IN THE SUPREME COURT OF FLORIDA

THOMAS ELWELL

PETITIONER,

V. CASE NO. SC07-1003
L.T. NO. 2D05-907

STATE OF FLORIDA,
RESPONDENT.
_____/

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

BILL McCOLLUM
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

JONATHAN P. HURLEY
Assistant Attorney General
Florida Bar No. 0160520
Concourse Center Bldg. Four
3507 Frontage Road, Suite 200
Tampa, Florida 33607
Phone: (813) 287-7900
Fax: (813) 281-5500

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with Lewd and Lascivious Molestation. The alleged victim was the eleven-year-old nephew of a friend of Petitioner's. Prior to trial, the State filed a notice of intent to introduce child-hearsay statements made by the child victim to his grandfather. Details of the hearsay statements were derived from a pre-trial deposition taken of the grandfather. In response to the State's motion, the defense filed a motion to strike the notice based upon their alleged lack of trustworthiness under section 90.803(23), Florida Statutes, (2003). The trial court held two pre-trial hearings on the issue. At the hearings, the victim testified to the events surrounding the offense. The victim's grandfather also testified regarding the victim's statements made to him.

At the close of the pre-trial hearing, the trial court ruled the grandfather's statements were admissible and relevant. The trial court made no further findings. After the trial court made its ruling at the conclusion of the pre-trial hearing, the trial court asked if there was anything else, and Petitioner's trial counsel made no response. The proceedings then concluded. At no point during the pre-trial proceedings did Petitioner's trial

counsel offer an objection regarding the trial court's specific findings of fact as to the basis of its ruling pursuant to section 90.803(23). Likewise, at trial, defense counsel never specifically challenged the trial court's failure to make specific factual findings when determining the admissibility of the hearsay statements. Instead, defense counsel simply voiced a general, "objection hearsay, Your Honor." To which, the trial court overruled. (Vol. III, Tr. 259). Thereafter, the victim's grandfather testified regarding the victim's statements to him. The victim, the victim's aunt, and Petitioner's friend also testified. The jury returned a guilty verdict for the lesser-included offense of Attempted Lewd and Lascivious Molestation. The trial court sentenced Petitioner to thirty years imprisonment as a habitual violent felony offender.

On direct appeal to the Second District Court of Appeal, Petitioner argued the trial court erred by admitting into evidence the testimony of the victim's grandfather concerning the victim's hearsay statements without making specific findings of fact and a pre-trial determination concerning the statement's reliability as required by section 90.803(23). Petitioner further argued

the admission of the child-hearsay testimony was harmful because it bolstered the credibility of the child victim.

The Second District rendered an Opinion rejecting Petitioner's claim concluding, pursuant to section 924.051, Florida Statutes, (2003), Petitioner failed to properly preserve for appeal his argument the trial court failed to make specific factual findings as required by section 90.803(23). The Second District further determined, "the failure of a trial judge to make sufficient findings under the statute, in and of itself, does not constitute fundamental error." Elwell v. State, 32 Fla. L. Weekly D1067 (Fla. 2d DCA April 25, 2007), citing State v. Townsend, 635 So.2d 949 (Fla. 1994). Thereafter, Petitioner filed its notice of intent to invoke this Court's jurisdiction based on express and direct conflict with decisions of this Court and other district court of appeals decisions.

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 Elwell v. State, 32 Fla. L. Weekly D1067 (Fla. 2d DCA April 25, 2007), does not expressly or directly conflict with this Court's holding in Hopkins v. State, 632 So.2d 1372 (Fla. 1994), nor other district court cases cited by Petitioner whose decisions as to this issue relied solely upon the reasoning stated in Hopkins: Heuss v. State, 660 So.2d 1052 (Fla. 4th DCA 1995); In Re:R.L.R., 647 So.2d 251 (Fla. 1st DCA 1995); and Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996). Accordingly, Respondent respectfully requests this Court deny review of the instant case.

ARGUMENT

WHETHER THE SECOND DISTRICT'S OPINION IN ELWELL V. STATE, 32 Fla. L. Weekly D1067 (Fla. 2d DCA April 25, 2007), DIRECTLY AND EXPRESSLY CONFLICTS WITH HOPKINS V. STATE, 632 So.2d 1372 (Fla. 1994), HEUSS V. STATE, 660 So.2d 1052 (Fla. 4th DCA 1995), IN RE:R.L.R., 647 So.2d 251 (Fla. 1st DCA 1995), and MATHIS V. STATE, 682 So.2d 175 (Fla. 1st DCA 1996).

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 appeals that expressly and directly conflict with a decision of this Court or another district on the same question of law. In Elwell v. State, 32 Fla. L. Weekly D1067 (Fla. 2d DCA April 25, 2007), the Second District rendered an Opinion rejecting Petitioner's claim the trial court failed to make specific factual findings as required by section 90.803(23), concluding, pursuant to section 924.051, Florida Statutes, (2003), Petitioner failed to properly preserve for appeal this specific argument. The Second District further determined, "the failure of a trial judge to make sufficient findings under the statute, in and of itself, does not constitute fundamental error." Id., citing State v. Townsend, 635 So.2d 949 (Fla. 1994).

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 Elwell. The decision in Elwell is distinguishable from Hopkins v. State, 632 So.2d 1372 (Fla. 1994), in a number of ways. First, this Court's holding in Hopkins was predicated on the defendant's assertion of his confrontation rights. It follows, the trial court's failure to make specific findings under section 90.803(23), in Hopkins implicated the defendant's right to confrontation. Id. at 1377. In the instant case, Petitioner did not raise and issue regarding his confrontation rights because the victim testified at trial, thereby giving Petitioner an opportunity to cross-examine him.

Second, in Hopkins, unlike the facts here, at the close of the pre-trial hearing concerning the admissibility of statements under section 90.803(23), defense counsel did object to their admissibility, arguing there was no showing of reliability. Hopkins, at 1376. As a result, defense counsel's objection to the reliability of the evidence necessarily encompassed the sufficiency of the judge's findings as to that reliability. Id. Consequently, based upon the context of the objection, the defense in Hopkins

clearly put the trial court on notice of the basis for its objection and the court's potential error. The same can not be said regarding the general, perfunctory objection expressed by defense counsel in the instant case.

Finally, Respondent notes the decision in Hopkins was decided prior to the adoption of section 924.051, with its exacting requirements regarding the preservation of error.[1]

[1] Section 924.051(3), provides: An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and properly preserved or, if not properly preserved, would constitute fundamental error. Section 924.051(1)(b), provides: Preserved is defined to mean that and issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefore.

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 James C. Banks, Special Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000—Drawer PD, Bartow, Florida 33831, on this 12th day of June, 2007.

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,

BILL McCOLLUM.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

JONATHAN P. HURLEY
Assistant Attorney General
Florida Bar No. 0160520
Concourse Center Bldg. Four
3507 Frontage Road, Suite 200
Tampa, Florida 33607
Phone: (813) 287-7900
Fax: (813) 281-5500

COUNSEL FOR RESPONDENT