IN THE SUPREME COURT OF FLORIDA

CARLOS J. ACEVEDO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

Case No. SC15-1873
L.T. Case Nos.: 4D14-3124
06-002820CF10A

INITIAL BRIEF OF PETITIONER

On Review from the District Court of Appeal
Fourth District, State of Florida

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STATEMENT OF CASE AND FACTS

The Dangerous Sexual Felony Offender Act ("DSFO Act") provides that any person who is convicted of violating section 800.04(4) or (5), Florida Statutes, and has previously been convicted of a violation of "any offense under a former statutory designation which is **similar in elements** to an offense described in this paragraph" is a Dangerous Sexual Felony Offender ("DSFO"), "who must be sentenced to a mandatory minimum term of 25 years imprisonment up to, and including, life imprisonment." § 794.0115(2)(e), Fla. Stat. (2005) (emphasis added).

Here, Petitioner, Carlos Acevedo ("Acevedo"), was convicted of violating section 800.04(4)(a), (5)(a), (5)(c)2, (6)(a), and (6)(b), Florida Statutes (2005). Because he was previously convicted in 1982 of violating the 1981 version of section 800.04, the trial court designated him a DSFO and sentenced him to life in prison.

The issue before this Court is how to determine whether a prior statute is "similar in elements" to an offense identified in section 794.0115. The Fourth District in this case and the Fifth District in *Durant v. State*, 94 So. 3d 669 (Fla. 5th DCA 2012), reached opposite conclusions.

A. Acevedo's Conviction And Sentencing.

In 2006, Acevedo was charged with one count of lewd or lascivious battery

in violation of section 800.04(4)(a), Florida Statutes (2005) (count 1); three counts of lewd or lascivious molestation in violation of section 800.04(5)(a) and (5)(c)2, Florida Statutes (2005) (counts 2-4); and one count of lewd or lascivious conduct in violation of section 800.04(6)(a) and (6)(b), Florida Statutes (2005) (count 5). (R:20-21). The State sought to have Acevedo sentenced as a habitual felony offender under section 775.084, Florida Statutes (2005). (R:24).

Acevedo was found guilty by a jury on all counts. (R:25-29). At sentencing, count 5 was treated as Acevedo's primary offense, and the court used the 1998 Criminal Punishment Code Supplemental Scoresheet to determine his sentence on that count. (R:35). Although many of Acevedo's prior convictions occurred before the 1998 sentencing scoresheet existed, the trial court scored all of those convictions under that scoresheet, reached a total score of 458.1, and sentenced Acevedo to life in prison on count 5. (R:35-37). The lowest permissible sentence Acevedo could have received under the scoresheet was 26.88 years. (R:37).

Counts 1-4 were treated as Acevedo's additional offenses. (R:35). Because he previously had been convicted of violating section 800.04, Florida Statutes (1981), the trial court designated Acevedo a DSFO for counts 1-4 and sentenced him to life in prison on those counts, with a 25-year mandatory minimum sentence. (R:33-34). It is not clear on this record why the trial court believed the elements of the 1981 and 2005 versions of section 800.04 were similar.

B. Acevedo Moves To Correct Illegal Sentence Under Rule 3.800(a), And The Trial Court Denies His Motion.

Acevedo filed a motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a), asserting that the trial court erred in designating him a DSFO and imposing life sentences on counts 1-4 because his prior 1982 conviction was not for a crime that contained elements similar to the crime for which he was presently convicted. (R:1-5). Specifically, the 1981 version of section 800.04, under which Acevedo was convicted in 1982, provided, in its entirety:

> 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 in the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added).

Acevedo contended that, in contrast, section 800.04(4) and (5), Florida Statutes (2005), explicitly requires "sexual activity" as an element of the crime. "Sexual activity" is defined as "the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose." § 800.04(1)(a), Fla. Stat. (2005).

The portions of the statute under which Acevedo was convicted provide:

(4) Lewd or lascivious battery.— A person who:

(a) Engages in **sexual activity** with a person 12 years of age or older but less than 16 years of age; or

* * * *

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.

(5) Lewd or lascivious molestation.—

(a) A person who **intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, buttocks, or the clothing covering them**, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.

* * * *

(c)2. An offender 18 years of age or older who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added).

Acevedo explained that the elements of the offenses under these two statutes are not similar. (R:3-5). The 1981 version of the statute criminalizes lewd or lascivious activity "without the intent to commit sexual battery." *Id.* (quoting § 800.04, Fla. Stat. (1981)). The 2005 version, on the other hand, explicitly requires sexual activity. (R:4-5) (quoting § 800.04(4) and (5), Fla. Stat. (2005)).

Acevedo pointed to *Durant*, where the Fifth District conducted the same analysis in applying the DSFO Act. In *Durant*, the defendant was convicted of

committing an unnatural or lascivious act and solicitation of a child under the age of 18 to engage in an act that constitutes a sexual battery, in violation of section 794.011(8)(a), Florida Statutes. 94 So. 3d at 671. The trial court designated the defendant a DSFO because he previously was convicted of violating section 800.04(1), Florida Statutes (1995). The State argued that the 1995 version of section 800.04(1) has similar elements to section 800.04(4) and (5), Florida Statutes (2009), which are identified in section 794.0115(2)(e). 93 So. 3d at 671.

Reversing and remanding for resentencing, the Fifth District held that the 1995 version of section 800.04(1) is not similar in elements to sections 800.04(4) and (5), Florida Statutes (2009). The court explained that section 800.04(4) requires evidence of "sexual activity," whereas there is no "sexual activity" requirement contained in section 800.04(1). 93 So. 3d at 671. Similarly, section 800.04(5) requires evidence that the perpetrator intentionally touched the breasts, genitals, genital area, or buttocks, or the clothing covering them, of the minor. Section 800.04(1) contains no such requirement. Consequently, although other elements of the statutes were the same, the court held that the statutes did not have similar elements for purposes of the DSFO statute. *Id.*

In response to Acevedo's motion, the State contended only that the similarity analysis Acevedo advocated under the DSFO statute was factual in nature, not legal. (R:16-27). Accordingly, the State contended, Acevedo's rule

3.800 motion was legally insufficient. *Id.*

The trial court denied Acevedo's motion "for the reasons set forth in the State's Response . . . ." (R:77).

C. The Fourth District Affirms The Trial Court's Order But Certifies Conflict With *Durant v. State*.

The Fourth District affirmed the trial court's denial of Acevedo's rule 3.800(a) motion, holding that the 1981 and 2005 versions of section 800.04 contain **some** elements that are similar. *Acevedo v. State*, 174 So. 3d 437, 438 (Fla. 4th DCA 2015). Specifically, both statutes "proscribe the lewd or lascivious touching of a child" and "require the victim to be under a certain similar age." *Id.* The court reasoned that the DSFO statute requires "similar" elements, not identical ones. *Id.* The court did not cite any legal authority in support of its holding.

The Fourth District expressly rejected the analysis conducted by the court in *Durant*, where the Fifth District – citing legal precedent – considered the **dissimilarities** in the two statutes and held that Durant did not qualify as a DSFO. *Id.* (discussing *Durant*, which, in turn, cited *Fike v. State*, 63 So. 3d 847 (Fla. 5th DCA 2011), and *Abrams v. State*, 971 So. 2d 1033 (Fla. 4th DCA 2008)).

This Court accepted jurisdiction based on the certified conflict with *Durant.*

SUMMARY OF ARGUMENT

The Fourth District's decision to consider only the similarity between statutory elements in determining whether to designate a defendant a DSFO and

subject that person to a heightened, potentially life, sentence is contrary to every decision counsel could find addressing this, or a legally similar, issue. It is inconsistent with at least two decisions from this Court, decisions from other district courts of appeal, a decision by a different panel of the Fourth District, and decisions from federal courts conducting similar analyses. These courts routinely considered both the similarities and dissimilarities among statutory elements to determine whether a defendant could be subjected to a certain designation and resulting heightened sentence.

Simply put, considering only whether two statutes have elements in common fails to show whether two offenses are actually similar. It is only when the dissimilarities between elements are also considered that courts gain an accurate picture of whether the statutes are truly similar. Considering only the similarities also violates the rule of lenity, which requires any ambiguity in a sentencing statute to be construed in favor of the defendant.

The Fourth District's decision should be disapproved and the Fifth District's decision approved.

ARGUMENT

THE FOURTH DISTRICT APPLIED AN INCORRECT TEST TO DETERMINE WHETHER ACEVEDO'S PRIOR CONVICTION CONTAINED ELEMENTS SIMILAR TO HIS CURRENT CONVICTION

A. Standard Of Review.

This case turns on an issue of statutory interpretation – how to construe the similarity requirement of section 794.0115, Florida Statutes. This is a legal issue reviewed de novo. *See Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006).

B. The Fourth District's Similarity Test Is Contrary To The Law And Untenable.

Under the DSFO Act, Acevedo could not have been designated a DSFO unless his prior 1982 conviction was "similar in elements" to the crimes for which he is presently convicted. § 794.0115(2)(e), Fla. Stat. (2005). In making this determination, courts look only to the legal elements of the crime, not the underlying facts. *Dautel v. State*, 658 So. 2d 88, 90-91 (Fla. 1995).

Under the Fourth District's holding in this case, if two statutes have **any** elements in common, they are similar for purposes of the DSFO Act, and a person can be designated a DSFO. That person, consequently, also is subject to a 25-year mandatory minimum sentence and is not eligible for statutory gain-time or any form of discretionary early release, other than pardon or executive clemency or conditional medical release, before serving the minimum sentence. *See* § 794.0115(6), (7), Fla. Stat. (2005). This is not only contrary to how courts have

routinely addressed this issue, but is untenable and leads to unfair and unjustified sentences.

Like *Durant* and contrary to the decision under review, Florida's courts – including this Court – routinely consider all of the statutory elements of a crime, including their **dissimilarities**, to determine whether the crimes are similar. For example, in *Dautel*, this Court considered whether the elements of the defendant's prior conviction in Ohio for gross sexual imposition were analogous[1] to the elements of the crimes of lewd and lascivious assault or attempted sexual battery in Florida, thereby allowing the defendant's Ohio conviction to be scored higher for sentencing purposes. 658 So. 2d at 90-91.

The Court held that "Florida's lewd and lascivious assault statute is not analogous to Ohio's gross sexual imposition statute" because "the Florida crime of lewd and lascivious assault upon a child requires proof of the element that the victim is a child under the age of sixteen, whereas the Ohio crime contains no element rendering the age of the victim pertinent." *Id.* at 91. Further, the Florida sexual battery statute proscribed "oral, anal, or vaginal penetration," while the Ohio statute did not require penetration or union of sexual organs. *Id.* The Court thus analyzed the dissimilarities between the statutes, not just the elements they had in common, and the result directly impacted the length of the defendant's

[1] "Analogous" means "similar in some way." *See* www.merriam-webster.com/dictionary/analogous.

sentence.

Applying the Fourth District's similarity analysis to *Dautel* would have led to a significantly different, and unreasonable, result. Under that analysis, the two crimes would have been treated as similar – resulting in vastly different consequences to the defendant – simply because both statutes involved some type of sexual misconduct.

Similarly, in *Robinson v. State*, 692 So. 2d 883, 887 (Fla. 1997), this Court held that the defendant's prior conviction in Georgia for robbery by sudden snatching could not qualify as a predicate offense to sentence the defendant as a habitual felony offender because the elements of that offense were not similar to the defendant's current conviction for armed robbery in Florida. Pointing to the dissimilarities in the two relevant statutes, the Court held the elements were not substantially similar. The defendant's robbery conviction in Georgia did not require force to overcome the victim's resistance, while his Florida robbery conviction did. *Id.* at 886-87. Again, applying the Fourth District's similarity analysis to *Robinson* would have led to a significantly different result simply because both crimes involved robbery.

Other Florida courts have similarly analyzed the issue. *See*, *e.g.*, *Fike v. State*, 63 So. 3d 847 (Fla. 5th DCA 2011) (defendant should not have been designated sexual predator because Florida conviction required victim to be under

16, while prior conviction in Michigan did not); *Alix v. State*, 799 So. 2d 359 (Fla. 3d DCA 2001) (defendant could not be sentenced as habitual felony offender because prior Canadian crime of sexual assault not similar to Florida's, as the Canadian offense encompasses less serious conduct not covered under Florida's sexual battery statute).

Indeed, just a few months before its decision in this case, a different panel of the Fourth District considered the dissimilarities between criminal statutes in determining whether the defendant should be designated a sexual predator. *See Montgomery v. State*, 183 So. 3d 1042 (Fla. 4th DCA 2015). In *Montgomery*, the court held the defendant could not be designated a sexual predator because the purported qualifying offense did not contain elements similar to the crime for which the defendant was being convicted. The current conviction required coercion by threatening to use force or violence likely to cause personal injury, as well as proof of the victim's reasonable belief in the offender's ability to carry out the threat. The purported qualifying conviction, on the other hand, merely required "forcible compulsion that would prevent resistance by a person of reasonable resolution." *Id.* at 1044-45.

Federal courts also consider the dissimilarities in statutory elements in determining whether convictions are similar for purposes of sentencing or in comparing offenses for double jeopardy purposes. *See, e.g.*, *United States v.*

Hines, 628 F.3d 101, 112 (3d Cir. 2010) (holding elements of New Jersey loitering statute were not similar to more generalized loitering offense in federal guidelines because the former required specific intent while the latter did not); *United States v. Porrini*, No. Crim. 3:98CR208(AWT), 2001 WL 50525, at *7 (D. Conn. Jan. 18, 2001) (comparing dissimilarities in offenses in evaluating whether offenses were the same offense for double jeopardy purposes), *aff'd*, 34 F. App'x 19 (2d Cir. 2002).

The analyses in all of the above cases make eminent sense and demonstrate why the Fourth District's analysis in this case is untenable and leads to unfair sentences. At heart, all similarity analyses are designed to evaluate how closely one thing resembles another thing. Here, whether a court looks only at the elements of the statutes, or at the punishments associated with those statutes, it makes no sense to rigidly and exclusively focus **only** on the ways in which the statutes are alike *Cf. United States v. Estrada*, 320 F.3d 173, 182 (2d Cir. 2003) (similarities in offenses "by no means negate[] the substantial dissimilarities that render the two offenses distinct" for double jeopardy purposes).

Furthermore, such a rigid focus on similarities violates the rule of lenity. Section 775.021(1), Florida Statutes (2005), provides that "[t]he provisions of [the Criminal Punishment Code] and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be

construed most favorably to the accused." This rule applies equally to sentencing guidelines. *Gross v. State*, 820 So. 2d 1043, 1045 (Fla. 4th DCA 2002) ("Sentencing guidelines are subject to the rule of lenity.").

Here, to the extent that section 794.0115(2)(e)'s provision regarding similarity is susceptible to differing constructions, it should have been construed most favorably to Acevedo.

C. A Correct Similarity Analysis Establishes That The Elements Of Acevedo's Prior Conviction Are Not Similar To Those Required For His Present Conviction.

Applying the correct analysis to Acevedo's 1982 and 2006 convictions establishes that the two are not similar in elements and that Acevedo should not have been designated a DSFO. The 1981 version of section 800.04 sanctions a much less serious offense than the 2005 version of that statute because it does not require proof of sexual activity or the intent to commit lewd or lascivious molestation.

In contrast, the types of activity sanctioned by the 2005 version of section 800.04 differ in character and degree from those sanctioned by the 1981 statute. First, subsection (4)(a) of the 2005 version of section 800.04 requires "sexual activity," which is defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide

medical purpose." This activity is not required by the 1981 version of the statute.

Furthermore, had Acevedo committed his present crime in 1981, he would have been convicted under an entirely different statute that criminalized sexual battery. Section 794.011(1)(f), Florida Statutes (1981), criminalized "sexual battery," which was defined identically to "sexual activity" as used in the 2005 version of section 800.04. Like section 800.04(1)(a), Florida Statutes (2005), "sexual battery" in the 1981 statute was defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include acts done for bona fide medical purposes." § 794.011(1)(f), Fla. Stat. (1981).

Consequently, Acevedo's 1982 conviction under section 800.04 cannot be similar in elements to his 2006 conviction because that conviction would have been addressed under a completely different statute in 1982 – a statute under which Acevedo was never convicted.

Similarly, the 2005 version of section 800.04(5) prohibits two types of activity: the intentional touching in a lewd or lascivious manner of protected areas ("breasts, genitals, genital area, or buttocks"), or the intentional forcing or enticing of the victim to touch the perpetrator in the same areas in a lewd or lascivious manner. The 1981 statute did not require any element of intent, nor did it restrict

the prohibited touching to any particular areas.

Because Acevedo's 1982 conviction under section 800.04 does not contain similar elements to his present conviction, he should not have been designated a DSFO. The sentences he received for counts 1-4 thus are illegal, and the Court should remand this case for resentencing on those counts. *See Shea v. State*, 128 So. 3d 131, 132 (Fla. 4th DCA 2013) (where defendant received illegal sentence on two counts, case must be remanded for resentencing on those counts); *Abrams v. State*, 971 So. 2d 1033 (Fla. 4th DCA 2008) (same); *Collins v. State*, 800 So. 2d 660 (Fla. 2d DCA 2001) (same).

CONCLUSION

Consistent with existing law, this Court should approve the similarity analysis conducted by the Fifth District in *Durant*; disapprove the analysis conducted by the Fourth District in this case; and remand the case for resentencing on counts 1-4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following via e-mail on this 5th day of May, 2016.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Christine Davis Graves
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