IN THE SUPREME COURT OF FLORIDA

CARLOS J. ACEVEDO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-1873
4th DCA Case No. 4D14-3124

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RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

A jury convicted Petitioner of lewd and lascivious battery, three counts of lewd and lascivious molestation, and lewd and lascivious conduct. Acevedo v. State, 174 So. 3d 437, 437 (Fla. 4th DCA 2015). The trial court found Petitioner to be a sexual predator and sentenced him to life in prison on each count, to run concurrently. Id. The trial court declared Petitioner to be a dangerous sexual felony offender, pursuant to section 794.0115(2), Florida Statutes, and imposed a mandatory minimum twenty-five-year sentence. Id.

In a rule 3.800(a) motion, Petitioner challenged the twenty-five-year mandatory minimum part of his sentence. Id. In his motion, Petitioner argued that he did not qualify as a dangerous sexual felony offender 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). Id. at 437-38. The trial court summarily denied the motion and Petitioner appealed to the Fourth District Court of Appeal. Id. at 437.

The Fourth District Court of Appeal analyzed the issue as follows:

The DSFO [Dangerous Sexual Felony Offender] 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.

Acevedo, 174 So. 3d at 438-39.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal was based on facts not present in the decision from the Fifth District Court of Appeal. Since the different holdings were based on different controlling facts, there is no conflict.

ARGUMENT

> THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL NOT DOES NOT CONFLICT WITH THE DECISION FROM THE FIFTH DISTRICT COURT OF APPEAL.

A defendant qualifies for sentencing pursuant to the Dangerous Sexual Felony Offender Statute where the defendant is convicted of an enumerated offense and was previously convicted of a violation of any offense under "a former statutory designation which is similar in elements to an offense described in this paragraph." § 794.0115, Fla. Stat. (2006). In both Acevedo v. State, 174 So. 3d 437, 437-39 (Fla. 4th DCA 2015) and

Durant v. State, 94 So. 3d 669, 670-72 (Fla. 5th DCA 2012), the courts examined whether a previous conviction was similar in elements to a designated offense. However, the decision in Acevedo relied on additional facts not present in the Durant decision.

In Durant, the Fifth District Court of Appeal conducted a strict comparison of the statutory elements of the 1995 version of section 800.04(1) with the 2012 version of sections 800.04(4) and (5). Durant, 94 So. 3d at 670-72. In the Durant decision, there was no mention of the manner in which the 1995 crime was committed. Id.

In Acevedo, the Fourth District Court of Appeal compared the statutory elements of the 1981 version of section 800.04 with the 2005 version of sections 800.04(4) and (5). Acevedo, 174 So. 3d at 438. However, the Fourth District Court of Appeal considered additional facts by examining the pertinent elements that apply to Petitioner's 1981 crime: "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." Id. at 438.

Thus, the different decisions were based upon different controlling facts. Since the controlling facts were not the

same, there is no express and direct conflict. See Crossley v. State, 596 So. 2d 447, 449 (Fla. 1992) (concluding that conflict jurisdiction existed where the courts reached the opposite result based on the same or closely similar controlling facts).

The decision of the Fourth District Court of Appeal noted only the possibility of conflict: "[t]o the extent our decision conflicts with the Fifth District's decision in Durant." Acevedo, 174 So. 3d at 439. However, since Acevedo involved different controlling facts, there is no conflict at all.

CONCLUSION

Since there is no conflict, this Court should deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was sent by U.S. Mail to Carlos Acevedo, DC # 083568, Okaloosa Correctional Institution, 3189 Colonel Greg Malloy Road, Crestview, Fl 32539 on December 10, 2015.

_____
/s/ MARK J. HAMEL
Counsel for Respondent

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

_____
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