Supreme Court of Florida

No. SC09-1169

JAMES RICHARD COOPER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[August 26, 2010]

PER CURIAM.

James Richard Cooper seeks review of the decision of the Second District Court of Appeal in Cooper v. State, 13 So. 3d 147 (Fla. 2d DCA 2009), on the grounds that it expressly and directly conflicts with the decision of this Court in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).[1]

Cooper was convicted of four counts of sexual battery on a person in familial custody and two counts of lewd molestation for his sexual abuse of a single victim over a period of years. Cooper v. State, 13 So. 3d 147, 148 (Fla. 2d DCA 2009). On appeal, the Second District concluded that the trial court erred in

1. We have jurisdiction. See art. V, § 3(b)(3), Fla. Const.

allowing the State to present evidence that Cooper engaged in extensive, ongoing abuse of the victim when Cooper was charged with only six single counts of sexual misconduct.[2] Id. at 148-49. The Second District then performed a harmless error analysis, citing but not using the standard set forth by this Court in DiGuilio:

> As to whether the error of allowing the State to present evidence of extensive abuse did or did not contribute to the verdict, we note that if the case had been presented as six distinct acts as charged, the State's presentation of its case would have necessarily been different. On the other hand, the jury heard a taped statement where Cooper admitted engaging in sexual acts with the victim. Because the taped statement is strong evidence of Cooper's guilt, we conclude that the error of allowing the State to present evidence of multiple sexual acts did not affect the verdict and was harmless in this case. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Cooper, 13 So. 3d at 149 (emphasis added).

Although the Second District cited DiGuilio, it failed to follow the DiGuilio standard when it relied on what it deemed the "strong evidence of Cooper's guilt." Id. As we have explained, the applicable test "is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." DiGuilio, 491 So. 2d at 1139. Likewise, it is not a strong evidence test. Rather, the test is "whether there is a reasonable possibility that the error affected the verdict." Id.; see also Ventura v. State, 29 So. 3d 1086, 1091 (Fla. 2010) (quashing

2. We decline to address whether the admission of evidence of numerous incidents of sexual contact was, in fact, error in these circumstances.

and remanding a district court's decision when the harmless error analysis focused on overwhelming evidence of guilt because it "does not address a proper [DiGuilio] analysis and does not discuss whether there is a reasonable possibility that the . . . error affected the verdict").

Accordingly, we quash and remand to the Second District for reconsideration of the harmless error analysis enunciated in DiGuilio.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Second District - Case No. 2D08-1981 and CF06-005770-XX

(Polk County)

James Marion Moorman, Public Defender, and William L. Sharwell, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Petitioner

Bill McCollum, Attorney General, Tallahassee, Florida, and Marilyn Muir Beccue, Assistant Attorney General, Tampa, Florida,

for Respondent