IN THE SUPREME COURT OF FLORIDA

CARLOS J. ACEVEDO,
Appellant,

v.

Case No: 15-1873

STATE OF FLORIDA,
Appellee
_____/

APPELLANT'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA
DCA CASE NO: 4D14-3124
L.T. CASE NO: 06-002820CF10A

Carlos J. Acevedo, *pro se*
DC# 083568
Okaloosa Correctional Institution
3189 Colonel Greg Malloy Road
Crestview, Florida 32539

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STATEMENT OF THE CASE AND FACTS

The Appellant was charged by information with:

A) Count 1, Lewd or Lascivious Battery, § 800.04(4)(a)

B) Count 2, Lewd or Lascivious Molestation, § 800.04(5)(a) & 800.04(5)(c)2

C) Count 3, Lewd or Lascivious Molestation, § 800.04(5)(a) & 800.04(5)(c)2

D) Count 4, Lewd or Lascivious Molestation, § 800.04(5)(a) & 800.04(5)(c)2

E) Count 5, Lewd or Lascivious Conduct, § 800.04(6)(a) & 800.04(6)(b)

(Appellant's alleged date of offense was between Jan 1, 2006 and Feb. 16, 2006)

All the counts charged were second-degree felonies punishable to 15 years of incarceration in prison.

Mr. Acevedo had a jury trial conducted on Jan 17-18, 2008 in which the jury convicted him on all counts charged on Jan 18, 2008.

Appellant was sentenced on Jan 23, 2008 to life on counts I thru V. All count's were ran concurrent to each other as Mr. Acevedo was sentenced as a dangerous sexual felony offender (§ 794.0115(2005)).

Appellant received 25 years minimum-mandatory on counts I thru V. On count V, the Appellant received a life sentence due to his criminal punishment code score sheet scoring to 458.1 sentencing points.

Appellant timely filed a direct appeal for his judgment and sentence(s) to the Fourth District Court of Appeal.

The Fourth DCA affirmed his conviction and sentence(s) on Oct 28, 2009 and issued its mandate on Dec 1, 2009. (See Acevedo v. State, 20 So. 3d 859 (Fla. 4th DCA 2009).

Appellant filed a 3.800(a) motion to correct illegal sentence on June 3, 2013 (mailbox rule) claiming that the trial court erred in sentencing him to life sentences for count I thru IV as a dangerous sexual felony offender (DSFO, § 794.0115 (2005)). The predicate used by the trial court did not qualify Mr. Acevedo for such sentencing and exceeded the statutory maximum of 30 years for all the counts he was convicted of.

The trial court denied the 3.800(a) motion on June 25, 2014 and the Appellant timely filed a notice of appeal to the Fourth DCA.

The Fourth DCA issued a written opinion on July 29, 2015 affirming the lower trial court's order denying Appellant's 3.800(a) motion but certified conflict with the Fifth DCA decision in Durant v. State, 94 So. 3d 669 (Fla. 5th DCA 2012). (See 40 Flw d1752 (Fla. 4th DCA 2015)).

A timely motion for rehearing was filed and denied on Aug 17, 2015 but the denial was not mailed to the Appellant from the Clerk of the Fourth DCA, until Sept 11, 2015. This denial was not received by the Appellant at Okaloosa Correctional Institution until Sept 21, 2015.

The mandate was not issued and mailed to the Appellant until Oct 2, 2015.

The Appellant timely filed a notice for discretionary review to the Florida Supreme Court on Oct 8, 2015. (Mailbox rule)

SUMMARY OF ARGUMENT

The Supreme Court has discretion to accept jurisdiction pursuant to Rule 9.030(a)(2)(A)(vi) and the Florida Constitution to settle conflicts, on a question of law, between separate District Courts of Appeal in the State of Florida.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION TO REVIEW CONFLICT BETWEEN THE FOURTH AND FIFTH DISTRICT COURT'S OF APPEAL ON A QUESTION OF LAW.

The Appellant asserts that the current Fourth DCA opinion, in this case, certifies to be in express and direct conflict with the Fifth DCA decision in Durant v. State, 94 So. 2d 669 (Fla. 5th DCA 2012) of which the Appellant contends (and relies upon) that his current sentences of life are illegal as a matter of law.

Additionally, the opinion of the Fourth DCA addressed only subsection (4) of Florida Statute 800.04 which dealt with count I of the sentences. The opinion

did not address subsection (5) of § 800.04 which dealt with count 2, 3 and 4 of Appellant's sentences.

Therefore the legal conclusions of the Fourth DCA's opinion are incomplete and does not address all the matters of law the Appellant's motion to correct illegal sentence relied on for relief pursuant to Durant.

CONCLUSION

WHEREFORE, Appellant respectfully requests that this court accept discretionary jurisdiction of this case on a conflict between the Fourth and Fifth DCA's decisions concerning a matter of law.

Respectfully submitted,

Carlos J. Acevedo DC# 083568
Okaloosa Correctional Institution
3189 Colonel Greg Malloy Road
Crestview, Florida 32539

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed a true and correct copy of this document in the hands of Florida Department of Corrections Officials for mailing by U.S. Mail to: Mark J. Hamel, Asst. Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432 on this 19 day of November, 2015.

Carlos J. Acevedo DC# 083568
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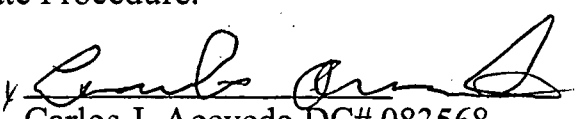
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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APPENDIX

Pursuant to Rule 9.120(d), Appellant submits an attached copy of the decision of the Fourth District Court of Appeal.

Respectfully submitted,

Carlos J. Acevedo DC# 083568
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3189 Colonel Greg Malloy Road
Crestview, Florida 32539-6708

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed a true and correct copy of this document in the hands of Florida Department of Corrections Officials for mailing by U.S. Mail to: Mark J. Hamel, Asst. Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432 on this 19 day of November, 2015.

Carlos J. Acevedo DC# 083568

ORIG.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CARLOS J. ACEVEDO,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D14-3124

[July 29, 2015]

Appeal of order denying rule 3.800 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Paul L. Backman, Judge; L.T. Case No. 06-002820CF10A.

Carlos J. Acevedo, Crestview, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee, and Mark J. Hamel, Assistant Attorney General, West Palm Beach, for appellee.

MAY, J.

The defendant appeals an order summarily denying his rule 3.800(a) motion. He argues the trial court erred in imposing a mandatory minimum twenty-five-year sentence pursuant to section 794.0115(2), Florida Statutes (2005), because his predicate crime did not satisfy the statute. We disagree and affirm.

A jury convicted the defendant of lewd and lascivious battery, three counts of lewd and lascivious molestation, and lewd and lascivious conduct. The court found him to be a sexual predator and sentenced him to life in prison on each count, to run concurrently. The court declared him to be a dangerous sexual felony offender ("DSFO"), pursuant to section 794.0115(2), Florida Statutes, and imposed a mandatory minimum twenty-five-year sentence.

The defendant did not raise a sentencing issue in either his direct appeal or subsequent rule 3.850 motion. We affirmed his conviction and sentence on direct appeal, and the trial court's summary denial of his rule 3.850 motion in his subsequent appeal. *Acevedo v. State*, 110 So. 3d 461

(Fla. 4th DCA 2013) (unpublished table decision); *Acevedo v. State*, 20 So. 3d 859 (Fla. 4th DCA 2009) (unpublished table decision).

In his most recent rule 3.800(a) motion, the defendant challenged the twenty-five-year mandatory minimum part of his sentence. He claimed the predicate conviction used to qualify him as a DSFO was insufficient. The State responded, and the trial court summarily denied the motion. He now appeals the order denying his motion.

The defendant argued in his motion that he did not qualify as a DSFO because his prior conviction under section 800.04, Florida Statutes (1981), did not contain elements similar to section 800.04(4), Florida Statutes (2005) (lewd or lascivious battery), or section 800.04(5), Florida Statutes (2005) (lewd or lascivious molestation). We disagree.

The DSFO statute enumerates various qualifying prior offenses, including violations of sections 800.04(4) and (5), but also includes "any offense under a former statutory designation which is similar in elements to an offense described in this paragraph." § 794.0115(2)(e), Fla. Stat. (2005). The defendant's 1981 conviction was for a violation of a former version of section 800.04, which provided:

> Any person who shall handle, fondle or make an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without the intent to commit sexual battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

§ 800.04, Fla. Stat. (1981).

In 2005, section 800.04 provided, in relevant part:

> (4) LEWD OR LASCIVIOUS BATTERY.—A person who:
> . . . .
> (b) Encourages, forces, or entices any person less than 16 years of age to engage in . . . any other act involving sexual activity commits lewd or lascivious battery, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 800.04(4), Fla. Stat. (2005).

The DSFO statute requires *similar* elements, not *identical* elements. To determine if the statutes are similar, we focus on their similarities and not their dissimilarities. And, there are similarities between the 1981 and 2005 statutes.

Both statutes proscribe the lewd or lascivious touching of a child. Section 800.04 (1981) prohibited "any person from making "an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner. . . ." Section 800.04(4)(b) (2005) defines a lewd or lascivious battery as encouraging, forcing or enticing "any person less than 16 years of age to engage in . . . any other act involving sexual activity." Both statutes require the victim to be under a certain similar age. Both statutes are second degree felonies.

In 1981, the defendant was charged with coercing an 11-year-old boy to allow the defendant to perform oral sex on him. That conduct is proscribed by subsection (4)(b) of the 2005 statute. Thus, had the same crime been committed in 2005, it would have satisfied the similar elements of section 800.04(4)(b).

We agree with the State, while not identical, the statutes are similar. The court did not err in finding the defendant to be a DSFO and imposing a twenty-five-year mandatory minimum sentence.

The defendant relies on *Durant v. State*, 94 So. 3d 669 (Fla. 5th DCA 2012), to support his position that the statutes are not similar. We understand that by focusing on the dissimilarities of two statutes, a court can conclude the statutes are dissimilar. But, we disagree that the focus should be on the dissimilarities between the two statutes.

In *Durant*, the defendant also challenged his classification as a DSFO and the imposition of a twenty-five-year mandatory minimum sentence on direct appeal. The defendant was convicted of violating section 794.011(8)(a), Florida Statutes (2012), for "committing an unnatural or lascivious act and solicitation of a child under eighteen years of age to engage in an act that constitutes sexual battery by a person who is in a position of familial or custodial authority." *Id.* at 670. In designating the defendant as a DSFO, the trial court relied upon a predicate conviction for a violation of section 800.04(1), Florida Statutes (1995). That section is nearly identical to the 1981 version of section 800.04.

Section 800.04(1) (1995) made it a second degree felony to "handle[], fondle[], or assault[] any child under the age of 16 years in a lewd, lascivious, or indecent manner . . . without committing the crime of sexual

battery." *Id.* at 671. The state argued that the elements of section 800.04(1) were similar to the elements of sections 800.04(4) and (5). *Id.* The court reviewed the two statutory provisions and did "not believe that the 1995 version of section 800.04(1) [was] similar in elements to sections 800.04(4) and (5)." *Id.* It focused on the dissimilarities between the two statutes, and reversed the mandatory minimum sentence. *Id.* at 672.

The purpose of the dangerous sexual felony offender statute was to provide an enhanced sentence to offenders who had previously been convicted of enumerated provisions of the Florida Statutes or statutes with similar elements. The serious nature of the crime, the defendant's recidivism, and the young age of the victim, begged for enhanced sentencing. Our legislature provided the enhanced sentencing. By our decision, we enforce the legislature's intent.

To the extent our decision conflicts with the Fifth District's decision in *Durant*, we certify conflict.

We affirm the order denying the defendant's rule 3.800(a) motion.

Affirmed.

CIKLIN, C.J., and GROSS, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.