IN THE SUPREME COURT OF FLORIDA

SAYSINH KHIANTHALAT
PETITIONER,

V

CASE NO SC06-1802
L.T. NO. 2D05-2592

STATE OF FLORIDA,
RESPONDENT.
_____/

RESPONDENT'S JURISDICTIONAL BRIEF ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

On June 23, 2004, the State Attorney for the Tenth Judicial Circuit in and for Polk County charged petitioner with nine counts of lewd battery on a child 12 years of age or older but less than 16 years of age. See section 800.04(4), Florida Statutes. The Amended Information lleged petitioner between February 12, 2003, and May 15, 2003, "engaged in sexual activity with [the victim], a child older than 12 years of age but less than 16 years of age." The victim was born February 14, 1989.

On March 2-3, 2005, petitioner's trial was held. The victim testified at the start of the instant offenses, she was thirteen (13) years old and petitioner was twenty-six. At first, petitioner French kissed the victim. Then petitioner started touching the victim's bottom. Initially, the victim felt uncomfortable because petitioner was her brother-in-law. However, since petitioner was older, the victim thought it was okay. Petitioner and the victim had penis-to-vaginal sex when the victim was still thirteen. Petitioner did not make her, but the victim had oral sex with petitioner twice between February and May 2003. Petitioner also penetrated the victim's vagina with his fingers between February and May 2003.

Prior to the jury instructions, defense counsel requested a lesser-included instruction of simple battery for the lewd battery counts. The State objected because simple battery is not a Category 1 lesser-included offense for lewd battery. The State also argued there was no evidence presented that would qualify for a simple battery. Moreover, any kissing or hugging between petitioner and the victim was not charged in the Amended Information. Thus, there was no support for a simple battery instruction as a Category 2 lesser-included to lewd battery. Finally, the State noted petitioner was not charged with sexual battery.

Nevertheless, petitioner argued because the victim was a minor she was not legally capable of consenting to sexual activity; thus, petitioner was entitled to a battery instruction even though the information did not specifically allege and the evidence did not establish he touched the victim against her will. The trial court agreed with the State there was no evidence presented evidencing any touching by petitioner against the will of the victim, and simple battery is not an element of lewd battery. Accordingly, the trial court denied petitioner's request for a proposed lesser-included instruction of simple battery.

At the conclusion of petitioner's trial, the jury returned guilty verdicts for the remaining (6) counts of lewd battery. On August 4, 2006, the Second District Court affirmed petitioner's conviction. In so doing, the appellate court held the lower court properly refused to give a simple battery instruction as a lesser-included offense of lewd battery under Fla. Stat. § 800.04(4), because the (13) year-old victim's age did not preclude her consent to engaging in sex with defendant and thus, the nonconsensual touching required for simple battery did not exist. See Khianthalat v. State, 935 So. 2d 583 (Fla. 2d DCA 2006). In rejecting petitioner's argument, the Second District, in footnote 4, remarked petitioner's argument is not without support; in Jackson v. State, 920 So. 2d 737 (Fla. 5th DCA 2006), that court, relying on the presumption of incapacity where the victim was over the age of twelve, concluded the defendant in that case was entitled to an instruction on simple battery even though there was no allegation of nonconsensual touching.

Thereafter, Petitioner filed notice of intent to seek the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Petitioner argues this Court may exercise its discretionary jurisdiction to review the instant issue considered by the Second District Court of Appeal. Respondent, however, submits the Second District's opinion in Khianthalat v. State, 935 So. 2d 583 (Fla. 2d DCA 2006), did not expressly or directly conflict the holding in Jackson v. State, 920 So.2d 737 (Fla. 5th DCA 2006), or Biles v. State, 700 So.2d 166 (Fla. 4th DCA 1997), as alleged by petitioner. Accordingly, respondent respectfully requests this Court deny review of the instant case.

ARGUMENT

WHETHER THE SECOND DISTRICT'S OPINION IN KHIANTHALAT V. STATE, 935 So. 2d 583 (Fla. 2d DCA 2006), DIRECTLY AND EXPRESSLY CONFLICTS WITH JACKSON V. STATE, 920 So.2d 737 (Fla. 5th DCA 2006), AND BILES V. STATE, 700 So.2d 166 (Fla. 4th DCA 1997).

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), allows this Court to exercise its discretionary review of decisions of district courts of appeal that expressly and directly conflict with a decision of another district on the same question of law. In Khianthalat v. State, 935 So. 2d 583 (Fla. 2d DCA 2006), the Second District Court of Appeal affirmed the trial court's refusal to give a simple battery instruction as a permissive, lesser-included offense to the charge of lewd battery because the charging document in that case did not specifically allege, and the evidence did not establish, petitioner touched the victim against her will.

This Court should decline to entertain jurisdiction because the cases cited by petitioner do not expressly and directly conflict with the Second District's decision in Khianthalat. The decision in Khianthalat is factually distinct from those in Biles v. State, 700 So.2d 166 (Fla. 4th DCA 1997). In that case, the defendant was convicted of

lewd, lascivious, or indecent assault upon a child. The appellate court reversed the defendant's conviction because the trial court failed to instruct the jury on simple battery as a lesser-included offense under section 784.03, Florida Statutes. Importantly, in Biles, the facts alleged in the information and the evidence presented satisfied the elements for the lesser-included offense of simple battery. In contrast to the facts in Biles, touching against the will of the victim was not charged in the Amended Information in Khianthalat. Likewise, there was no evidence presented evidencing any touching by petitioner against the will of the victim.

In Jackson v. State, 920 So.2d 737 (Fla. 5th DCA 2006), the trial court denied a defendant's request for a jury instruction on simple battery as a lesser-included offense of lewd and lascivious battery because the Information did not specifically allege the defendant's sexual activity with the minor victim was un-consented to, and there was no evidence at trial that anything occurred against the victim's will. Importantly, the Fifth District's decision in Jackson relied on the holding in Caulder v. State, 500 So.2d 1362 (Fla. 5th DCA 1987). In that case, the court held in a prosecution for sexual battery on a child 11 years of age or younger, lack of consent, though an

element, need not be specifically alleged or proved as it is presumed by law, and thus the jury should be instructed upon a request on the lesser offense of simple battery. In contrast, in affirming the lower court's actions in Khianthalat, the Second District noted Fla. Stat. § 800.04(4) (2002) does not apply to children under the age of twelve; accordingly, the presumption of incapacity to consent is not applicable to offenses under that statute.

CONCLUSION

Respondent respectfully requests that this Honorable Court decline to exercise its jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000—Drawer PD, Bartow, Florida 33831, on this 23rd day of October, 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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