

SUPREME COURT OF FLORIDA

JESSE DIEGUEZ,

Petitioner,

CASE NO. SC07-532

L.T. Case No. 3D04-1894

vs.

FLORIDA DEPARTMENT OF
LAW ENFORCEMENT,
CRIMINAL JUSTICE
STANDARDS AND TRAINING
COMMISSION,

Respondent.

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

Mark J. Berkowitz, P.A.
Attorney for Petitioner
1620 W. Oakland Park Blvd.
Suite 300
Ft. Lauderdale, Florida 33311
(954) 527-0570 Telephone
(954) 523-5893 Telecopier
E-mail: mjb2157@aol.com
Fla. Bar No. 369391

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I.
STATEMENT OF THE CASE

Through its Amended Administrative Complaint, dated January 31, 2003, the Respondent herein, the Department of Law Enforcement Criminal Justice Standards and Training Commission (hereinafter, referred to as the “DEPARTMENT,” or as, the “AGENCY”), sought to revoke the law enforcement certificate of the Petitioner, herein, Jesse Dieguez (hereinafter, referred to as, “DIEGUEZ”). The allegations of the Amended Administrative complaint indicated that in February of 2001, the Appellant’s sixteen-year old stepdaughter had alleged that DIEGUEZ sexually assaulted her, over an extended period of time. On April 12, 2004, the administrative law judge issued her recommended order, indicating that the Appellant’s law enforcement certificate should be permanently revoked.

On May 6, 2004, the DEPARTMENT’S disciplinary officers met in Naples, Florida, to consider the prior recommendation, which had been made by the administrative judge, as well as the exceptions, which had been filed by the Petitioner’s counsel below. The exceptions indicated, first, that there was no direct evidence offered below, supporting the allegations of the

Amended Administrative Complaint;¹ and second, the alleged victim, the stepdaughter, clearly recanted her allegations of sexual abuse at the administrative hearing.

The DEPARTMENT disciplinary officers stated that the admissibility of the letters, the evidence allegedly linking the Petitioner to the offensive conduct; actually constitutes an evidentiary matter, which they declined to address. Therefore, the DEPARTMENT affirmed the recommended order of the administrative law judge.

The Third District Court of Appeal erroneously held that the “letters or contracts,” were admissions against interest and therefore, admissible. However, there was no corroborating evidence indicating that the Petitioner was the author of these writings.

¹ The only evidence consisted of “letters or contracts” which allegedly established the Petitioner’s untoward and illicit advances toward the stepdaughter; however, these writings were never authenticated, either by lay or expert witness testimony. In short, there was no testimony that the Petitioner was the author of these “letters or contracts.”

II. **STATEMENT OF FACTS**

Detective Alan Foote (hereinafter, referred to as, “FOOTE”) of the Miami-Dade Police Department acted as the lead investigator in this case. One day following making allegations of sexual molestation against the Petitioner, the stepdaughter indicated to FOOTE that she had fabricated the statements and that her assertions regarding DIEGUEZ were not truthful. In addition, four months later, on May 10, 2001, FOOTE was notified that Police Officer Mauro Lopez of the City of Sweetwater Police Department had found some “letters,” in his patrol car.

Over objection, despite the fact that the “letters” had not been properly authenticated; these writings were admitted into evidence. FOOTE testified that after discovering the “letters,” he questioned the stepdaughter regarding these writings. According to FOOTE, *in an unrecorded interview, the stepdaughter* identified the letters as the “contracts,” which DIEGUEZ had written, when “he was touching her.”

Once again, Petitioner’s counsel below objected to the admissibility of the letters on the basis of hearsay, because a qualified expert on the handwriting analysis; did not appear and presented no testimony at the hearing, but nevertheless, the handwriting report, containing the handwriting

analysis, was admitted into evidence. No lay testimony at the hearing indicated that the Petitioner was the author of the writings.² Moreover, although there was other writing on the letters, indicating a different author, no analysis was performed on this other handwriting.

² Although the Administrative Judge indicated that the letters would only be admitted on a “limited basis,” these letters were indeed subsequently admitted as substantive evidence. The Third District Court of Appeal also admitted the letters as substantive evidence, even though there was no evidence corroborating the authenticity of these documents.

III.
SUMMARY OF THE ARGUMENT

The judgment rendered below should be of no force or affect, as a matter of law, since the alleged author of the incriminating writings was not properly authenticated, either by lay or expert testimony. There was no admissible evidence, indicating that the Petitioner was indeed the author of the incriminating “writings” or “contracts.”

The failure of the Third District Court of Appeal to mandate the presentation of proper evidence on the question of admissibility; renders the judgment below a nullity. The Supreme Court should exercise its jurisdiction in this matter since the decision of the Third District Court of Appeal directly conflicts with the decision of the First and Second District Courts of Appeal on the same evidentiary issue.

IV. ARGUMENT

The Third District Court of Appeal affirmed the entry into evidence,³ before the administrative tribunal, of certain incriminating writings, or “contracts,”⁴ which had allegedly been written by the Appellant herein, Jesse Dieguez (“DIEGUEZ”). The evidentiary issue, which the lower court wrongly decided, was whether or not these “writings,”⁵ could be entered into evidence, at the administrative hearing below, without proper authentication.

DIEGUEZ emphatically denied that he was the author of the incriminating writings. No one at the administrative hearing, a lay witness, or expert witness, testified that DIEGUEZ was in fact the author of the

³ In its opinion dated January 3, 2007, the District Court of Appeal erred in finding that the “letters,” or “contracts,” were admissible as “declarations against interest,” without inquiring in the first instance, if whether or not, there was any proof that Appellant JESSE DIEGUEZ was the actual author of these “writings.”

⁴ Without proper authentication, there is no admissible evidence implicating DIEGUEZ in the alleged sexual molestation of his stepdaughter. At the administrative hearing, no one properly authenticated the writings, as being authored by DIEGUEZ. In fact, at the administrative hearing, the alleged victim recanted her allegations against DIEGUEZ, maintaining that her prior allegations of sexual molestation against DIEGUEZ were untrue.

⁵ The writings were purportedly substantive evidence of the sexual molestation of the stepdaughter by DIEGUEZ.

incriminating contracts, or “writings,”⁶ indicating that he had allegedly sexually molested his stepdaughter. There was simply no admissible proof below, whatsoever, indicating that DIEGUEZ was the author of the incriminating “writings;” and his counsel below was not given an opportunity to test the conclusions of the handwriting expert, which was contained within an internal investigation report.

The opinion of the Third District Court of Appeal, herein, directly conflicts with the opinions of the First District Court of Appeal and the Second Court of Appeal, regarding the authentication of certain critical contracts, or “writings.”

For example, in a case where the perpetrator was charged with a uttering a forged instrument, and the only relevant evidence indicated that he had possession of the forged check and caused it to be cashed, the evidence was held to be insufficient to sustain a conviction. *See, Heath v. State*, 382 So.2d 391 (Fla. 1st DCA 1980). Since the alleged perpetrator offered an explanation for his possession of the instrument, there must be some

⁶ Furthermore, the stepdaughter indicated that the Appellant had written letters or “contracts” to her, pertaining to alleged sexual favors, occurring in the prior year, 2000. However, one of the letters was dated, “1996” and the remaining “contracts” were actually undated. These discrepancies further illustrate the necessity of authenticating the writings in some manner, either by lay or expert testimony.

independent evidence of guilty knowledge, such as a handwriting analysis.

See also, Brown v. State, 426 So.2d 76, 80 (Fla. 1st DCA 1983).

In short, the critical document at issue here, the “letters,” or “contracts, must be properly authenticated, either by eye witness testimony, or possibly, secondarily, by expert testimony.

The point to be kept in the foreground is that the testimony of experts is, at best, secondary evidence, merely an opinion as opposed to a positive fact, and however expert the witness may be, he is not giving voice to any direct statement capable of proof, but only the opinion of what he thinks the alleged differences in the signatures disclose.

In the *Fekete* case (323 Ill. 468, 154 N.E. 209), it is also said that opinions as to the authenticity of handwriting at best are weak and unsatisfactory evidence, since there is much room for error, and great temptation to form opinions favorable to the party calling the witness.

The testimony of the experts is nothing but an opinion, which may be useful when it can be corroborated by definite facts, or when it is connected with facts which may be substantiated, but it cannot be allowed to prevail over the uncontradicted and unimpeached testimony of two disinterested witnesses, who testified they saw the testatrix write the signature in question.

See, In Re Krugle's Estate, 134 So.2d 860, 863 (Fla. 2d DCA 1961)

In the instant case, we have neither eyewitness testimony, nor expert testimony, actually properly authenticating the author of the “letters,” or the “contracts.” As noted above, the alleged victim totally recanted her accusatory testimony; and there was no live expert testimony presented at

the administrative hearing below, establishing that the Petitioner was in fact the author of these writings. Under these circumstances, there is not even a *scintilla* of admissible evidence, to even suggest that DIEGUEZ was in fact the author of the incriminating “letters,” or “contracts.”

CONCLUSION

The opinion of the Third District Court of Appeal, herein, directly conflicts with the opinions of the First District Court of Appeal and the Second Court of Appeal, on the same evidentiary issue, regarding the authentication of the certain written evidence; and hence, the admissibility of certain critical “writings.” There was no evidence, either lay testimony or expert testimony, confirming that DIEGUEZ was in fact the author of the incriminating “writings,” or “contracts.”

The Third District Court of Appeal indicated that the “writings” were somehow a “declaration against interest,” but such a conclusion is clearly erroneous, in the absence of any evidence that DIEGUEZ had authored the incriminating documents. Based upon this clear conflict among the district courts of appeal, the Supreme Court should accept jurisdiction of this case; and direct the parties to submit briefs on the merits in this case.

Respectfully submitted,

Mark J. Berkowitz, P.A.
Attorney for Appellant
Interstate Centre I
1620 W. Oakland Park Blvd.
Suite 300
Ft. Lauderdale, Florida 33301
(954) 527-0570 Telephone
(954) 523-5893 Telecopier
E-mail: mjb2157@aol.com.
Fla. Bar No. 369391

Mark J. Berkowitz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by regular mail on this ___ day of April, 2007, to Linton Eason, Esq., The Florida Department of Law Enforcement, P.O. Box 1489, Tallahassee, Florida 32302.

Mark J. Berkowitz

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.

Mark J. Berkowitz

