IN THE SUPREME COURT OF FLORIDA

BRIAN MITCHELL LEE,

Petitioner,

vs. CASE NO. **SC17-1555**

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF ON THE MERITS

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I. WHETHER THE BURDEN OF PROVING A VIOLATION OF DOUBLE JEOPARDY RESTS WITH PETITIONER WHEN ISSUE WAS RAISED IN TRIAL COURT?

Petitioner relies on his argument in his Initial Brief. Respondent argues this Court does not need to address this issue because it is beyond the scope of the certified conflict. (Respondent's Answer Brief, page 20). However, this Court has the discretion to consider issues beyond the basis of conflict jurisdiction because once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court. *Planned Parenthood of Greater Orlando v. MMB Properties*, 211 So. 3d 918, 926 (Fla. 2017), *citing*, *State v. T.G.*, 800 So.2d 204, 210 n.4 (Fla. 2001). *See also, Special v. West Boca Medical Center*, 160 So. 3d 1251, 1262 (Fla. 2014), *citing, Savoie v. State*, 422 So.2d 308, 312 (Fla. 1982) ("... once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal."). Thus, this Court certainly has jurisdiction to hear this issue.

The cases cited by Respondent are examples where this Court has used its discretion not to hear issues that were beyond the scope of the certified question or

conflict. This Court should hear this issue of which party bears the burden of proof regarding violations of double jeopardy on appeal. This became an issue in this case when the majority of the lower court *sua sponte* held the initial burden of proof regarding any issue of double jeopardy on appeal rested with the Defendant/Petitioner. *Lee v. State*, 223 So. 3d 342, 348 (Fla. 1st DCA 2017). The State did not raise the issue of the burden of proof in its Answer Brief filed in the District Court of Appeal (hereinafter referred to as DCA). Since the DCA's holding that Petitioner bears the initial burden of proof on direct appeal despite the fact he raised the issue in the trial court runs counter to precedent, this Court should hear this issue to provide uniformity in the jurisprudence on this issue.

Respondent's argument on the merits ignores the question of where the initial burden of proof lies when raising the issue of double jeopardy on direct appeal by arguing the merits of Petitioner's pre-trial motion to dismiss. The reason Petitioner mentioned his pre-trial motion to dismiss in his argument on this issue in his Initial Brief was simply to demonstrate the fact he had preserved the issue for appellate review, and had not raised it for the first time on appeal. Demonstrating that he raised the issue first in the trial court is relevant as to whether he bore the burden of proof as to the violation of double jeopardy on direct appeal. According to the case law cited in the Initial Brief, when the defendant has raised the issue of double jeopardy in the trial court, the burden then shifts to the State on appeal to

prove there was no violation of double jeopardy. *Griffith v. State*, 208 So. 3d 1208 (Fla. 5th DCA 2017). This Court should reverse the lower court on this issue, and find that when the issue of double jeopardy has been first raised in the trial court, the burden of proof shifts to the State on appeal to demonstrate the absence of violation of double jeopardy.

II. WHETHER PETITIONER'S CONVICTIONS FOR SOLICITATION OF A MINOR, UNLAWFUL USE OF A TWO WAY COMMUNICATION DEVICE, AND TRAVELING TO MEET MINOR FOR UNLAWFUL SEXUAL ACTIVITY AROSE FROM THE SAME CRIMINAL EPISODE IN VIOLATION OF DOUBLE JEOPARDY?

Petitioner relies on his argument made in his Initial Brief. Respondent argues there is no express or direct conflict with *Shelley v. State,* 176 So. 3d 914 (Fla. 2015) or with the opinions from the other DCAs cited in the Initial Brief because the conduct for traveling was charged on a separate day than the conduct for the solicitation. (Answer Brief, pages 20-21). Respondent's argument ignores the elephant in the room. It was the manner in which the First DCA used to determine whether there was a double jeopardy violation which expressly and directly conflict with *Shelley*. The First DCA relied on the test it developed in *Partch v. State*, 43 So. 3d 758, 760 (Fla. 1st DCA 2010) wherein the first step is to determine whether the acts occurring in a single episode; then, the second step is to determine whether the convictions were separate and distinct acts; and, the third step is if the convictions are not predicated on distinct acts within a single episode, then it is determined whether the offenses survive the same element test. The court wrote in *Lee*, "Thus, we only reach the third step of the analysis, the so-called "same elements" test if the first two questions are answered in the negative." *Lee,*

223 So. 3d at 348. This test for determining whether a double jeopardy violation exists is the express and direct conflict with *Shelley* wherein this Court wrote,

"'Absent an explicit statement of legislative intent to authorize separate punishments for two crimes, application of *Blockburger* 'same-elements' test is the **sole** method of determining whether multiple punishments are double-jeopardy violations." *Shelley*, 176 So. 3d at 917-918 (emphasis added). Thus, the First DCA's use of the *Partch* test to determine whether there is a double jeopardy violation expressly and directly conflicts with *Shelley* and its progeny.

The 1st DCA's opinion in *Lee* also expressly and directly conflict with *Shelley* and its progeny in performing a *de novo* review of the evidence in the record to find evidence supporting multiple acts of an offense rather than considering the number of counts alleged in the charging document. By looking beyond the information to consider whether the evidence could have supported multiple acts of an offense, a reviewing court is considering *uncharged* conduct to avoid finding a double jeopardy violation. *Stapler v. State*, 190 So. 3d 162, 165 (Fla. 5th DCA 2016) (quoting *Shelley v. State*, 134 So. 3d 1138, 1141-1142 (Fla. 2d DCA 2014). *See also, Dygart v. State*, 43 Fla. L. Weekly D1143 (Fla. 1st DCA May 18, 2018) (Makar dissents, "if the appellate court on its own can glean two acts of solicitation from the record on appeal-one charged and one uncharged-*Shelley* doesn't apply and the double jeopardy violation vanishes. That's why *Lee*'s

holding is in apparent conflict with what the Second District held in *Shelley (*and what other districts hold as well, *see Stapler*, *Pamblanco*[1]*),* which is to draw the line at only charged conduct.")

Ironically, Respondent cited to *State v. Bloom*, 497 So. 2d 2 (Fla. 1986) and *State v. Cain*, 381 So. 2d 1361 (Fla. 1980) in the State's argument on Issue I as authority that the prosecutor has the complete discretion to decide how to prosecute. (Answer Brief, page 13). The prosecutor in this case had the same complete discretion to charge Petitioner with just one count of solicitation or for multiple counts of solicitation based on each occurrence of solicitation. Respondent's argument on this issue would undermine that very discretion by allowing a reviewing court to look beyond the charging document in determining whether there were separate and distinct acts.

Using Respondent's interpretation of *Shelley* allowing the reviewing court to consider the evidence rather than just the information and verdict, there is still a double jeopardy violation because there was no allegation of solicitation on January 2nd. Count I alleged traveling to meet minor after soliciting on January 2, 2014; Count II alleged Petitioner unlawfully used a two way communication device from December 22, 2013 through January 1st; and Count III alleged unlawful use of a computer to solicit a minor from December 22, 2013 through

[1] *Pamblanco v. State*, 199 So. 3d 507 (Fla. 5th DCA 2016).

January 1st (I:3-4). Since there was no allegation of solicitation on January 2nd, the count of traveling to minor on January 2nd after solicitation must be based upon the same conduct alleged in Counts II and III. Thus, all three counts stem from the same conduct of soliciting the minor through use of a computer and a two-way communication device from December 22nd to January 1st. This Court wrote, "…though the State argues that the Legislature demonstrated its intent to authorize separate convictions because section 847.0315(3) provides that each separate use of a computer service or device to solicit may be charged as a separate offense, this statement pertains only to charging solicitation offenses. It does not address what effect charging a solicitation offense has on the State's ability to use the same solicitation to charge the defendant with traveling after solicitation." *Shelley*, 176 So. 3d at 919.

This Court should find that it has jurisdiction in this case because *Lee* expressly and directly conflicts with this Court's decision and its sister courts decisions in *Thomas v. State,* 209 So. 3d 35 (Fla. 2d DCA 2016); *Honaker v. State*, 199 So. 3d 1066 (Fla. 5th DCA 2016); *Stapler v. State*, 190 So. 3d 162 (Fla. 5th DCA 2016); *Holt v. State*, 173 So. 3d 1079 (Fla. 5th DCA 2015); and, *Mizner v. State*, 154 So. 3d 391 (Fla. 2d DCA 2014). This Court should find that based upon the information and the verdict, Petitioner's convictions of solicitation, unlawful use of a two-way communication device, and traveling arose from the

same criminal episode and violate double jeopardy, and reverse Petitioner's convictions for solicitation and use of a two-way communications device.

III. WHETHER THE JURY INSTRUCTIONS GIVEN ON THE OFFENSE OF IMPROPER USE OF A COMPUTER TO SOLICIT A MINOR CONSTITUTED FUNDAMENTAL ERROR?

Petitioner relies on his argument in his Initial Brief, Respondent argues this Court does not need to address this issue because it is beyond the scope of the certified conflict. (Respondent's Answer Brief, page 35). However, this Court has the discretion to consider issues beyond the basis of conflict jurisdiction because once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court. *Planned Parenthood of Greater Orlando v. MMB Properties*, 211 So. 3d 918, 926 (Fla. 2017), *citing, State v. T.G.,* 800 So.2d 204, 210 n.4 (Fla. 2001). *See also, Special v. West Boca Medical Center*, 160 So. 3d 1251, 1262 (Fla. 2014), *citing, Savoie v. State*, 422 So.2d 308, 312 (Fla. 1982) ("... once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal."). Thus, this Court certainly has jurisdiction to hear this issue. this Court should find that the jury instruction given

in this case constituted fundamental error since the former standard jury instruction upon which it was based improperly reduced the State's burden of proof. This Court should reverse Petitioner's conviction on Count III, and discharge Petitioner from that offense.

IV. WHETHER THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE TO EXCLUDE PETITIONER'S LETTER TO JENNIFER KLOUS WRITTEN DURING THE INCIDENT AS ADMISSIBLE EVIDENCE OF PETITIONER'S THEN EXISTING STATE OF MIND?

Petitioner relies on his argument in his Initial Brief, Respondent argues this Court does not need to address this issue because it is beyond the scope of the certified conflict. (Respondent's Answer Brief, page 41). However, this Court has the discretion to consider issues beyond the basis of conflict jurisdiction because once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court. *Planned Parenthood of Greater Orlando v. MMB Properties*, 211 So. 3d 918, 926 (Fla. 2017), *citing, State v. T.G.,* 800 So.2d 204, 210 n.4 (Fla. 2001). *See also, Special v. West Boca Medical Center*, 160 So. 3d 1251, 1262 (Fla. 2014), *citing, Savoie v. State*, 422 So.2d 308, 312 (Fla. 1982) ("... once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal."). Thus, this Court certainly has

jurisdiction to hear this issue. Since the letter was proof of Petitioner's then existing state of mind and highly relevant and crucial to his defense that he had no intent to solicit a minor for sexual activity, the trial court's error in excluding the letter was harmful error. This Court should reverse Petitioner's judgment and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing arguments and authorities in this brief, Petitioner is entitled to reversal of his conviction for solicitation of a minor and unlawful use of a two-way communication device, or in the alternative, remand for a new trial.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Heather Flanagan Ross, Assistant Attorney General, at crimapptlh@myfloridalegal.com, this day of June 13, 2018. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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