IN THE SUPREME COURT OF THE STATE OF FLORIDA

JESSE BLANTON,

Petitioner,

v. Case No. SC04-1823

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF THE FIFTH DISTRICT,
AND THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

AMENDED ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The facts of this case are contained in the decision below. Blanton v. State, 880 So. 2d 798, 800 (Fla. 5th DCA 2004). Blanton was charged with capital sexual battery of his adopted daughter and promoting sexual performance by the child. At the time of the offenses, the victim was 11 years old. "The primary evidence against him was a videotape recording, with an audio track of Appellant's voice, and numerous photographs depicting the victim in various lewd poses, some of which also depicted Appellant engaged in acts of sexual battery with the victim. The videotape and photographs were found by police at Appellant's house when they served a search warrant." Id.

The child victim made a statement to a police investigator in which she stated that the photographs and videotapes depicted her, and she identified Appellant's picture and voice as well. By the time of trial, the trial court determined that the child was unavailable pursuant to section 90.803(23), Florida Statutes (2002), due to her psychological condition. The child's statements were admitted at trial.

Also at trial, the child's mother testified and independently authenticated the photographs and videos. She

established the respective ages of the victim and the defendant. Circumstantial evidence that the photos and videos were taken at Appellant's house was offered through a police officer. The videos and pictures "vividly depicted the criminal acts in excruciating detail." Id. at 802.

Two issues were raised on appeal and decided by the district court. First, whether the child hearsay statute applies when the child is age 11 or less when the crime occurs and the statement is given to the police, but over age 11 at the time of the hearing on the motion to admit the statement. The court determined that the "statute clearly and unambiguously pertains to statements made by a child victim who is 11 years old or less at the time the statement is made." Id. at 799. The second issue on appeal was whether the right of confrontation was violated by the admission of the child hearsay statements, even though defense counsel deposed the child after she gave the statement. The district court determined that the statement was properly admitted. Alternatively, even if the statement should not have been admitted, any error was harmless due to the mother's testimony independently authenticating the pictures and video.

SUMMARY OF ARGUMENT

Petitioner argues that this Court should exercise jurisdiction to review this case because the district court's decision expressly construes a constitutional provision, namely, the right of confrontation. Respondent contends that the decision below merely applies controlling precedent, and so jurisdiction does not lie. This case is not an appropriate vehicle to consider the application of Crawford v. Washington, infra, because as the district court found in the alternative, any error is harmless as a matter of law under the facts of this case. The issue of whether the child hearsay statement was or was not properly admitted does not change the outcome. For this reason, this Court should decline to accept jurisdiction in this case.

ARGUMENT

THE DECISION OF THE DISTRICT COURT MERELY APPLIES A CONSTITUTIONAL PROVISION TO THE FACTS OF THIS CASE AND SO THIS COURT SHOULD DECLINE TO EXERCISE DISCRETIONARY JURISDICTION

Under Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii), this Court has the discretionary jurisdiction to review decisions of the district court that expressly construe a state or federal constitutional provision. See, Melbourne v. State, 679 So. 2d 759 (Fla. 1996). Decisions that have the practical effect of construing a constitutional provision are not reviewable, even before the 1980 addition of the requirement that the decision "expressly" construe a constitutional provision. Miami Herald Publishing Co. v. Brautigam, 121 So. 2d 431 (Fla. 1960). A mere application of a constitutional provision to the particular facts of a case is not a proper basis for this Court to exercise jurisdiction. Ogle v. Pepin, 273 So. 2d 391 (Fla. 1983).

In this case, the district court was called upon to apply the recent decision of Crawford v. Washington, ___ U.S. ___, 124 S.Ct. 1354 (2004), to the particular facts of this case. The second issue posed was whether the admission of the child

victim's hearsay statement was admissible or whether it violated Blanton's constitutional right to confrontation. Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004). The district court determined that under the facts of this case, no infringement occurred. The district court correctly applied the Crawford decision to the facts of this case.

As an alternative holding, the district court determined that any error in admitting the statement was harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The out-of-court statement was cumulative to other, properly admitted evidence. The proof of the crime "was in the pictures and video, which vividly depicted the criminal acts in excruciating detail." Blanton, 880 So. 2d at 802. Since the district court determined in the alternative that any error was harmless, the application of Crawford to the facts of this case is not dispositive of the outcome. Therefore, this Court should not exercise discretionary jurisdiction in this case.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Court to decline to exercise its discretion to accept jurisdiction of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Brief has been furnished by delivery to Assistant Public Defender Rose Levering, counsel for Petitioner, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this ____ day of October, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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APPENDIX

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