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IN THE SUPREME COURT OF FLORIDA

KEMAR ROCHESTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. SC12-1932

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, Kemar Rochester, was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. The petitioner will be referred to herein as "appellant." The respondent, State of Florida, was the prosecution in the trial court and the appellee before the Fourth District Court of Appeal. The respondent will be referred to as the "the prosecution" or "the State."

In this brief, the following symbols will be used:

IB = Appellant's Initial Brief on the Merits

R = Record on Appeal

SR = Supplemental Record

T = Trial Transcripts

STATEMENT OF THE CASE AND FACTS

The State accepts the statement of the case and facts contained in the Initial Brief subject to any additions, corrections, and/or clarifications set forth below and developed throughout the argument section of the Answer Brief.

Appellant was charged with lewd or lascivious molestation against J.C. (the victim), a child under the age of twelve. (R. 55-56). Before trial, the State offered to lower the charge so appellant could avoid a twenty-five year mandatory minimum sentence. (T1. 3). After some negotiations, the State made the following plea offer to appellant: seven and one-half years in prison followed by seven and one-half years sex offender probation. Id. at 5. Appellant rejected the State's offer and stated he was interested in obtaining "straight probation," as opposed to sex offender probation. Id. at 6. The case proceeded to trial.

When appellant was alone outside with the victim, he asked her if she could keep a secret. (T2. 116). After the victim stated that she could keep a secret, appellant picked her up and touched her vagina and buttocks. Id. at 116-117, 128, 135. Appellant told the victim not to tell anyone about what happened, and she identified him in open court. Id. at 123, 135. During his taped statement to the police, appellant admitted that he touched the victim's vagina for approximately ten seconds. Id. at 199-20.

The jury found appellant guilty as charged, and he filed a motion for downward departure sentence that alleged his crime was an isolated incident, was committed in an unsophisticated manner, and he had shown remorse for his crime. Id. at 248-249; (R. 77-78). Appellant did not present any evidence at the sentencing hearing to support a downward departure sentence under section 921.0026(2)(j) of the Florida Statutes. (T3. 253-287).

The Fourth District affirmed appellant's conviction and sentence in Rochester v. State, 95 So. 3d 407 (Fla. 4th DCA 2012). The Fourth District's opinion certified conflict with the Second District's decision in Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010). Appellant sought review of the Fourth District's decision, and the Court accepted jurisdiction over this case.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction over this case because the decisions in Montgomery and Rochester do not expressly and directly conflict on the same question of law. Furthermore, appellant's argument is without merit because the specific punishment mandated by sections 800.04(5)(b) and 775.082(3)(a)4 of the Florida Statutes control over the general provisions of section 921.0026(2)(j) of the Florida Statutes. Sections 800.04(5)(b) and 775.082(3)(a)4 are also controlling because they represent the most recent legislative pronouncement regarding the issue. Appellant does not cite a single case holding that a trial court has the authority to downwardly depart from the twenty-five year mandatory minimum sentence the Florida Legislature established for adults who molest children under the age of twelve.

The Fourth District's opinion should also be affirmed because appellant did not present any evidence at sentencing to prove that his molestation of the victim was an isolated incident, that the crime was committed in an unsophisticated manner, and that appellant had shown remorse. Finally, appellant's public policy argument is without merit because the Florida Legislature established public policy when it expressly stated that adult child molesters cannot be sentenced to less than twenty-five years in prison for their crimes.

ARGUMENT

THE FOURTH DISTRICT PROPERLY HELD THAT AN ADULT CONVICTED OF MOLESTING A CHILD UNDER THE AGE OF TWELVE MUST BE SENTENCED TO (1) LIFE IN PRISON, OR (2) A MANDATORY MINIMUM SENTENCE OF 25 YEARS IN PRISON.

Standard of Review

This case involves an issue of statutory interpretation, i.e., whether an adult who molests a child under the age of twelve can receive a sentence less than the twenty-five year mandatory minimum sentence established by the Florida Legislature. Thus, the proper standard of review is de novo. Johnson v. State, 78 So. 3d 1305, 1310 (Fla. 2012)("Judicial interpretations of statutes are pure questions of law subject to de novo review.").

Argument

Jurisdiction

The State maintains that there is no conflict between the Fourth District's decision in Rochester and the Second District's decision in Montgomery. In Montgomery, the defendant was sentenced to a minimum mandatory sentence of twenty-five years in prison for molesting a child "if required" by section 775.082(3)(a)4 of the Florida Statutes. Montgomery, 36 So. 3d at 188. On appeal, the defendant argued that his sentence could not include a "minimum mandatory"

because 775.082(3)(a)4 does not provide for a "minimum mandatory" sentence. Id.

The Second District agreed with the State's concession that the defendant's sentence was not a "minimum mandatory" sentence for purposes of gain time, early release, etc. Id. at 188-189. In fact, the Second District cited various "minimum mandatory" statutes with language expressly stating that defendants sentenced thereunder were not eligible for gain time, early release, etc. Id. at 189. The Second District affirmed the defendant's conviction and sentence, but noted that his twenty-five year sentence "does not provide for a minimum mandatory term of imprisonment." Id. at 189.

The only issue involved in this case is whether the trial court "erred in concluding that it could not downward depart from the mandatory minimum sentence of twenty-five years in prison followed by a term of probation for life for a violation of section 800.04(5)(b)." Rochester, 95 So. 3d at 407. The Second District's decision in Montgomery, in contrast, does not address whether an adult child molester can receive a downward departure sentence. Rather, the relevant issue in Montgomery was whether the defendant's sentence was a "minimum mandatory" sentence for purposes of gain time, early release, etc. The instant case, unlike Montgomery, does not address whether appellant's sentence is a "minimum mandatory" sentence for purposes of gain time, early release, etc. Since the

decisions in Montgomery and Rochester do not expressly and directly conflict on the same question of law, the Court should decline jurisdiction over this case. Art. V, § 3(b)(3), Fla. Const.

Merits

The crux of appellant's argument is that the Fourth District erroneously held that the general provisions of section 921.0026(2)(j) of the Florida Statutes do not control over the specific punishment mandated by sections 800.04(5)(b) and 775.082(3)(a)4 of the Florida Statutes. Appellant's argument must fail in light of this Court's decision in McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994). In McKendry, the defendant was convicted of possession of a short-barreled shotgun. Although the defendant's crime carried a mandatory minimum term of five years in prison, the trial court suspended the mandatory minimum prison sentence and placed the defendant on community control and probation pursuant to section 948.01 of the Florida Statutes. The State appealed, and the Fourth District reversed the defendant's sentence. State v. McKendry, 614 So. 2d 1158 (Fla. 4th DCA 1993).

The defendant sought review in this Court, which accepted the case and approved of the Fourth District's opinion. The Court held that: (1) the more specific statute addressing sentencing for possession of a short-barreled shotgun controlled over the statute that generally gives the trial court discretion to suspend

criminal sentences, and (2) the later promulgated statute, i.e., the short-barreled shotgun statute, prevailed as the last expression of legislative intent. McKendry, 641 So. 2d at 46-47. Similarly, the Fourth District's decision in Rochester should be upheld because it concluded that (1) the more specific statute addressing sentencing for adult child molesters controls over the general statute that gives the trial court discretion to mitigate criminal sentences, and (2) the later promulgated statutes, sections 800.04(5)(b) and 775.082(3)(a)4, represent the last expression of legislative intent on the issue.

Appellant acknowledges that the Jessica Lunsford Act was the Florida Legislature's last word on sentencing discretion for adults who molest children under the age of twelve, but claims this "is not a relevant consideration." (IB.14). Appellant does not explain why the Florida Legislature's most recent pronouncement on the sentencing of adult child molesters is irrelevant, nor does he cite any authority to support such an assertion. (IB. 14-15). Furthermore, appellant fails to explain why this case is not controlled by the Court's opinion in McKendry. The Fourth District's opinion in Rochester should also be upheld because "a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." McKendry, 641 So. 2d at 46.

Appellant's Initial Brief also overlooks the decision in an analogous case, State v. Scriber, 991 So. 2d 969 (Fla. 4th DCA 2008). In Scriber, the defendant was charged with aggravated fleeing and eluding. Although the applicable statute provided that "no court may suspend, defer or withhold adjudication of guilt or imposition of sentence" for such a crime, the trial court found mitigating circumstances under section 921.0026 and entered a downward departure withholding adjudication. The State appealed the trial court's ruling, and the Fourth District reversed because (1) the fleeing and eluding statute enacted in 2004 prevailed over section 921.0026 because it was the last expression of legislative intent on the subject, and (2) the fleeing and eluding statute was more specific, and the specific statute is considered to be an exception to the general terms of the more comprehensive statute. Id. at 970; McDonald v. State, 957 So. 2d 605, 610-611 (Fla. 2007)(10-20-Life statute was more specific statute and controlled over the provisions of the Prison Releasee Reoffender statute).

Appellant, like the defendant in Scriber, seeks refuge under section 921.0026(2)(j) in order to avoid the mandatory minimum sentence established by the Florida Legislature in sections 800.04(5)(b) and 775.082(3)(a)4. The Court should reject appellant's argument because section 775.082(3)(a)4 clearly establishes a twenty-five year mandatory minimum sentence for adult child molesters who prey on victims less than twelve years of age. The Florida

Legislature established this twenty-five year mandatory minimum sentence for child molesters when it enacted the Jessica Lunsford Act in 2005. Ch. 2005-28, Laws of Fla. Section 921.0026 was passed in 1998, so section 775.082(3)(a)4 should prevail as the last expression of legislative intent on the subject of sentencing for a violation of section 800.04(5)(b). Scriber, 991 So. 2d at 970; McKendry, 641 So. 2d at 46-47. Furthermore, sections 800.04(5)(b) and 775.082(3)(a)4 are controlling because they specifically address sentencing for adult child molesters and are considered to be an exception to the general terms of the more comprehensive statute, i.e., section 921.0026(2)(j). Id.

Appellant maintains there is no indication that the Florida Legislature intended to preclude a trial court from imposing a downward departure sentence for adult child molesters. (IB. 21). Such an assertion is belied by the preamble to the Jessica Lunsford Act, which states that it is "amending s. 775.082, F.S.; ***providing for specified sentencing*** of persons convicted of the life felony offense in s. 800.04(5)(b), F.S.; ***providing for 25-year mandatory minimum*** term of imprisonment." Ch. 2005-28, Laws of Fla. (emphasis added). Before the enactment of the Jessica Lunsford Act, lewd or lascivious molestation of a child less than twelve years of age by an adult was a first degree felony punishable by up to thirty years in prison. § 800.04(5)(b), Fla. Stat. (2004); § 775.082(3)(b), Fla.

Stat. (2004). No mandatory minimum sentence for this crime existed prior to the 2005 amendments.

In 2005, the Florida Legislature made the following substantive changes to the pertinent statutes: (1) it made a violation of section 800.04(5)(b) a life felony, and (2) it imposed a twenty-five year mandatory minimum sentence for violations of section 800.04(5)(b). Ch. 2005-28, §§ 4-5, Laws of Fla. The fact that the Legislature specifically amended the statutes in this manner constitutes a clear and unambiguous expression of the Legislature's intent to impose a twenty-five year mandatory minimum sentence for all adult child molesters. McKendry, 641 So. 2d at 47. Any doubt regarding the Legislature's intent when it amended the statutes in 2005 is resolved by the plain language of the preamble of the Jessica Lunsford Act, which states it amended section 775.082 to establish a twenty-five year mandatory minimum term of imprisonment for adult child molesters. Ch. 2005-28, Laws of Fla.

The Florida Legislature established two specific sentencing options for adults who molest children under the age of twelve: (1) life in prison, or (2) a mandatory minimum of twenty-five years in prison followed by a lifetime of probation and/or community control. § 775.082(3)(a)4, Fla. Stat. The only thing "permissive" about the statute is the fact that a trial court "may" impose one of the two sentencing options. Appellant's reliance on the language contained in other

sentencing schemes, like 10-20-Life and Prison Releasee Reoffender, is misplaced because those statutes expressly require the sentences imposed thereunder to be served in full (no gain time or early release). (IB. 19-23); McDonald, 957 So. 2d at 611. The plain language in section 775.082(3)(a)4, however, does not preclude the application of gain time. Thus, the statutes appellant relies upon to support his argument are inapposite.

The decision in Rochester should also be upheld because appellant did not present any evidence at sentencing to prove that his molestation of the victim was an isolated incident, that the crime was committed in an unsophisticated manner, and that appellant had shown remorse. The law is clear that appellant had the burden to prove, by a preponderance of the evidence, facts that supported a downward departure sentence. State v. Hunter, 65 So. 3d 1123, 1124 (Fla. 4th DCA 2011). Appellant, however, failed to present any evidence whatsoever to support a downward departure sentence under section 921.0026(2)(j). (T3. 253-287). Even though appellant's scoresheet did not indicate any prior history of sexual offenses, appellant failed to present competent substantial evidence that his actions were indeed an isolated incident. Staffney v. State, 826 So. 2d 509, 513 (Fla. 4th DCA 2002). In fact, appellant admitted he had "done this before" during a recorded phone call. (T1. 8). Although the Fourth District did not expressly base its opinion on appellant's failure to produce any evidence to support a downward

departure sentence under section 921.0026(2)(j), the law is clear that "[a]n appellate court may apply the 'tipsy coachman' doctrine to affirm a lower court's holding when the lower court reached the correct result despite using incorrect reasoning." Ray v. State, 40 So. 3d 95, 98 (Fla. 4th DCA 2010). Accordingly, the Fourth District's decision in Rochester should be affirmed.

Appellant contends that "[a]s a matter of policy, there should be no legal bar against a trial court's consideration of a downward departure sentence for a lewd or lascivious molestation conviction pursuant to Section 800.04(5)(b), Florida Statute." (IB. 24). Appellant's argument must fail because the Florida Legislature established public policy when it expressly provided for a mandatory minimum twenty-five year sentence for adult child molesters. This Court previously stated that the courts "have no right to ignore or set aside a public policy established by the legislature or the people." Local No. 234 v. Henley & Beckwith, Inc., 66 So. 2d 818, 821 (Fla. 1953). The Third District Court of Appeal also indicated that "[a]fter the legislature has delineated public policy, the court has the duty to enforce it." Griffin v. Stonewall Ins. Co., 346 So. 2d 97, 98 (Fla. 3d DCA 1977). Accordingly, the Court should enforce the public policy established by the Florida Legislature and uphold the twenty-five year mandatory minimum sentence imposed in this case.

Finally, appellant argues that the Fourth District should have applied the rule of lenity and held that the trial court was not required to impose a mandatory minimum sentence of twenty-five years imprisonment in this case. (IB. 15-16). Appellant's argument is without merit because the rule of lenity is a "canon of last resort." Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008). The Fourth District did not apply the rule of lenity because it followed other canons of interpretation set forth by this Court, i.e., the more specific statute controls over the general statute, and the most recently enacted statute prevails as the last expression of legislative intent. McKendry, 641 So. 2d at 46-47.

Application of the rule of lenity in this case would also produce an absurd or unreasonable result, i.e., adult child molesters would be able to avoid the sentencing provisions the Florida Legislature specifically created for them when it passed the Jessica Lunsford Act in 2005. Davila v. State, 75 So. 3d 192, 198 (Fla. 2011)(the rule of lenity should not be "applied to produce an absurd or unreasonable result.")(Pariente, J., concurring). It would be absurd for the Florida Legislature to enact an entirely new statutory provision requiring adult child molesters to be sentenced to either (1) life in prison, or (2) a mandatory minimum of twenty-five years in prison if the Legislature intended for adult child molesters to be eligible for downward departure sentences. If the Florida Legislature truly wanted adult child molesters to be eligible for sentences of less than twenty-five

years in prison, it never would have created section 775.082(3)(a)4. (which only applies to adult child molesters). Accordingly, the rule of lenity is inapplicable in this case because it would produce an absurd result.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court affirm the Fourth District's opinion in Rochester because it properly holds that an adult child molester must be sentenced to either life in prison or a mandatory minimum of twenty-five years in prison.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via email (appeals@pd15.state.fl.us) to Ian Seldin, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on June 3, 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

/s/ Richard Valuntas
Assistant Attorney General