IN THE SUPREME COURT OF FLORIDA

THOMAS ELWELL,

Petitioner,

vs. **CASE NO. _____**

STATE OF FLORIDA,

Respondent.

_____

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES C. BANKS, ESQUIRE
Special Assistant Public Defender
Office of the Public Defender
Post Office Box 9000-PD
Bartow, Florida 33831

ATTORNEY FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATION

STATEMENT OF THE CASE AND FACTS

The Petitioner, Thomas Elwell, was charged by an Amended Felony Information with Lewd or Lascivious Molestation. The State filed a Notice of Intent to Use Hearsay Statement of Child Victim of Sexual Abuse. The Petitioner filed a Motion to Strike same. After a hearing on the aforementioned notice and motion, the trial court ruled that everything the child's grandfather testified about came from the child which would give credence to the child's comments and would therefore be admissable against the Appellant. During the Petitioner's trial, without any further findings by the trial court, and over the hearsay objection of the Appellant, (Vol. 3, P. 259) the grandfather testified about the conversation he had with the alleged victim.

The Appellant was convicted and sentenced to 30 years in prison. Notice of Appeal was timely filed. The Second District Court of Appeal rendered an Opinion rejecting Mr. Elwell's claim that the trial court made insufficient factual findings in ruling the child-hearsay testimony was admissible by concluding the Petitioner failed to make a contemporaneous objection and the issue was therefore not preserved. Mr. Elwell timely filed a notice to invoke this Court's jurisdiction based on express and didn't conflict with decisions of this Court and other district court of appeals decisions.

SUMMARY OF THE ARGUMENT

Contrary to the opinion of the Second District Court of Appeal the Petitioner did preserve his objection for the appeal of this issue by filing a Motion to Strike and having it heard pretrial and by raising a hearsay objection during the trial. Furthermore, the Second District Court of Appeal's decision conflicts with this Court's opinion in Hopkins v. State, 632 So.2d 1372 (Fla. 1994), the Fourth District Court of Appeals case of Heuss v. State, 660 So.2d 1052 (Fla. 1995), and the First District Court of Appeals cases of 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) which hold to the contrary.

ARGUMENT

BY HOLDING THAT THE PETITIONER FAILED TO PRESERVE HIS OBJECTION TO SECTION 90.803(23) FLA. STAT. HEARSAY THE SECOND DISTRICT COURT OF APPEALS DECISION CONFLICTS WITH THE FLORIDA SUPREME COURT'S DECISION IN HOPKINS V. STATE, 632 So.2d 1372 (Fla. 1994) AND SEVERAL DISTRICT COURT OF APPEALS CASES.

The Second District Court of Appeals decision in Elwell v. State, 32 Fla. L. Weekly D1067 (Fla. 2d DCA 2007) held the petitioner failed to preserve his objection to the introduction of Section 90.803 (23) Fla. Stat. hearsay testimony

and upheld the Petitioner's conviction for lewd or lascivious molestation. However, the record on

appeal reflects the Petitioner filed a Motion to Strike the testimony of the victim's grandfather, a hearing was held on the Motion to Strike, the Trial Court ruled the objectionable testimony was admissible without making any findings of fact and during the trial defense counsel raised an objection based on hearsay. These actions by the Petitioner should be held to sufficiently preserve the issue for appellate review. See 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).

The Petitioner submits the lower court misinterpreted Hopkins. The lower court distinguished Hopkins by claiming that its holding was "predicated on the defendant's assertion of his confrontation rights." Elwell v. State, 32 Fla. L. Weekly D 1067 (Fla. 2nd DCA 2007). However, this was not the basis of the Hopkins' opinion. To the contrary, Hopkins' constitutional right to confront witnesses against him was only a supplemental part of the holding. Instead, the Court held that "[f]ailure to make specific findings not only ignores the clear directive of the statute, *but also* implicates the defendant's constitutional right to

confrontation." Hopkins, Id. at 1377. (emphasis added). The Hopkins' opinion focused on the trial court's failure to meet the statutory mandates. Id. It focused on whether defense counsel's objection "necessarily called into question whether the statutory procedures had been

followed." Id. at 1376.

Hopkins addressed two independent issues. The first, is whether the requirements of Section 92.54(5) Fla. Stat. were met, and the other is whether the requirements of Section 90.803(23) Fla. Stat. were met. Id. The Elwell court confuses these issues and erroneously applies the reasoning behind the first issue to the latter, which is the question presented to this Court.

Hopkins did address defense counsel's general objection as it relates to the right to confrontation, but analyzed it according to section 92.54(5). Id. However, the court undertook an independent analysis when reviewing section 90.803(23) Fla. Stat. requirements. Id. In this analysis, the Court looked at whether a general hearsay objection to the reliability of hearsay statements was sufficient to preserve the issue. Id.

At the end of a lengthy pretrial hearing, concerning the admissibility of the statements, Hopkins made a general objection. Id. The Court found that "defense counsel objected to the admissibility of the hearsay statements, arguing that there

was no showing of reliability." Id. The trial court ruled the statements were admissible and began trial immediately. Id. During the first witness's testimony, defense counsel objected three times to the admission of the hearsay statements. Id. Defense counsel then requested a continuing objection, which the trial court denied. Id. After

the first witness, defense counsel made no further objections to the hearsay evidence. Id.

The Hopkins Court found that:

> "Although it would have been preferable for defense counsel to object each time the hearsay testimony was introduced, we find that the issue was preserved for appeal. The trial court was put on notice of the potential error by the pretrial hearing and by defense counsel's request for a continuing objection during trial."

Id. Furthermore, "defense counsel's objection to the reliability of the evidence necessarily encompassed the sufficiency of the judge's findings as to that reliability.

unsel was not required to specify each finding of fact to which he was objecting." Id. As a result, the Court found that the issue of whether the trial court had sufficiently made specific findings of fact as to the reliability of the child's statement under section 90.803(23) Fla. Stat. was preserved. Id.

Similar to Hopkins, Elwell argued at the pre-trial hearing that the "child did not make the statements at the first vailable opportunity and that the child may have

had a motive to make his story up." Elwell, 32 Fla. L. Weekly at ____. As the Elwell court noted, "[t]hese arguments relate to the reliability of the child-hearsay statements." Id.; Also see State v. Townsend, 635 So.2d 949, 957-58 (Fla. 1994)(holding that in determining whether the statements are reliable, the court may consider "whether the statement was made at the first available opportunity following

the alleged incident" and thereof the motive to fabricate the statement).

Since the court recognized the basis for the objection, the court was put on sufficient notice of defense counsel's general objection concerning the reliability of the statements. This is particularly true in Elwell's case as the issue was argued over the course of several days of hearings. Additionally, this general objection encompasses the sufficiency of the judge's findings as to the reliability of the statements. See Hopkins, 632 So.2d at 1376. However, the district courts are split on whether or not this general objection is sufficient to preserve the issue.

In Heuss v. State, 660 So.2d 1052, 1056 (Fla. 4th DCA 1995), the court found that although the appellant had not made a specific objection as to the lack of specific findings concerning the reliability of the statements, that his other objections as to the admission of the statements were sufficient. The court also found that

appellant's pretrial motions challenging the trustworthiness and reliability of the child-victims' statements supported preservation of the issue. Id.

The Second District Court of Appeals decision in this cause conflicts with Heuss which supports reversal of the case at hand. Although Elwell did not make a specific objection regarding the lack of factual findings surrounding the reliability of the statements, he had made an objection based on hearsay during the trial and also filed a pretrial motion to strike the statements. Elwell, 32 Fla. L. Weekly _____.

der Heuss, the pretrial motion and objection during trial are sufficient to preserve the issue. Heuss, 660 So.2d at 1056.

The Second District Court of Appeals decision in Elwell also conflicts with In re R.L.R., 647 So.2d 251 (Fla. 1st DCA 1995) which further supports preserving this issue based on Elwell's general objection of the reliability of the statements. The In re R.L.R. court used Hopkins to find that counsel's general objection as to the reliability of the statements under section 90.803(23) Fla. Stat. was sufficient to encompass the sufficiency of the judge's factual findings. Id. at 253. Womack v. State, 855 So.2d 1236 (Fla. 1st DCA 2003) also used In re R.L.R. and Hopkins to hold that appellant's general objection to the child hearsay statements preserved the issue for appeal.

Finally, Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996) found that appellant's general objection regarding the reliability of the child-hearsay statements was also recognized by both the State and the trial court as questioning the legal sufficiency of the court's findings. The First District found "unpersuasive the State's argument that this issue was not preserved for appellate review." Id.

As a result, this Court should find the Second District Court of Appeals decision in Elwell is incorrect. Several of district courts in Florida and this Court hold that a general objection as to the reliability of the statements encompasses the

ficiency of the trial court's factual findings. See 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); Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996); Womack v. State, 855 So.2d 1236 (Fla. 1st DCA 2003).

The Elwell court attempted to use State v. Townsend, 635 So.2d 949 (Fla. 1994) to contradict this holding. Elwell, 32 Fla. L. Weekly _____. However, Townsend is distinguishable from the case at hand.

Townsend argued that the failure of the trial judge to make sufficient findings of fact was properly preserved for appeal. Townsend, 635 So.2d at 959. However, this Court noted that no objection was made to the issue. Id. In response, Townsend argued that an objection was not necessary because the trial court's

failure constituted fundamental error. Id. This Court found that "the failure of a trial judge to make sufficient findings under the statute, in and of itself, does not constitute fundamental error." Id. However, in the case at hand, defense counsel did in fact make an objection as to the introduction of the statements. As a result, the reasoning in Townsend does not apply because Townsend made no such objection.

Elwell's objection as to the reliability of the child-victims' hearsay statement during the pre-trial hearing and his general hearsay objection during trial preserve the issue of whether the trial court's factual findings were sufficient. This Court

uld hold the Second District Court of Appeals decision in Elwell v. State conflicts with the cases mentioned earlier and reverse the opinion of the Second District Court of Appeals.

CONCLUSION

This Court should reverse the Opinion of the Second District Court of Appeals.

JAMES C. BANKS, ESQUIRE
Florida Bar No: 281670
Special Assistant Public Defender
Office of the Public Defender
Post Office Box 9000-P.D.
Bartow, Florida 33831

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of the foregoing BRIEF OF PETITIONER ON JURISDICTION has been furnished by U.S. MAIL to the DISTRICT COURT OF APPEALS, Lakeland, Florida; Assistant Attorney General, Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607; and to the Appellant/Defendant, Thomas Elwell DOC#R40096, c/o Gulf Correctional Institute, 500 Ike Steele Road, Wewahitchka, Florida 32465-0010, on this_____ day of May, 2007.

_____
JAMES C. BANKS, ESQUIRE

CERTIFICATE OF COMPLIANCE
WITH FONT STANDARDS

I HEREBY CERTIFY that this brief complies with the Times New Roman 14-point font requirement Fla. R. App. P. 9.210.

JAMES C. BANKS, ESQUIRE

APPENDIX

Elwell v. State, ___ So.2d _____ (Fla. 1st DCA 2007), 32 Fla. L. Weekly D1067 (Fla. 1st DCA April 25, 2007)