

SC10-1359

FILED
THOMAS D. HALL

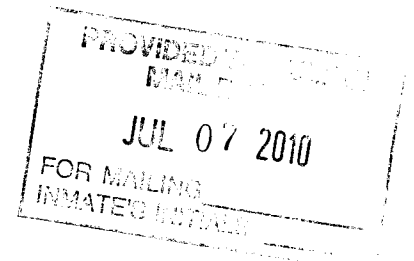
IN THE SUPREME COURT OF FLORIDA

CASE NO.: _____

2010 JUL 12 AM 1:52

CLERK, SUPREME COURT

BY _____



MOISES ESPINOZA

Petitioner

DCA CASE NO. 4D08-5144

L.T. CASE NO. 07-5069 CF10A

Vs.

STATE OF FLORIDA

Respondent

_____ /

On Discretionary Review From The
Fourth District Court of Appeal

JURISDICTIONAL BRIEF OF PETITIONER

Moises Espinoza, pro se
Gulf Coast. Instit.

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JURISDICTIONAL BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

Moises Espinoza was the defendant in the trial court, the appellant in the Fourth District Court of Appeal, and will be referred to in this brief as petitioner.

The opinion of the Fourth DCA is attached as an Appendix, and will be referred to as such. All other references or referrals will be made accordingly.

II STATEMENT OF THE CASE AND FACTS

Following his conviction after jury trial, appellant's counsel raised and argued a single issue on appeal that the trial court reversibly erred by precluding from the defense the ability to impeach J.E.'s credibility with her prior inconsistent statement made at deposition by restricting the defense to asking only the question asked at deposition verbatim. On June 9, 2010, the Fourth DCA affirmed petitioner's conviction with a lengthy opinion that discussed and defined the parameters of impeaching witnesses about prior inconsistent statements and eventually concluded agreement with James v. State 765 So2d 763 (FLA. 1st DCA-2000), as well others on same issue of law. Such thesis cannot be correct, and petitioner wishes to show this court why this theory is incorrect.

III SUMMARY OF THE ARGUMENT

Restriction of a defense counsel's cross examination of a state's witness, and alleged victim in a sex abuse case as to prior inconsistent statements she made violated petitioner's 6th and 14th Amendment rights, as well as ensuring his conviction when other evidence was invalid or insufficient to support it.

IV ARGUMENT

ISSUE PRESENTED

WHETHER THIS COURT HAS JURISDICTION TO
REVIEW THE DECISION OF THE DISTRICT
COURT IN PETITIONER'S CASE?

On Appeal in the Fourth District Court of Appeal, petitioner's counsel argued essentially that the trial judge reversibly erred by restricting the defense from pursuing a successful impeachment of the alleged victim. This was performed by a judge who was clearly on the state's side during trial, when defense counsel sought to establish the alleged victim had claimed four incidents of abuse, but, could not remember any details of the fourth, so he attempted to read what the victim had said at deposition to possibly refresh her memory when state objected to that being improper impeachment. The judge then directed defense counsel to read the deposition question verbatim. The judge also reminded defense counsel that the victim had not provided any testimony that was inconsistent with what she said in her deposition thereby vouching for the victim's credibility. This violated the concept of cross examination where a defense counsel is denied the opportunity to prove to a jury that the witness is being untruthful, as well petitioner's 6th Amendment right to fair trial. Thus, under the principles of O'Sullivan v. Boenckel 526 U.S. 838 (1999), this court should grant jurisdiction in petitioner's case.

II CONCLUSION

Based upon the foregoing argument, petitioner moves this court to accept the case for review and to order briefs on the merits.

Respectfully Submitted

151 Moises Espinoza

Moises Espinoza, pro se

Gulf Coast. Instit.

500 Ike Steele Rd, Main Unit

Wewahatchee, FLA. 32465

I hereby certify that a true copy of the foregoing was placed in the hands of prison staff to be mailed to the Office of Attorney General, 1515 N. Flagler Dr., West Palm Beach, Florida, 33401 - 3432, on this 7th day of July, 2010.

151 Moises Espinoza

Moises Espinoza

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APPENDIX

1. Opinion of Fourth DCA on June 9, 2010.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2010

MOISES ESPINOZA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D08-5144

[June 9, 2010]

CIKLIN, J.

The sole issue raised on appeal is whether the trial court erroneously precluded the appellant, Moises Espinoza, from attacking the victim's credibility with previous statements made by the victim during a pre-trial deposition. Because, at trial, defense counsel did not elicit testimony from the victim that was truly inconsistent with the earlier deposition testimony, the proper foundation necessary as to that method of impeachment was not laid. We affirm.

Espinoza was charged with two counts of sexual battery on a child under 12 years of age. At trial, the victim testified about three instances of sexual battery perpetrated by Espinoza, her step-father. Specifically, on direct examination, the victim described in great detail three forced encounters with one occurring at a beach and two in the family home.

During cross-examination, counsel for Espinoza attempted to impeach the victim with testimony from a pre-trial deposition in which she apparently mentioned a fourth incident. While the victim acknowledged her mention of a fourth encounter during the prior deposition, she could not recall the details of a fourth incident while being cross-examined before the jury. Defense counsel then attempted to read the victim's deposition testimony pertaining to a fourth incident when the prosecutor objected to the technique as constituting improper impeachment. The trial court sustained the objection and reminded defense counsel that the victim, up until that point, had not provided trial testimony that was inconsistent with the statements she made during the prior deposition.

The jury ultimately reached a verdict finding Espinoza guilty as charged. The trial court sentenced him to two consecutive life sentences.

"Although wide latitude is permitted on cross-examination in a criminal trial, a determination as to the scope of cross-examination lies within the sound discretion of the trial court." *Eliakim v. State*, 884 So. 2d 57, 60 (Fla. 4th DCA 2004). "An appellate court reviews decisions on the admissibility of evidence for abuse of discretion as limited by the rules of evidence." *Ocasio v. State*, 994 So. 2d 1258, 1261 (Fla. 4th DCA 2008).

Introduction of a prior statement that is inconsistent with a witness's present testimony is a main method to attack the credibility of a witness. § 90.608(1), Fla. Stat. (2008). The theory of admissibility is not that the prior statement is true and the in-court testimony is false, but that because the witness has not told the truth in one of the statements, the jury should disbelieve both statements. To impeach a witness utilizing this methodology, however, the examining attorney must first lay the proper foundation. "To be inconsistent, a prior statement must either directly contradict or be materially different from the . . . testimony at trial." *Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004).

"The fact that a witness once stated something was true is not logically inconsistent with a subsequent loss of memory. The only thing that is inconsistent with a claimed loss of memory is evidence that suggests that the witness in fact remembers." *Brooks v. State*, 918 So. 2d 181, 200 (Fla. 2005) (quoting *James v. State*, 765 So. 2d 763, 766 (Fla. 1st DCA 2000)). "[C]aution should be exercised in permitting impeachment of a witness who has given favorable testimony but simply fails to recall every detail unless the witness appears to be fabricating." *Ocasio*, 994 So. 2d at 1262 (quoting *Morton v. State*, 689 So. 2d 259, 264 (Fla. 1997), *receded from on other grounds by Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000)).

At her pre-trial deposition, the victim recounted four incidents involving Espinoza. During her direct examination at trial, however, she only described three. While being cross-examined, the victim acknowledged that she had earlier described a fourth incident but could not recall the details while on the witness stand. This inability to remember is "not synonymous with providing trial testimony that is inconsistent with a prior statement." *Brooks*, 918 So. 2d at 200; *see also James*, 765 So. 2d at 766; *Calhoun v. State*, 502 So. 2d 1364, 1365 (Fla. 2d DCA 1987). The only foundation laid by defense counsel was that

this victim witness had a loss of memory. See *Brooks*, 918 So. 2d at 200 (quoting *James*, 765 So. 2d at 76) ("The controlling issue on appeal is whether it was appropriate to impeach [a witness'] asserted lack of memory by showing substantive statements that she made when her memory was [more] fresh. As a matter of logic, that is not appropriate impeachment by inconsistent statement.").

Affirmed.

TAYLOR, J., and BLANC, PETER D., Associate Judge, concur.

* * *

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Cynthia L. Cox, Judge; L.T. Case No. 562007CF005069A.

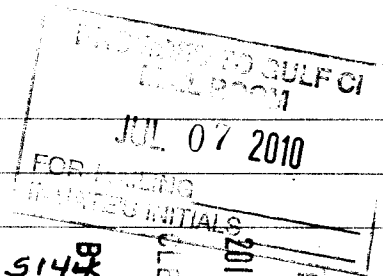
Carey Haughwout, Public Defender, and Peggy Natale, Assistant Public Defender, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Katherine Y. McIntire, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.

July 7, 2010

Hon. Thomas Hall, Clerk of
Supreme Court of Florida.



Re: Brief on Jurisdiction; DCA Case No. 4D08-5147

Dear Sir,

Enclosed herein is an original ~~of my~~ of my jurisdictional brief for filing in your court. I understand the rule for briefs advises an original and 5 copies of this brief but, when I went to have copies made, I was told since I'm pro se, the original and 1 copy go to you, 1 copy goes to the attorney general office, and I keep a copy. So, if this is true, will you let me know and if not would you please provide me a notice or order that I can show the librarian here at Gulf C.I..

Thank you in advance for your help

151 Moises Espinoza
Moises Espinoza
Gulf Connect. Inst.

* Also, the notice to invoke discretionary jurisdiction was sent to the 4th DCA clerk's office on June 30, 2010, but it takes about 6-7 days to get there due to the out of way location of Gulf C.I. but, should still be timely pursuant mailbox rules - yes?