APPEAL

APPELLEE'S ANSWER BRIEF ON THE MERITS

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

DONALD J. CANNAROZZI
Assistant Public Defender
Florida Bar No. 776830
Broward County Courthouse
Suite 3872, 3d Floor, N. Wing
(954) 831-8808
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page(s)**

Rules and Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's statement of the case and facts. Any additions will be quoted in full in the body of the argument.

SUMMARY OF ARGUMENT

Point I. The trial court did not have to consider whether the alleged victim's hearsay statements were reliable in an effort to avoid passing on the constitutionality of the hearsay statute. This Court's decision in Conner v. State, 748 So. 2d 950 (Fla. 1999) cert. denied, 530 U.S. 1262 (2000), was not decided on the facts, but rather on a legal analysis as to the facial constitutionality of the statute. The statute in question contains one large class of people broken down into two distinct but inseparable subcategories: elderly people and disabled adults. This Court has already decided this issue as it relates to elderly people. The second subgroup, disabled adults, need not be treated differently.

Furthermore, this issue is not properly before this Court. At the trial level, the state requested the trial court to find the statute unconstitutional so that this Court could review the constitutionality of the statute as it pertains to disabled adults. What the Appellant is now claiming as error is what the state specifically requested the trial court to do. It is improper to raise this issue for the first time on appeal.

Point II. In Conner, this Court did not engage in a severability analysis. If this Court determined that severing a portion of the statute would render it constitutional, this Court would have done so in Conner. Instead, this Court struck down the entire statute as it relates to elderly people. The lower courts did not err in failing to decide

whether portions of the statute could be severed because the lower courts were simply abiding by this Court's precedent in Conner.

Point III. In Conner, this Court analyzed four factors which compelled a finding that the statute was unconstitutional as applied to elderly people. The hearsay statute does not separate elderly people from disabled adults. The statute consistently refers to both groups as one class of people. There is no logical or legal reason for this Court to find the statute unconstitutional as it applies to elderly people and to find the statute constitutional as it applies to disabled adults. Therefore, this Court's analysis of the four factors in Conner apply with equal force to disabled adults.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT NEED TO CONSIDER THE RELIABILITY OF ALLEGED VICTIM'S HEARSAY STATEMENTS WHERE THE APPELLEE'S CLAIM WAS THAT THE STATUTE WAS FACIALLY UNCONSTITUTIONAL.

In 1995, the Florida Legislature decided to add another exception to the hearsay rule. §90.804(24), Fla. Stat. (1995). The newly created exception deals with two classes of people: elderly people and disabled adults. In creating this exception, the legislature bound together these two classes of people together for purposes of the hearsay exception. The statute never individually addresses the two classes of people. They are consistently referred to as a single unit: "elderly person or disabled adult." Borrowing the term from the infamous "Dred Scott" decision[1], the Legislature created two classes of individuals which are "separate but equal" in the eyes of the newly created exception.

In Conner v. State, 748 So. 2d 950 (Fla. 1999), cert. denied, 530 U.S. 1262 (2000), this Court unanimously decided that the exception as it applied to elderly people was unconstitutional because it violated the state and federal constitutional right guaranteeing confrontation of witnesses. In a footnote, this Court declined to reach

[1]Scott v. Sanford, 60 U.S. 393 (1856).

the constitutionality of the statue as it applied to disabled adults because the issue had not been "squarely presented" in Conner's case. Id. n.11. The case at bar presents this Court with a case involving a disabled adult, and nothing in Conner suggests that this Court should now reach a different result.

In order to prevail, the Appellant must show that disabled adults should be treated differently from elderly persons in the context of the statute. In its brief, the Appellant advances numerous arguments. However, none adequately explains why the result in this case should be different from the result in Conner.

The Appellant first argues that the trial court erred because it did not allow the state to produce evidence that the alleged victim's hearsay statements were reliable. The Appellant postulates that without this finding, the trial court unnecessarily decided that the statute was unconstitutional. The Appellant cites three cases for the proposition that courts should not unnecessarily decide constitutional issues. State v. Efthimiadis, 690 So. 2d 1320 (Fla. 4th DCA 1997)(holding that section 327.02(37), Florida Statutes (1994), which deals with the jurisdiction of the state to regulate the marginal sea and high seas, is constitutional); Victer v. State, 174 So. 2d 544 (Fla. 1965)(holding that section 552.101, Florida Statutes, which deals with the possession of explosives without a license, is constitutional); and Buckhalt v. McGhee, 632 So. 2d 120 (Fla. 1st DCA 1994)(holding that section 61.13(7), Florida Statutes (1993),

which provides for a "best interest test" in child custody contests, is constitutional). While these cases do stand for the axiom that courts should not unnecessarily decide constitutional issues, they do nothing to support the Appellant's argument that the trial court erred in finding the hearsay statute unconstitutional without first allowing the state to show whether the alleged victim's hearsay statements were reliable.

First, unlike the above-cited cases, section 90.803(24) brings into question whether the legislature unconstitutionally abridged the basic constitutional right of an accused to confront witnesses. This statutes curtails a basic right guaranteed by the federal and state constitutions. None of the cases cited by the Appellant deal with a statute which diminishes a basic constitutional right.

Second, this case is unique because this Court has already struck down the statute as it applies to the disabled adult's sister class: elderly people. Nothing in Conner suggests there should be a different result when dealing with disabled adults. In Conner, this Court briefly stated the facts in two short paragraphs and then did an extensive analysis as to why the statute was facially unconstitutional. This Court never held that a finding as to whether the alleged victim's hearsay statements were reliable is a condition precedent to a ruling on the facial constitutionality of the statute. The district court below also recognized the fallacy of the Appellant's position by holding:

> The state argues that the trial court departed from the

> essential requirements of law in denying the state an opportunity to lay a proper factual basis in this case. However, there was no need to establish a factual basis for the application of the statute in this case, since the challenge to the statute was that it was facially unconstitutional. Contrary to the state's contention, Conner was decided on the claim that the statue was facially violative of a constitutional right, not on the facts of that case.

State v. Hosty, 835 So. 2d 1202, 1205 (Fla. 4th DCA 2003).

Also, the Appellant advances an argument that the State specifically argued against in the trial court. The State requested the trial court to hear testimony as to the reliability of the alleged victim's hearsay because the state felt it was necessary for appellate review, not because the state wanted the trial court to avoid passing on the constitutionality of the statute. On the contrary, the state specifically sought to have the trial court declare the statute unconstitutional to allow for review in this Court. In the trial court the prosecutor stated:

> There are so many issues to show reliability in this case that I think all the facts have to be brought out before Your Honor can make a ruling. And at that time **we want to declare it unconstitutional.** Then it can be brought up to the Supreme Court where they can specifically review this case and the supreme court review (sic) this statute and see whether they think it's unconstitutional. (Emphasis added.) (State's appendix, exhibit 5, p. 16.)

The Appellant now claims an error to which the state did not object in the trial court. It is well settled law that it is improper to raise for the first time on appeal an

issue which was not objected to below. Davis v. State, 661 So. 2d 1193 (Fla. 1995). Because the state unequivocally requested that the trial court find the statue unconstitutional, to now argue that the trial court erred by failing to avoid passing on the constitutional issue is not only contrary to established precedent, it defies logic.

The Appellant next cites to Judge Cope's dissent in State v. Brocca, 28 Fla. L. Weekly D968 (Fla. 3d DCA Apr. 16, 2003), to support its argument that the Fourth District Court of Appeal "erroneously overlooked their duty to 'construe [section 90.803(24)] as to cause it to be constitutional if possible to do so." (Citation omitted, Appellant's brief p. 10-11.) Judge Cope's dissent is defective because it is based on false premises. In his dissent, Judge Cope states Hosty conflicts with Felder v. State, 767 So. 2d 1267 (Fla. 3d DCA 2000). Judge Cope mistakenly believes that Felder holds that if the declarant testifies at trial, there can be no Confrontation Clause objection. The one paragraph *per curiam* Felder decision does not indicate with what Felder was charged, what the hearsay statements were, under what circumstances the hearsay was admitted, or who testified to the hearsay statements. All one can glean from the cryptic Felder decision is that some type of hearsay was admitted at trial, that Felder was guilty beyond and to the exclusion of any reasonable doubt, and the error in admitting the hearsay was harmless. Felder does not say that a hearsay statute passes constitutional muster as long as the declarant testifies at trial. To state that

Hosty conflicts with Felder is reading something into Felder which simply does not exist.

Judge Cope also has a skewed reading of Conner. Judge Cope believes that this Court decided Conner based on the specific facts of that case, the critical fact being that the alleged elderly victim was unavailable to testify at trial. Judge Cope somehow interprets Conner to say that this Court would have reached a contrary result had Conner's alleged victim been available to testify. Nothing in Conner supports this assertion. If this Court meant to decide Conner on the facts presented in that case, this Court would have indicated such an intention by stating that the statute was unconstitutional as applied only to the facts of that case.

This Court has recognized that it should resolve doubts as to the validity of a statute in favor of its constitutionality. State v. Salder, 630 So. 2d 1072 (Fla. 1994). This Court has also recognized that whenever possible it will construe a statute so as not to conflict with the constitution. State v. Globe Communications Corporation, 648 So. 2d 110 (Fla. 1994). Being well aware of its own precedent, the Conner Court could not reconcile any part of section 90.803 (24) with the federal and state constitutions.

POINT II

THE LOWER COURT DID NOT ERR IN FAILING TO CONDUCT A

SEVERABILITY ANALYSIS WHERE THIS COURT ALREADY HELD THE STATUTE TO BE UNCONSTITUTIONAL AS APPLIED TO ELDERLY PEOPLE.

If this Court declared section 90.803(24) unconstitutional solely because the alleged victim was unavailable to testify, it would have severed section 90.803(2)(b), which deals with an unavailable witness, from the rest of the statute. As noted by the Appellant, the judiciary is obligated to strike only those portions of a statute which are unconstitutional. Ray v. Mortham, 742 So.2d 1276 (Fla. 1999). However, this Court did not mention severability in Conner. This leads to the inescapable conclusion that this Court found the entire statute to be facially unconstitutional as it relates to elderly people and did not decide Conner based solely on the facts of that case.

The Appellant also takes a completely irrational position on the severability issue. The Appellant argues that the "lower courts also erred in this case because they did not consider whether a portion of section 90.803(24) could be severed to preserve the validity of the statute." (Appellant's initial brief, p. 11.) If the lower courts erred in not severing a portion of the statue, it then follows that this Court also erred when it declared the statute facially unconstitutional in Conner without addressing the issue of severability. However, the Appellant neither indicates it believes that Conner was incorrectly decided nor makes any argument that this Court should reverse its decision in Conner. There are only two ways of reconciling this glaring inconsistency: reverse

Conner, or concede that this Court struck down section 90.803(24) because it was facially unconstitutional and not based solely on the specific facts presented in that case. Neither the Appellant, nor the Appellee, nor the Fourth District Court of Appeal, nor Judge Cope suggest that Conner was wrongly decided. This Court decided the statute was constitutionally infirm, regardless of whether the declarant is available or unavailable to testify. To argue otherwise is to maintain a fallacious and legally unsound position.

POINT III

THE LOWER COURTS CORRECTLY ANALYZED THE DISABLED ADULT PORTION OF THE HEARSAY STATUTE IN CONFORMANCE WITH THIS COURT'S OPINION IN CONNER.

The Fourth District's opinion correctly recognized that the provision for disabled adults suffers from the same constitutional shortcomings as the provision dealing with elderly people. In Conner, this Court compared the elderly person hearsay exception to the child hearsay exception found in section 90.803(23), which this Court held to pass constitutional muster in State v. Townsend, 635 So. 2d 949 (Fla. 1994). This Court stated:

> The most obvious difference between the hearsay exceptions in section 90.803(23) and (24) is that the exceptions apply to different victim declarants. While the hearsay exception for child declarants applies only to statements made by children "with a physical, mental, emotional, or developmental age of

> 11 or less,; section 90.803(23)(q), the hearsay exception for elderly adults applies to a much broader class of adult declarants. In fact, any adult over the age of sixty potentially qualifies as an "elderly person" under this definition.

Conner, 748 So. 2d at 958. In making this comparison, this Court did not resort to any empirical data to prove that there are more children than elderly persons. This Court simply noted that section 90.803(24) encompasses a potentially broader class of people than the class of children included in 90.803(23).

Using this comparison, the Fourth District correctly noted that the disabled adult exception:

> applies to a "broad class" of adult declarants. (Citation omitted.) Section 825.101(4) includes in the definition of "disabled adult" any person over 18 "who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living." This class is broader than the class of declarants under section 90.803(23) that the court approved in Townsend - children "with a physical, mental, emotional, or developmental age of 11 or less."

Hosty, 835 So. 2d at 1204

In its comparison, the Fourth District Court of Appeal articulated the first reason why Conner should apply to the disabled adult exception. As this Court did in Conner, the district court examined the potential class of people affected by the newly created hearsay exception. Obviously, the broad definition of a "disabled

person" would include a multitude of people. The class would include, for example, a person with a severed hand, a person with a bad heart, a person who is blind or deaf, a person with a severe eating disorder, and a person with schizophrenia. The list of ailments and handicaps that could restrict a person's ability to perform the normal activities of daily living is endless.

In a vain attempt to argue against the obvious, the Appellant included a copy of the 2000 census in its appendix. In its brief, the Assistant Attorney General includes a personal statistical methodology for deriving the number of children under age 11. (Appellant's initial brief, p. 15, n.6.) It is "highly improper for counsel to insert in their brief[s] matters and things which are not a part of the trial record and which have not been brought to the attention of the trial court for its consideration." Florida Livestock Board v. Hygrade Food Products Corporation, 141 So. 2d 6 (Fla. 1st DCA 1962), see also Pedroni v. Pedroni, 788 So. 2d 1138 (Fla. 5th DCA 2001). Accordingly, the Appellee requests this Honorable Court to strike the census from the Appellant's appendix because it is completely unauthorized by this Court and rule 9.220, Florida Rules of Appellate Procedure. Reza v. Ultra Brake, Inc., 637 So. 2d 984 (Fla. 1st DCA 1994)(court strikes appendices of answer and reply briefs because they contain materials not part of the record on appeal.)

Even if this Court does not strike the census from the Appellant's appendix, the

entire argument based on the census is completely useless because nothing in the census indicates the number of "disabled people" as that term is defined in section 825.101(4). Neither this Court, nor the Fourth District Court of Appeal, nor the trial court considered the 2000 census in determining that section 90.803 (24) was unconstitutional. It is improper for the Appellant to include the census in its appendix, and the entire argument based on the census, complete with personal formulas for deciphering the empirical data, only detracts from a legal analysis as to whether the statute is constitutional.

Another factor this Court considered in declaring the elderly person exception unconstitutional is that unlike the child hearsay statute, the elderly abuse statute "would be broadly applicable to a wide variety of crimes and is not restricted to the elder abuse context." Conner, 748 So.2d at 958. In 90.803(24), the legislature grouped elderly people and disabled persons as one entity. The statute reads in pertinent part:

> . . .any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant **elderly person or disabled adult**. . .

§ 90.803(24)(a), Fla. Stat. (1995).

The crimes that trigger the hearsay exception as it relates to elderly people are exactly the same crimes that would permit hearsay in the context of a disabled adult.

The district court in Hosty recognized this identical treatment. While any act of violence against an elderly person or disabled adult would open the door to section 90.803 (24) hearsay, only acts dealing with child abuse trigger the hearsay exception in section 90.803(23). Because the legislature treated elderly people and disabled people exactly the same, it is impossible to find a crime that would invoke the hearsay exception as it applies to an elderly person but not invoke the statute as it relates to a disabled person.

The Appellant does not logically explain why this Court should treat the crimes that trigger the hearsay statute as it relates to an elderly person different from disabled adults. Instead, the Appellant argues that the district court "overlooks the fact that a close review of section 90.803(23) and section 90.803(24) reveals that the disabled adult hearsay exception has a scope nearly identical to that of the child victim hearsay exception." (Appellant's initial brief, p. 19.) Because the statute draws no distinction between elderly people and disabled adults, this Court has already implicitly decided that the scope of the disabled adult hearsay exception is broader than the child hearsay exception. What the Appellant overlooks is that in order to find fault with the district court's opinion, the Appellant must also find fault with this Court's opinion in Conner. The legislature sought to treat elderly people and disabled people exactly the same for purposes of the statute. The district court recognized this obvious fact in Hosty. The

Appellant has offered no reason why the two groups of people should be treated differently.

The Appellant next argues that "the scope of the disabled adult hearsay exception in section 90.803(24) is contrary to well-established federal law." (Appellant's initial brief, p. 20.) This argument refers to Federal Rule of Evidence 807, which is the "residual," "catch-all" or "wide-open" exception to the hearsay rule. The Appellant's argument is utterly spurious because this type of exception was considered but specifically rejected in Florida. As stated by Professor Erhardt:

> Although such an exception was included in the early drafts of the Code, it was felt that since one of the most important purposes in codifying the law of evidence was to provide certainty and clarity, that purpose would be defeated by the inclusion of a catch all exception. There was a feeling that if hearsay exceptions were to be listed, they all should be listed. If a need developed for an additional exception the legislature could amend the Code and provide for it.

Charles W. Erhardt, Florida Evidence § 803.25, at 825 (2001 ed.)

Yet another factor this Court considered in striking down the elderly person exception was that this Court was "unable to formulate a list of permissible considerations that would ensure the reliability of a hearsay statement made by an elderly adult to the extent that 'adversarial testing would add little to its reliability.'"(Citation omitted.) Conner, 748 So. 2d at 959. As the district court

recognized, "part of the problem comes from the breadth of the definition of "disabled adult." Hosty, 835 So. 2d at 1294. The Appellee can fill several dozen pages with types of people who qualify as a "disabled adult" under the definition found in section 825.101(4). Almost any illness can restrict the person's ability to perform the normal activities of daily living. No court could devise a comprehensive list of factors which would cover disabilities which would range from severe Down Syndrome, to anorexia, to blindness, to deafness, to paralysis etc. . . Further, people with certain types of disabilities, for example, blindness, deafness, and mental retardation, call into question the disabled person's ability to perceive the events to which he or she is testifying. The Confrontation Clause would demand that the testimony of a person with such a disability be subject to in-court adversarial testing. This Court recognized this problem in Conner, and the Fourth District Court of Appeal similarly recognized the statute's flaw in Hosty. The Appellant has offered no cogent argument to explain why this Court's analysis in Conner should not apply with equal force to disabled adults.

Lastly, in Conner, this Court stated that "the policies that supported upholding the narrowly drawn child abuse hearsay exception are not present in the elderly adult context." Conner, 748 So. 2d at 959. As with all of the arguments the Appellant advances, the Appellant offers no reason why this Court's rationale in Conner should

not apply with equal force to disabled adults.

Section 90.803(24) was created with the laudable purpose of protecting elderly people and disabled adults from possible abuses in the legal system. In creating this hearsay exception, the legislature grouped these separate but equal classes of individuals into one large class. The two groups are treated identically in the statute. Similarly, this Court should treat the two groups exactly the same for purposes of section 90.803(24) and declare the statute unconstitutional as it relates to disabled adults. Logic and common sense dictate such a result and the Appellant has offered no persuasive argument to hold otherwise.

CONCLUSION

WHEREFORE, based on foregoing arguments and authorities, the Appellee respectfully requests this Honorable Court to affirm the decision of the district court and to hold that section 90.803(24) is unconstitutional as it relates to disabled adults.

Respectfully submitted,

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

_____
DONALD J. CANNAROZZI
Assistant Public Defender
Florida Bar No. 776830

Broward County Courthouse
Suite 3872, 3d Floor, N. Wing
(954) 831-8808
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the response was delivered by overnight mail to Assistant Attorney Generals Celia Terenzio and Richard Valuntas, Department of Legal Affairs, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida, 33401, this 23rd day of May, 2003.

_____
Donald Cannarozzi #776830

CERTIFICATE OF FONT STYLE AND SIZE

I hereby certify that this response was prepared using Times New Roman 14 point font.

_____
Donald J. Cannarozzi #776830