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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. DEAN ALDEN SHELLEY, Respondent.	Case No. SC14-755

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent was charged with ① traveling to meet a minor for the purpose of engaging in unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer to solicit the consent of a parent or legal guardian to the participation of such child in any sexual conduct, a second-degree felony, in violation of Section 847.0135(4)(b), Florida Statutes (2011); ② attempted sexual battery of a victim less than 12 years of age by a defendant 18 years of age or older, a life felony, in violation of Sections 794.011(2)(a) and 777.04(1); and ③ use of a computer to solicit the consent of a parent or legal guardian to the participation of a child in any sexual conduct, a third-degree felony, in violation of Section 847.0135(3)(b) (R 11-14).

Respondent filed a motion to dismiss pursuant to Rule 3.190-(c)(4), Florida Rules of Criminal Procedure (R 31-44). The State filed a demurrer, asserting that the facts contained in the motion to dismiss would establish a prima facie case on counts 1 and 3 but conceding that there was insufficient evidence to proceed on the attempted sexual battery count (count 2) (R 83). Respondent then filed an amended motion to dismiss, adding the argument that Respondent could not be convicted of both counts 1 and 3 as count 3 was a lesser offense of count 1 (R 78-82). The trial court subse-

quently issued an order that assumed that Respondent was no longer charged with the attempted sexual battery count and that refused to dismiss either count 1 or count 3, ruling in pertinent part that dismissal of one of these two counts prior to trial was not required, stating, "Double jeopardy is not violated by the charging of an offense and a lesser included offense, but rather by the entry of a conviction on an offense and a necessarily lesser included offense based on the same conduct" (R 84-86). The trial court thereafter entered a second order on Respondent's motion to dismiss, granting dismissal of count 2 based on the State's concession in its demurrer but refusing to dismiss either count 1 or count 3 (R 118).

Respondent pled guilty to counts 1 and 3 pursuant to a plea agreement, reserving his right to appeal the partial denial of his motion to dismiss (R 94-97), and, in accordance with his plea bargain, was given concurrent sentences of 10 years in prison followed by 5 years sex offender probation on count 1 and 5 years in prison on count 3 (R 99-106). Respondent appealed, and the Second District Court of Appeal reversed in part, holding that Respondent's judgment and sentences for both soliciting and traveling in this case violated the prohibition against double jeopardy because the soliciting offense was subsumed by the traveling offense, therefore vacating Respondent's judgment and sentence for soliciting, but

certifying conflict with *State v. Murphy*, 124 So. 3d 323 (Fla. 1st DCA 2013).

STATEMENT OF THE FACTS

On September 8, 2011, Florida Department of Law Enforcement (FDLE) Special Agent Michael Baute posted a listing in the Craigslist Casual Encounters section as a single mother nudist with family "looking for family fun" (R 31-32, 45). Approximately one hour later, Respondent responded to the post in an e-mail in which he included his age, weight, e-mail address, and phone number and information about his lifestyle choice as a nudist and stated that he was serious about finding a partner (R 32, 46). Approximately 20 minutes thereafter, Baute responded to Respondent's email in his undercover capacity as "Cynthia Hawkins" (a fictitious person) and gave an age, height, and weight for Hawkins (R 32, 46). Baute's e-mail also mentioned a 10-year-old daughter, also a nudist, and stated that Hawkins and her daughter had been introduced to family fun by an ex years earlier and that "she" would understand if Respondent was not interested (R 32, 46).

The communications moved to Yahoo Instant Messenger (R 32, 47-50). In the instant message conversation that followed that day between Baute and Respondent, Respondent inquired as to what Hawkins was looking for in order to ensure no misunderstandings (R 32-33, 47). Baute responded, "I am looking for us both to be NSA

and you to also teach my daughter the proper way to have sex. Condom is a must and u must be gentle but firm" (R 33, 47). Respondent replied that he was up for that and further inquired as to whether Hawkins would also be involved, to which Baute answered "yes" (R 33, 47).

Respondent requested pictures from Hawkins and asked whether Hawkins had shown the pictures he had sent her to her daughter (R 33, 47-48). Respondent attempted to arrange a dinner meeting for later in the day, but Baute did not immediately respond (R 33, 48). Shortly thereafter, Respondent messaged, "Hello there...are you still online...or did you for get me...or are you sending over pinellas county sherrifs department to my house...Lol..." (R 33, 48). Later in the conversation, Respondent stated that he was apprehensive that Hawkins was law enforcement and that he had never "ran into this situation" (R 33, 48-49).

As the conversation progressed, Respondent and Baute agreed that they would first meet in a neutral public place and then go back to Hawkins' house if both felt comfortable (R 33, 49). Respondent also stated that he would frisk Hawkins at dinner to make sure that Hawkins was "not wearing a wire...lol" (R 33-34, 49). The instant message conversation ended with Respondent and "Hawkins" plans to meet left up in the air (R 34, 50).

During the early hours of September 9, Respondent e-mailed

"Hawkins" and expressed concerns about the situation (R 34, 51). On September 9 and 15, Respondent sent several instant messages and text messages to "Hawkins" that were not answered (R 34, 52-55).

On September 16, Respondent initiated an instant message conversation with "Hawkins" (R 34, 56). Baute referenced Respondent's September 9 e-mail, and Respondent replied that he was just ranting and had "screwed that up" (R 34, 56). Respondent stated that he mostly wanted to be with the daughter and that he would never tell anyone about it because of the legal implications and his concerns about going to jail (R 34, 56).

Baute told Respondent that he would always have to wear a condom while having sex with the daughter but stated that he did not have to wear condoms when having sex with Hawkins (R 35, 56, 58). A meeting between Respondent and Hawkins was tentatively scheduled for Monday, September 19, or Tuesday, September 20, depending on when Hawkins returned from a long weekend at her parents' house (R 35, 57-58). The tentative arrangements were that Respondent and Hawkins would first have coffee, then go to Hawkins' house, where Respondent would engage in sexual intercourse with both Hawkins and the daughter (R 35, 56-58).

On September 16, Respondent text messaged Hawkins to wish her well on her visit with her sister (R 35, 53). On September 17 and 18, Respondent text messaged and e-mailed Hawkins to ask her how

things were going and to ask her to let him know when she could get away (R 35, 53, 60). Also on September 18, FDLE Special Agent Grettel Chavarria made a controlled phone call to Respondent posing as Cindy Hawkins, during which call she set a meeting time and location for September 19 at 10:30 a.m. at the Starbucks at Montague Street and Linebaugh Avenue in Tampa (R 35). The plans that Respondent and Hawkins would meet first in public and then go to Hawkins' home, where Respondent would engage in sexual intercourse with both Hawkins and the daughter, were also confirmed during this phone conversation (R 36).

On September 19, Respondent sent Hawkins two text messages and two e-mails. The first text message, which asked if they were "still on" for the meeting at Starbucks, was sent at 8:47 a.m., and the second one, indicating what time he would be leaving for the meeting and what he would be wearing, was sent at 9:03 a.m. (R 53). A minute after sending the second text message, Respondent e-mailed Hawkins with a message similar to that second text message (R 61). And at 9:56, Respondent sent Hawkins a second e-mail, this one asking for confirmation of their plans to meet "today at eleven," noting that it would take him approximately 40 minutes to get to the Starbucks, and further noting that he had also left a voice mail message on at the phone number he had given her (R 62). In response, Chavarria made a second controlled phone call to Respon-

dent to confirm their plans (R 36).

At about 10:15, Det. Tiller saw Respondent park a white van and walk to an ATM next door to the Starbucks where Respondent and "Hawkins" had arranged to meet (R 36). FDLE agents took Respondent into custody at the ATM, and Respondent spontaneously stated that he knew it was a trap (R 36). Post-arrest, condoms and a web camera were found in Respondent's pockets (R 36).

After advising Respondent of his Miranda[1] rights, Baute and Tiller conducted a taped interview of Respondent (R 64-77), during which Respondent admitted that he had child pornography on his computer that he had looked at that day and that he would have had sex with the daughter; he also consented to the seizure of his computer (R 36-37, 69-76).

SUMMARY OF THE ARGUMENT

There was no double jeopardy violation in convicting and sentencing Respondent for both the crime of using a computer to solicit a person believed to be a parent to consent to a child's participation in unlawful sexual activity and the crime of traveling to meet a minor after using a computer to solicit a person believed to be a parent because there is a clear legislative intent to punish these offenses separately.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

Even if this Court were to conclude that the Legislature has not provided an explicit statement of intent to allow for convictions under both Section 847.0135(3) and Section 847.0135(4), convictions for both are nevertheless proper in the instant case because Section 847.0135(3)(b) expressly permits each separate use of a computer to solicit the consent of the parent or legal guardian of a child to unlawful sexual conduct with that child to be charged as a separate offense. Respondent admittedly used a computer to solicit the consent of the parent or legal guardian of a child at least three separate times on the date in question, and only one of those uses would be subsumed by the statutory elements of traveling to meet a minor after using a computer to solicit consent from a parent or legal guardian. Respondent was therefore properly adjudicated guilty of and sentenced for a single count charging using a computer to solicit the consent of the parent or legal guardian of a child to unlawful sexual conduct with that child (and could have been charged with and convicted of at least one more) as well as the charge of traveling to meet a minor after using a computer to solicit the consent of the parent or legal guardian of a child to unlawful sexual conduct with that child.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT RESPONDENT'S CONVICTIONS IN THIS CASE FOR BOTH THE OFFENSE OF TRAVELING TO MEET A MINOR AFTER USING A COM-

PUTER TO SOLICIT CONSENT FROM A PARENT OR LEGAL GUARDIAN AND THE OFFENSE OF USE OF A COMPUTER TO SOLICIT CONSENT FROM A PARENT OR LEGAL GUARDIAN VIOLATED DOUBLE JEOPARDY PRINCIPLES.

This is a question of law, which is reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 1023, 127 L. Ed. 2d 344 (1994); *State v. Glatzmayer*, 789 So. 2d 297, 301-02 n. 7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review.").

Both the Fifth Amendment to the United States Constitution and Article 1, Section 9 of the Florida Constitution provide that no person shall be twice put in jeopardy for the same offense.

In Florida, "[t]he prevailing standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature 'intended to authorize separate punishments for the two crimes.' *M.P. v. State*, 682 So. 2d 79, 81 (Fla. 1996); *see State v. Anderson*, 695 So. 2d 309, 311 (Fla. 1997) ('Legislative intent is the polestar that guides our analysis in double jeopardy issues....')." *Gordon v. State*, 780 So. 2d 17, 19 (Fla. 2001). "[I]f the Legislature intended separate convictions and sentences for a defendant's single criminal act, there is no double jeopardy violation for the multiple punishments." *Hayes v. State*, 803 So. 2d 695, 699 (Fla. 2001), citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).

Section 847.0135(3), Florida Statutes (2011), provides in pertinent part:

> Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
>
> * * *
>
> (b) Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct,
>
> commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084....*Each separate use of a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission wherein an offense described in this section is committed may be charged as a separate offense*.

(Emphasis supplied.)

Section 847.0135(4) provides in pertinent part:

> Any person who travels any distance either within this state, to this state, or from this state by any means...for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

* * *

> (b) Solicit, lure, or entice or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct,
>
> commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

And Section 847.0135(8) provides:

> **Effect of prosecution.—**Prosecution of any person for an offense under this section shall not prohibit prosecution of that person in this state or another jurisdiction for a violation of any law of this state, including a law providing for greater penalties than prescribed in this section or any other crime punishing the sexual performance or the sexual exploitation of children.

State v. Murphy, 124 So. 3d 323, 330-331 (Fla. 1st DCA 2013), held:

> We find no double jeopardy violation here because the Legislature expressly intended to punish both acts. ...The crime of using the Internet to solicit a person believed to be a parent to consent to a child's participation in unlawful sexual activity is defined in section 847.0135(3)(b), and is designated a third degree felony. The crime of traveling to meet a minor after using the Internet to solicit a person believed to be parent, as described above, is separately established and defined in section 847.[0135](4)(b), and is designated a second degree felony. In light of clear legislative intent to punish solicitation and traveling after solicitation separately, we conclude Murphy's sentences for the two crimes do not violate double jeopardy.

(Footnote omitted.)

Not only are using a computer to solicit a person believed to be a parent to consent to a child's participation in unlawful sexual activity and traveling to meet a minor after using a computer to solicit a person believed to be a parent defined as separate and distinct crimes, but the Legislature has expressly stated that each separate use of a computer to solicit a parent or guardian or someone believed to be a parent or guardian of a child may be charged as a separate offense. Indeed, the Legislature has even more broadly stated that prosecution of an accused for one offense under Section 847.0135 does not preclude prosecution of that person for a violation of any other law of this state, which is a clear expression of legislative intent to authorize separate punishments for the separate statutory violations of use of a computer to solicit the consent of a parent or legal guardian to the participation of a child in any sexual conduct, proscribed by subsection (3), and traveling to meet a minor for the purpose of engaging in unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer to solicit the consent of a parent or legal guardian to the participation of such child in any sexual conduct, proscribed by subsection (4).

Thus, we have clear statements of legislative intent to authorize separate punishments for these offenses. The *Murphy* court was

therefore correct, and the Second District was in error in its opinion holding to the contrary in the instant case, *Shelley v. State*, 134 So. 3d 1138 (Fla. 2d DCA 2014).

Additionally, even if this Court were to conclude that the Legislature has not provided an explicit statement of intent to allow for convictions under both Section 847.0135(3) and Section 847.0135(4), convictions for both are proper in the instant case because Respondent used a computer to solicit a person believed to be a parent to consent to a child's participation in unlawful sexual activity four times on the date in question, sending "Hawkins" two text messages and two e-mails to "her" on that date prior to completing the act of traveling to meet "her" (R 36, 53, 61, 62). Even treating the second text message and the first e-mail as a single act because they occurred so close together in time, the State could have charged Respondent with three separate counts of use of a computer to solicit consent from a parent or legal guardian for the date of September 19, 2011 alone. Even if it could be argued that the elements of one of those counts were subsumed by the statutory elements of traveling to meet a minor after using a computer to solicit consent from a parent or legal guardian, neither of the other two would be subsumed by the traveling count unless Respondent had traveled three times, i.e., after each e-mail or text message, which he did not do. See *Avila v. State*, 9 So. 3d

778 (Fla. 2d DCA 2009), in which the Second District held that, if multiple batteries occurred during the course of a burglary, the defendant's convictions of and sentences for both burglary with a battery and battery would not constitute a double jeopardy violation.

Saavedra v. State, 576 So. 2d 953 (Fla. 1st DCA 1991), *aff'd*, 622 So. 2d 952 (Fla. 1993), *cert. denied*, 510 U.S. 1080, 114 S. Ct. 901, 127 L. Ed. 2d 93 (1994), held that double jeopardy principles did not preclude convictions and sentences for multiple acts of sexual battery of the same type and character committed against the same victim even when they were committed on the same date where the victim was moved to different locations and the defendant had time to pause and reflect and form a new criminal intent between these acts. Here the first two messages sent by Respondent on the date in question were sent approximately 15 minutes apart, the third was virtually simultaneous with the second, and these three messages were all apparently sent while Respondent was still at home. The final message, however, was sent nearly an hour after the third and apparently while he was en route to the Starbucks. Thus, similar to *Saavedra*, the last two messages sent by Respondent on the date in question were sent at locations different from each other and from the destination that Respondent had agreed to—and did—travel to, and Respondent had time to pause and reflect and

reaffirm his criminal intent between sending at least three of these messages, i.e., the first, the second/third, and the fourth.

The Second District's holding that Respondent could not be convicted of the soliciting offense because it occurred on the same date as the traveling offense is not supported by *Hartley v. State*, 129 So. 3d 486 (Fla. 4th DCA 2014), one of the cases on which the Second District relied, because nothing in *Hartley* indicates that two or more incidents of soliciting occurred on the same date as the traveling offense, let alone that the defendant had time to pause and reflect and reaffirm his criminal intent between sending the separate communications constituting soliciting.

Furthermore, Hartley had a jury trial, whereas Respondent pled guilty to the charges against him following the denial of a Rule 3.190(c)(4) motion in which he admitted that the facts recited therein—and summarized in Petitioner's statement of facts, *supra* at pp. 3-6—and supported by documentation in the form of copies of his e-mails and text messages were undisputed. With a jury trial, the verdict form can be problematic when it is not properly worded and can result in the defendant's being adjudicated guilty of a less serious offense than the jury might have convicted him of if they had been asked all of the right questions. If there had been a verdict form in the instant case, and if it had not asked for a finding as to whether Respondent had committed more than one act of

solicitation, then the Second District could properly hold that the jury did not find more than a single act of solicitation, which would be subsumed by the traveling offense. Here, however, by admitting to the facts set forth in his (c)(4) motion, Respondent has admitted to committing multiple soliciting offenses on the date in question, and, having charged him with one soliciting offense on that date and proven that he committed more than one, the State is entitled to a conviction of one soliciting offense in addition to Respondent's traveling conviction.

The Second District's holding on this issue is also not supported by *Pinder v. State*, 128 So. 3d 141 (Fla. 5th DCA 2013), the other case on which the Second District relied, because *Pinder* is factually distinguishable. "Pinder was alleged to have violated subsection (3)(b) over an eight-day period, and the evidence established multiple offenses," *id*. at 143. *Pinder* notes that "Section 847.0135(3) expressly provides that '[e]ach separate use of a computer online service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission wherein an offense described in this section is committed may be charged as a separate offense,'" *id*. at 144, but gives no further legal explanation for its conclusion that "Therefore, under the facts of this case, Pinder's convictions under subsections (3)(b) and (4)(b) were for separate offenses and no double jeopardy

violation occurred," *id*., beyond a "see also" cite to *Murphy*. It should also be noted that *Pinder*, like *Hartley*, involved a jury trial, and the *Pinder* opinion does not tell us how its verdict form was worded.

The Second District in the opinion below assumed that the holding in *Pinder* depended on *both* the fact that Pinder was charged with violating Section 847.0135(3) over an eight-day period *and* the fact that he "expressed his desire to engage in sexual activity" with the (nonexistent) child "[o]n more than one occasion during [his] communications" with the undercover deputy. However, the *Pinder* opinion does not so state, although it *does* expressly "agree with Pinder's argument that a single violation of subsection (3)(b) would be a lesser-included offense of an offense found under sub-section (4)(b)." 128 So. 3d at 142. Nor does *Pinder* state that at least one of the acts of soliciting must take place on a different date than the traveling offense. Moreover, if *Pinder had* rendered either of these holdings, it would have been in conflict with *Avila* and *Saavedra*. So long as the acts are separate and distinct, and so long as the defendant had time to pause and reflect and form a new criminal intent between these acts, double jeopardy principles do not preclude convictions and sentences for multiple acts of the same type and character committed against the same victim even when such acts are committed on the same date.

The Second District's statement "We find no legal basis to deny a double jeopardy challenge based on uncharged conduct simply because it could have been charged," 134 So. 3d at 1141-1142, also overlooks the fact that there was only one soliciting count in *Pinder*. And the State should not be deprived of a legitimate conviction simply because it chose to charge fewer offenses than it could and did prove. Such a holding would only result in prosecutors filing more charges than they would like to see defendants punished for and defendants being convicted of more offenses and therefore receiving more severe sentences than either the prosecutor or the trial court would have wanted them to receive.

Finally, to the extent that the opinion below implies that, because there was only a single charge of soliciting here, it must be the act of soliciting required to be committed before the act of traveling occurs, it must be pointed out that an underlying felony need not be charged in order to convict an accused of first-degree felony murder—indeed, felony murder need not even be mentioned in the indictment if premeditation is alleged! *Knight v. State*, 338 So. 2d 201, 205 (Fla. 1976). It would therefore seem unnecessary and unreasonable, even nonsensical, to require that the felony of soliciting underlying a charge of traveling to meet a minor after using a computer to solicit a person believed to be a parent be separately charged—and then only to be dismissed as a violation of

double jeopardy!

In sum, because Respondent admittedly committed at least three separate violations of Section 847.0135(3) on the date in question, he could properly be charged with and convicted of at least one violation of Section 847.0135(3) committed on that date as well as being charged with and convicted of a violation of Section 847.0135(4) on that same date.

Accordingly, the Second District erred in vacating Respondent's conviction and sentence for soliciting, and this Court should quash the Second District's opinion in this case and reinstate Respondent's soliciting conviction and sentence.

CONCLUSION

Respondent respectfully requests that this Honorable Court quash the opinion of the district court below and reinstate Respondent's conviction and sentence for use of a computer to solicit the consent of a parent or legal guardian to the participation of a child in any sexual conduct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing will be furnished via the Florida Courts E-Filing Portal at the time of filing to Victoria Hatfield, Esq., 511 W. Bay St., Ste. 330, Tampa FL 33602 at veh@markjobrien.com this 25th day of July, 2014.

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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COUNSEL FOR PETITIONER

Dean SHELLEY, Appellant,

v.

STATE of Florida, Appellee.

No. 2D13–1941.

District Court of Appeal of Florida, Second District.

March 19, 2014.

Background: Defendant was convicted in the Circuit Court, Hillsborough County, Chet A. Tharpe, J., of using computer services or devices to solicit consent of a parent or legal guardian and traveling to meet a minor after using computer services or devices to solicit consent of a parent or legal guardian, and he appealed.

Holdings: The District Court of Appeal, Silberman, J., held that:

(1) dual convictions violate double jeopardy unless the State has charged and proven separate uses of computer devices to solicit, and

(2) defendant's convictions violated double jeopardy.

Affirmed in part and reversed in part.

1. Telecommunications ⚿1351

Although standard jury instructions for both offenses, use of computer services to solicit consent of a parent and traveling to meet a minor after using computer services, required that the defendant use a computer to contact the person believed to be the child victim, the applicable statutes, which were controlling, did not contain this requirement; recently approved amendments to the standard jury instructions cured these errors. West's F.S.A. § 847.0135(3)(b), (4)(b).

2. Double Jeopardy ⚿134

Prevailing standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction under double jeopardy clause is whether the Legislature intended to authorize separate punishments for the two crimes. U.S.C.A. Const.Amend. 5.

3. Double Jeopardy ⚿134, 135

For double jeopardy purposes, if there is no explicit legislative intent to allow separate punishments for two crimes arising out of the same criminal transaction, courts must apply the *Blockburger* test to determine whether the legislature intended to allow separate punishment. West's F.S.A. § 775.021(4); U.S.C.A. Const.Amend. 5.

4. Double Jeopardy ⚿148

Placement of offenses in separate statutory provisions did not constitute an explicit statement of intent for purposes of determining whether defendant's convictions for use of computer services or devices to solicit consent of a parent or legal guardian and traveling to meet a minor after using computer services violated double jeopardy. U.S.C.A. Const.Amend. 5.; West's F.S.A. §§ 847.0135(3)(b), 847.0135(4)(b).

5. Double Jeopardy ⚿148

Dual convictions, for using a computer service to solicit person believed to be a parent to consent to unlawful sexual activity with child and traveling to meet the minor after soliciting the person believed to be a parent, in the course of one criminal transaction or episode violate the prohibition against double jeopardy, but convictions for both soliciting and traveling may be legally imposed in cases in which the State has charged and proven separate uses of computer devices to solicit. U.S.C.A. Const.Amend. 5; West's F.S.A. §§ 775.021(4), 847.0135(3)(b), (4)(b).

6. Double Jeopardy ⚿148

Defendant's convictions for both use of computer services or devices to solicit consent of a parent and traveling to meet a minor after using computer services violat-

ed the prohibition against double jeopardy because the soliciting offense was subsumed by the traveling offense; traveling offense proscribed traveling to meet a child to engage in unlawful sexual contact after having solicited the child's parent, and the soliciting offense did not contain an element that was not found in the traveling offense, and State only charged one use of computer devices to solicit, and that charge was based on a solicitation occurring on the same date as the traveling offense. U.S.C.A. Const.Amend. 5.; West's F.S.A. §§ 775.021(4), 847.0135(3)(b), (4)(b).

Victoria Hatfield of O'Brien Hatfield, P.A., Tampa, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, for Appellee.

SILBERMAN, Judge.

Dean Shelley responded to a Craigslist ad posted in the Casual Encounters section by a police officer posing as a single mother nudist "looking for family fun." Shelley made arrangements via electronic communication to have sex with the "mother's" fictitious ten-year-old daughter and was arrested when he arrived at the predetermined meeting place. In this appeal, Shelley seeks review of his convictions for (1) use of computer services or devices to solicit consent of a parent or legal guardian, and (2) traveling to meet a minor after using computer services or devices to solicit consent of a parent or legal guardian. We affirm in part and reverse in part.

Shelley entered guilty pleas to the charges while reserving his right to appeal the denial of a motion to dismiss and amended motion to dismiss. Shelley argues that the trial court erred in denying the motion to dismiss because the undisputed facts failed to establish a prima facie case of the crimes. Shelley also argues that the trial court erred in denying the amended motion to dismiss because his convictions violate the prohibition against double jeopardy. We address these arguments in turn.

I. *Prima Facie Case*

[1] Shelley argues that the undisputed facts do not establish that he actually contacted a child or a person he believed to be a child. We recognize that the then-applicable standard jury instructions for both offenses required that the defendant use a computer to contact the person believed to be the child victim. *See* Fla. Std. Jury Instr. (Crim.) 11.17(b), (d) (2009). However, the applicable statutes, which are controlling, do not contain this requirement. *See* § 847.0135(3)(b), (4)(b), Fla. Stat. (2011); *State v. Wilson,* 128 So.3d 946, 948 (Fla. 5th DCA 2013). The supreme court has recently approved amendments to the standard jury instructions that cure the errors. *See In re Standard Jury Instructions in Criminal Cases–Report No. 2012–09,* 122 So.3d 263, 276, 279 (Fla.2013).

Shelley also argues that the undisputed facts fail to establish that he solicited, lured, or enticed a parent to consent to a child's participation in the illegal conduct. Shelley claims that his conduct on the date charged in the information did not constitute soliciting, luring, or enticing because the plan to engage in illicit sexual contact was set in motion before that date. And he claims that the undercover officer was the person who did the soliciting, luring, and enticing.

Both of these arguments have been rejected by our sister courts. *See Hartley v. State,* 129 So.3d 486, 489–90 (Fla. 4th DCA 2014) (holding that certain text exchanges on specific dates constituted soliciting even though they were merely confirming plans established on another date to meet the

child for a sexual encounter); *State v. Murphy,* 124 So.3d 323, 328–29 (Fla. 1st DCA 2013) (rejecting the argument that the defendant did not solicit a parent's consent because an officer was posing as the parent and had placed the Craigslist ad). Accordingly, the trial court did not err in rejecting Shelley's challenges to the State's prima facie case and denying the motion to dismiss.

II. *Double Jeopardy*

Shelley argues that his convictions for soliciting and traveling violate the constitutional prohibition against double jeopardy. Shelley asserts that the elements of soliciting under section 847.0135(3)(b) are subsumed by the elements of traveling under section 847.0135(4)(b). The State does not dispute that the soliciting offense is subsumed by the traveling offense but argues that the dual convictions are proper because the legislature intended to allow multiple punishments for the crimes.

[2, 3] We conduct a de novo review of a double jeopardy claim based on undisputed facts. *Pizzo v. State,* 945 So.2d 1203, 1206 (Fla.2006). " 'The prevailing standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature "intended to authorize separate punishments for the two crimes." ' " *Valdes v. State,* 3 So.3d 1067, 1070 (Fla. 2009) (quoting *Gordon v. State,* 780 So.2d 17, 19 (Fla.2001)). The legislative intent may "be explicitly stated in a statute." *M.P. v. State,* 682 So.2d 79, 81 (Fla.1996). If there is no explicit legislative intent to allow separate punishments for two crimes arising out of the same criminal transaction, courts must apply the *Blockburger*[1] test as codified in section 775.021(4), Florida Statutes (2011), to determine whether the legislature intended to allow separate punishments. *M.P.,* 682 So.2d at 81.

In this case, section 847.0135(3)(b) expressly provides, "Each separate use of a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission wherein an offense described in this section is committed may be charged as a separate offense." Thus, there is an explicit statement of the legislature's intent to authorize multiple punishments for each violation of section 847.0135(3)(b).

However, there is no explicit statement of intent to authorize multiple punishments for conduct that violates both section 847.0135(3)(b) and section 847.0135(4)(b). We recognize that the First District has reached the opposite conclusion. *See Murphy,* 124 So.3d at 330–31. The *Murphy* court reasoned that, by separately establishing and defining soliciting and traveling in different sections of the statute, the legislature expressed its intent to allow for multiple punishments for the crimes. *Id.* at 330.

[4] We do not agree that the placement of the offenses in separate provisions constitutes an explicit statement of intent for purposes of a double jeopardy analysis. *Compare M.P.,* 682 So.2d at 82 (holding that the legislature explicitly stated its intent to allow multiple punishments by providing "that '[t]he provisions of this section are *supplemental* to all other provisions of law' " (quoting § 790.22(7), Fla. Stat. (Supp.1994))), *with Gorday v. State,* 907 So.2d 640, 644 (Fla. 3d DCA 2005) (holding that there was "nothing in the language, structure, or legislative history of the credit card theft statute" that established an intent to allow for convictions under both the credit card statute and the armed robbery statute for an armed robbery of a purse containing a credit card).

1. *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

There being no explicit statement of intent, we must proceed to a *Blockburger* analysis under section 775.021(4). Under that section, the legislature provided for three exceptions to the general rule authorizing multiple convictions for separate criminal offenses committed in the course of one criminal transaction or episode. *Id.* The exception that Shelley argues applies in this case is for "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." § 775.021(4)(b)(3).

To determine whether this exception applies we must analyze whether the soliciting offense contains an element that is not found in the traveling offense. *See Pinder v. State,* 128 So.3d 141, 142–43 (Fla. 5th DCA 2013). The soliciting offense is set forth in section 847.0135(3)(b) and provides, in pertinent part:

> Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
>
> . . . .
>
> (b) Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct,
>
> commits a felony of the third degree. . . .

This language is repeated in the traveling offense which provides, in pertinent part:

> Any person who travels any distance either within this state, to this state, or from this state by any means, who attempts to do so, or who causes another to do so or to attempt to do so for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using *a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:*
>
> . . . .
>
> *(b) Solicit, lure, or entice or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct,*
>
> commits a felony of the second degree. . . .

§ 847.0135(4)(b) (emphasis added).

[5, 6] In essence, the traveling offense proscribes traveling to meet a child to engage in unlawful sexual contact after having solicited the child's parent, legal guardian, or custodian or a person believed to be such. Thus, the soliciting offense does not contain an element that is not found in the traveling offense. *See Hartley,* 129 So.3d at 491; *Pinder,* 128 So.3d at 143. As a result, dual convictions for soliciting and traveling in the course of one criminal transaction or episode violate the prohibition against double jeopardy. *Id.*

The State asserts that because Shelley's three separate uses of computer devices on the date charged in the information would have supported three separate soliciting charges, the soliciting charge is not subsumed by the traveling charge. We are not persuaded by this argument. The State only charged one use of computer devices to solicit, and that charge was based on a solicitation occurring on the same date as the traveling offense. We

find no legal basis to deny a double jeopardy challenge based on uncharged conduct simply because it could have been charged. But we acknowledge that convictions for both soliciting and traveling may be legally imposed in cases in which the State has charged and proven separate uses of computer devices to solicit. *See Hartley,* 129 So.3d at 491 (vacating a soliciting conviction for conduct on the same date as the traveling conviction but affirming two soliciting convictions for conduct on different dates); *Pinder,* 128 So.3d at 144 (affirming soliciting and traveling convictions because the soliciting conduct was charged over multiple dates and the evidence established multiple offenses over multiple dates).

In conclusion, the convictions for both soliciting and traveling as charged in this case violate the prohibition against double jeopardy because the soliciting offense is subsumed by the traveling offense. We therefore affirm the conviction and sentence for traveling and vacate the conviction and sentence for soliciting. *See Pizzo,* 945 So.2d at 1207 (holding that the proper remedy for a double jeopardy violation is to vacate the subsumed offense). We also certify conflict with the First District's decision in *Murphy* to the extent that it holds that the legislature explicitly stated its intent to allow separate convictions for soliciting and traveling for purposes of a double jeopardy analysis.

Affirmed in part and vacated in part; conflict certified.

NORTHCUTT and CRENSHAW, JJ., Concur.

Henry LAFFERTY, Jr., Appellant,

v.

Lora LAFFERTY, Appellee.

No. 2D12–4540.

District Court of Appeal of Florida, Second District.

March 28, 2014.

Background: Wife filed petition for dissolution of marriage. The Circuit Court, Manatee County, Gilbert Smith, Jr., J., entered final judgment of dissolution of marriage that included an award of retroactive alimony. Husband appealed.

Holdings: The District Court of Appeal, Crenshaw, J., held that:

(1) evidence did not support trial court's award of $29,423 in retroactive alimony;

(2) trial court's failure to conduct an analysis regarding imputation of income to wife as part of its award of alimony required reversal; and

(3) husband was entitled to a setoff against the retroactive alimony for the $1,000 payment he made for wife's rent.

Affirmed in part, reversed in part, and remanded with directions.

1. Divorce ⇨594(5)

Evidence in dissolution of marriage action did not support trial court's award of $29,423 in retroactive alimony to wife; wife's accountant, who prepared schedule relied on by the trial court, did not look to wife's need for retroactive alimony, but, rather, added the net disposable income attributed to the parties and decided that wife was entitled to 45% of the total, such percentage had no basis in the record, and wife's testimony as to her need for retroactive alimony did not quantify any amounts.