IN THE SUPREME COURT OF FLORIDA

RUSSELL OWEN INSKO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC06-1619

ON PETITION FOR REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The opinion of the Second District Court of Appeal, *Insko v. State*, 933 So. 2d 679 (Fla. 2d DCA 2006), outlines the relevant facts at this stage of the proceedings.

SUMMARY OF THE ARGUMENT

Firstly, the Second District correctly held that the age of the offender is not an element of the crime of lewd or lascivious conduct under Section 800.04(6), Florida Statutes (2001), but rather is a potential sentencing enhancement.

Secondly, the question of whether or not the perpetrator's age is an element of the crime of lewd or lascivious conduct is irrelevant to the question of whether Petitioner is entitled to discharge in the instant case. The real issue here is whether Petitioner can be retried after having been found guilty in his first trial of a lesser included offense of the charged offense, which offense includes a factual finding not supported by the evidence, although the evidence would support a conviction of the charged offense. Because Petitioner did not raise this issue on his original appeal, he is estopped to raise it after remand to the trial court for a new trial.

Thirdly, even if Petitioner had raised this issue on his

original appeal, since the jury's conviction of a lesser included offense is considered an acquittal of the charged offense, double jeopardy principles preclude Petitioner's retrial on the charged offense, but he can be retried on the lesser included offense of which he was convicted at his first trial. Moreover, because Petitioner's age, whether it is considered an element of the offense or not, does not determine whether he committed any offense at all, but only the degree of felony he is guilty of, and because that issue was determined in his favor by the original jury, the trial court's conclusion that the issue of Petitioner's age should not be placed before the jury at all at Petitioner's second trial was correct.

An accused who is convicted of a lesser degree of the charged offense may not be heard to complain that he should be set free merely because the evidence shows that he was guilty of the greater offense. Petitioner is not entitled to discharge.

ARGUMENT

WHETHER, IN LIGHT OF THE RULING IN *GLOVER V. STATE,* 863 SO. 2D 236 (FLA. 2003), THE AGE OF THE OFFENDER IS AN ELEMENT OF THE OFFENSE OF LEWD OR LASCIVIOUS CONDUCT UNDER SECTION 800.04(6), FLORIDA STATUTES.

This is a question of law, which is reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 1023, 127 L. Ed. 2d 344 (1994); *State v. Glatzmayer*, 789 So. 2d 297, 301-02 n. 7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review.").

The Second District correctly held that the age of the offender is not an element of the crime of lewd or lascivious conduct under Section 800.04(6), Florida Statutes (2001), but rather is a potential sentencing enhancement.

Section 800.04(6) provides in pertinent part:

> (6) Lewd or lascivious conduct.—
>
> (a) A person who:
>
> * * *
>
> 2. Solicits a person under 16 years of age to commit a lewd or lascivious act
>
> commits lewd or lascivious conduct.

> (b) An offender 18 years of age or older who commits lewd or lascivious conduct commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (c) An offender less than 18 years of age who commits lewd or lascivious conduct commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

In contrast, Section 794.011(2) provides:

> (a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony....
>
> (b) A person less than 18 years of age who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a life felony....

A careful perusal of these two statutes reveals that they are structured differently.

Section 794.011(2) consists of two subsections. Section 794.011(2)(a), in and of itself alone, defines the crime of capital sexual battery, although that crime is not so named in Section 794.011(2)(a). Section 794.011(2)(b), in and of itself alone, defines a separate crime, also unnamed in the statutory subsection that creates it.

Section 800.04(6), on the other hand, consists of three subsections. The first subsection, subsection (a), defines the crime of lewd or lascivious conduct, an element of which is that the victim's age must be less than 16 years; this definition does not mention the perpetrator's age. Subsections (b) and (c) go on to set the degree of the offense based on the age of the perpetrator, making the crime a second degree felony when committed by someone 18 years old or older and a third degree felony when committed by someone under the age of 18 years. Section 800.04(5), which deals with lewd or lascivious molestation, is similarly structured although more complicated.

Thus, unlike in Section 794.011(2), where each of the two subsections defines a separate crime, Section 800.04(6) defines the crime in one subsection, which is followed by two more subsections setting the degree of the crime based on the perpetrator's age. Accordingly, the perpetrator's age is not an element of the crime of lewd or lascivious conduct.

The Second District was eminently correct in concluding that this Court's opinion in ***Glover v. State,*** 863 So. 2d 236 (Fla. 2003), which held that the age of the defendant is an element of capital sexual battery under Section 794.011(2), is distinguishable from the instant case in that it deals with a

different statute and does not specifically address the holding in *Desbonnes v. State,* 846 So. 2d 565 (Fla. 4th DCA 2003), *cause dismissed*, 854 So. 2d 659 (Fla. 2003). As Petitioner notes, *Desbonnes* held that the age of the offender was not an element of the offense of lewd and lascivious molestation, relying on *Jesus v. State*, 565 So. 2d 1361 (Fla. 4th DCA 1990), in which the offense involved was capital sexual battery. Although this Court disapproved *Jesus'* holding that the age of the defendant is not an element of capital sexual battery, that does not obviate the Second District's conclusion that *Desbonnes* was right for the wrong reason based on a plain reading of Section 800.04(6). And *State v. D.A.*, 939 So. 2d 149 (Fla. 5th DCA 2006), upon which Petitioner relies, reaches an incorrect conclusion on this issue based on the same wrong reason as *Desbonnes* relied on, that is, that the sexual battery and lewd and lascivious conduct statutes are "virtually identical."

Nevertheless, even if this Court were to disagree with the Second District's answer to the certified question, Petitioner would not be entitled to the relief he seeks. The real issue in the instant case is whether Petitioner can be retried after having been found guilty in his first trial of a lesser included offense of the charged offense, which offense includes a factual

finding not supported by the evidence, although the evidence *would* support a conviction of the charged offense. That issue has NEVER been raised by Petitioner, not below and not in this Court.

In the first appeal in this case, Petitioner did not argue that he was entitled to discharge rather than a new trial, and the Second District in its opinion did not order Petitioner's discharge, but only a new trial. While the State agrees (and has never argued to the contrary) that double jeopardy precludes Petitioner's reprosecution for the second degree felony originally charged in light of the original jury verdict finding him guilty of the third degree felony of "Lewd or Lascivious Conduct (Solicit) (defendant under eighteen years of age)," the suggestion that, based on this jury finding, Petitioner is entitled to discharge was never made on the record by *anyone* until defense counsel so argued on remand after this Court's reversal for a new trial. Under these circumstances, as the majority in the Second District stated below in their concurring opinion, Petitioner is now estopped to assert that he may not be retried for the third-degree felony offense of lewd or lascivious conduct upon a person under sixteen years of age in violation of section 800.04(6)(a)(2) and (c). *Insko v. State*,

933 So. 2d at 683.

Finally, even if opposing counsel had made such an argument in the original appeal, it would have been without merit.

Rule 3.490, Florida Rules of Criminal Procedure, provides: "If the indictment or information charges an offense divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence. The judge shall not instruct on any degree as to which there is no evidence." And Rule 3.510 provides in pertinent part:

> On an indictment or information on which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> * * *
>
> (b) any offense that as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.

Based on these rules, it appears that the trial court should not have instructed the jury that it could find Petitioner guilty of *either* lewd or lascivious solicitation by a defendant under 18 years old *or* assault inasmuch as neither of these offenses was supported by the evidence.

However, this Court's opinion in *Amado v. State*, 585 So. 2d 282 (Fla. 1991), suggests that the instruction on the permissive

lesser included offense of lewd or lascivious solicitation by a defendant under 18 years old was proper despite the evidence that Petitioner's age was greater than 18 years. *Amado*, which was followed by the Second District in *Olea-Tejeda v. State*, 732 So. 2d 429 (Fla. 2d DCA 1999), held that the trial court was required to instruct the jury on simple possession as a lesser included offense of trafficking in cocaine by sale, manufacture, delivery, or possession even though there was no evidence that the amount of drugs involved in the transaction in question was less than 28 grams. Under the rationale of *Amado*, it would seem that lewd or lascivious solicitation by a defendant under 18 years old would constitute a permissive lesser included offense of lewd or lascivious solicitation by a defendant 18 years of age or older.

> [O]ne of the basic underlying policy reasons for allowing a jury to convict on a lesser included offense is that it allows a jury, in the proper case, to exercise its "pardon" power by acquitting the defendant of the charged offense and convicting the defendant of a lesser offense. *State v. Wimberly*, 498 So. 2d 929, 932 (Fla. 1986) ("The requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is bottomed upon a recognition of the jury's right to exercise its 'pardon power.'"); *State v. Bruns*, 429 So. 2d 307, 310 (Fla. 1983); *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978). The exercise of such a "pardon" power

necessarily presupposes that the lesser offense carries a lesser penalty, else a conviction on a lesser offense could hardly constitute a "pardon." In recognition of this power, the Florida Supreme Court has stated that lesser included offenses "give[ ] the jury an opportunity to convict of an offense with less severe punishment than the crime charged." *State v. Baker*, 456 So. 2d 419, 422 (Fla. 1984).[FN2]

> FN2. ...Fla. Stand. Jury Instr. (Crim.) 2.02(a) authorizes the jury to consider a lesser included offense only if it decides that the charged offense has not been proved beyond a reasonable doubt, which...seems to preclude a "jury pardon"; indeed, nowhere in the standard jury instructions is the jury ever instructed that it has the power of a "pardon." However, our law has always been somewhat schizophrenic on this point because in the jury's *de facto* power to find a defendant guilty of a lesser included offense, Florida law has always recognized that the jury, in fact, has a pardon power. This is so because we routinely accept—and do not set aside based on misconduct—a verdict where the jury has, in effect, ignored this instruction and found the defendant guilty of a lesser included offense, although it may be convinced based on highly persuasive evidence [and, indeed, such evidence may be uncontradicted] that the charged offense was, in fact, committed; we call such a verdict a "jury pardon" and do not disturb it. This long-standing practice may not be intellectually satisfying to legal purists, but, on the other hand, it allows juries to do substantial justice in extenuating circumstances, something which our law has always prized.

> Another underlying policy reason for lesser included offenses—which is related to the "jury pardon" rationale—is that the procedure allows a jury, which is otherwise hung on the ultimate issue of guilt or innocence, to compromise its internal differences by finding the defendant guilty of a lesser offense. Those jurors leaning toward an outright acquittal may, accordingly, be persuaded to convict on an offense which is less serious than the charged offense; and those jurors leaning toward conviction on the charged offense may be persuaded to convict on a less serious charge rather than risk a hung jury.

Nurse v. State, 658 So.2d 1074, 1078 (Fla. 3 DCA 1995), *review denied*, 667 So. 2d 775 (Fla. 1996) (bracketed material in original, footnote omitted). As defense counsel conceded below, the original jury verdict sub judice may well have been a jury pardon.

Moreover, even if the original jury should not have been instructed on the offense of which Petitioner was convicted, Petitioner is not entitled to any relief. This is because this Court held in *Ray v. State*, 403 So. 2d 956 (Fla. 1981), that

> it is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if...the improperly charged offense is lesser in degree and penalty than the main offense....Failure to timely object precludes relief from such a conviction.

Id. at 961 (footnote omitted), reaffirmed in *Armstrong v. State*, 579 So. 2d 734 (Fla. 1991); followed, *Firsher v. State*, 834 So. 2d 921 (Fla. 3d DCA), *review denied*, 859 So. 2d 514 (Fla. 2003), and *Chambers v. State*, 880 So. 2d 696 (Fla. 2d DCA 2004), *review denied*, 905 So. 2d 125 (Fla. 2005).

Since the jury's conviction of a lesser included offense is considered an acquittal of the charged offense, double jeopardy principles preclude Petitioner's retrial on the charged offense, but there is no authority for the proposition that he cannot be retried on the lesser included offense of which he was convicted at his first trial. Moreover, because Petitioner's age, whether it is considered an element of the offense or not, does not determine whether he committed any offense at all, but only the degree of felony he is guilty of, and because that issue was

determined in his favor by the original jury, the trial court's conclusion that the issue of Petitioner's age should not be placed before the jury at all at Petitioner's second trial was correct.

Two of the cases upon which Petitioner relies show the folly of his position. In *Baker v. State*, 604 So. 2d 1239 (Fla. 3d DCA 1992), the Third District held that "in the absence of either a specific allegation in the charging document, or a finding by the jury that the defendant is eighteen years of age or over, a conviction for capital sexual battery cannot stand." *Id*. at 1240 (footnotes omitted). However, the remedy afforded the defendant in that case was not discharge, as Petitioner would have this Court believe, but "to reduce the conviction to a life felony and to resentence the defendant accordingly." *Id*.

In *Glover*, this Court approved the Fifth District's holding that the trial court's failure to instruct the jury that the defendant's age was an element of the charged offense was harmless error inasmuch as the defendant was 35 years old at the time of the offense, the parties did not dispute that Glover was over 18 at trial, the jury was able to view the defendant at trial, the trial court advised the jury that Glover had to be over 18 to be convicted of the main charge, and that "'the jury

could not reasonably have found [Glover] to have been less than eighteen.'" 863 So. 2d at 237, quoting *Glover v. State*, 815 So. 2d 698 at 700 (Fla. 5th DCA 2002). Petitioner here was 33½ years old at the time of the offense, the parties did not dispute that Petitioner was over 18 at trial, the jury was able to view Petitioner at trial, and the trial court advised the jury that Petitioner had to be over 18 to be convicted as charged of the crime of which he was accused.

Jones v. State, 492 So. 2d 1124 (Fla. 3d DCA), *review denied*, 501 So.2d 1282 (Fla. 1986), is analogous to the instant case. Jones, who was charged with a burglary, argued on appeal that the trial court had erred in instructing the jury on the lesser offense of attempt because the evidence adduced at trial showed that he had clearly completed the offense, that he was entitled to a new trial, and that, at any such new trial, he could be tried for neither burglary nor attempted burglary, only trespass. Jones recognized that the jury may have intended his attempted burglary conviction as a jury pardon, but he argued that Rule 3.510(a), Florida Rules of Criminal Procedure, had effectively abrogated the jury pardon power. The Third District noted that there was no authority suggesting that "Rule 3.510(a) was intended to overturn the substantive law of jury pardon,"

found that “the inquiry should be whether, in light of all the circumstances, the instruction was so confusing as to prejudice the defendant” and that there was no indication that the complained-of instruction confused or misled the jury, and concluded: “An accused who is convicted of an attempt as the lesser of a charged offense will not be heard to complain that he should be set free merely because the evidence shows that he was guilty of the greater offense.” *Id*. at 1126.

Similarly, an accused who is convicted of a lesser degree of the charged offense should not be heard to complain that he should be set free merely because the evidence shows that he was guilty of the greater offense. Accordingly, Petitioner is not entitled to discharge in this case, and the Second District’s affirmance of his judgment and sentence should be approved.

CONCLUSION

Petitioner respectfully requests that this Honorable Court approve the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Maureen E. Surber, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 27th day of November 2006.

CERTIFICATE OF FONT 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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