

IN THE SUPREME COURT OF FLORIDA

HARRY PAUL OYARVID,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC10-1372

First DCA No. 1D09-2848

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

A jury found Oyarvid guilty of lewd or lascivious molestation by a person 18 or older on a person younger than 12. In the light most favorable to the state, the evidence showed that Oyarvid groped a 9-year-old girl's genital area in the toy section of a Wal-Mart store. The trial court sentenced Oyarvid to life in prison. Via Florida Rule of Criminal Procedure 3.800(b)(2) and on appeal, he challenged the constitutionality, as applied, of the sentencing provisions requiring either life in prison or 25 years in prison plus life on probation for lewd or lascivious molestation of a person under 12 by a person over 18. The district court affirmed, holding:

Appellant's final claim is that, as applied to him, the statutory scheme which requires a sentence of either life in prison or not less than 25 years in prison followed by probation or community control for the remainder of the offender's life constitutes cruel and unusual punishment in violation of the state and federal constitutions. We are unable to agree that this punishment is "grossly disproportionate" to the offense appellant committed. Accordingly, pursuant to the analysis set out in Adaway v. State, 902 So. 2d 746 (Fla. 2005), the punishment is not cruel and unusual pursuant to either the state or the federal constitution.

Slip op. at 3. Oyarvid filed timely notice invoking this Court's discretionary jurisdiction. This brief follows.

SUMMARY OF THE ARGUMENT

The First District expressly declared valid the sentencing provisions, enacted in 2005, under which Oyarvid received a sentence of life in prison for lewd molestation of a child under 12. “[P]ursuant to the analysis set out in Adaway v. State, 902 So. 2d 746 (Fla. 2002),” the court rejected Oyarvid’s claim that “as applied, the statutory scheme . . . constitutes cruel and unusual punishment in violation of the state and federal constitutions.” This language justifies discretionary review under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i).

This Court has rejected proportionality challenges to mandatory 25-year and life sentences for conduct defined as sexual battery on a child under 12. Adaway; Banks v. State, 342 So. 2d 469 (Fla. 1976). Discretionary review is appropriate to address an Eighth Amendment proportionality challenge, as applied, to the expansion of a mandatory 25-year or life prison term to criminal conduct which does not constitute sexual battery. To petitioner’s knowledge, this Court has not passed on the constitutionality of sentences imposed under the 2005 amendment which resulted in Oyarvid’s life sentence.

ARGUMENT

THE COURT SHOULD ACCEPT THIS CASE TO DETERMINE WHETHER PROVISIONS ENACTED IN 2005 WHICH REQUIRE A MANDATORY SENTENCE OF EITHER 25 YEARS OR LIFE IN PRISON FOR LEWD MOLESTATION ON A PERSON UNDER 12 CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The statutes under which Oyarvid was sentenced provide:

(a) A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or 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.

(b) An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a life felony, punishable as provided in s. 775.082(3)(a)4.

§ 800.04(5), Fla. Stat. (2008).

(3) A person who has been convicted of any other designated felony may be punished as follows:

4.a. Except as provided in sub-subparagraph b., for a life felony committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), by:

(I) A term of imprisonment for life; or

(II) A split sentence that is a term of not less than 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4).

§ 775.082(3)(a)4, Fla. Stat. (2008). These provisions, enacted in 2005, reclassified lewd molestation by a person 18 or older on a person under 12 from a first-degree

felony to a life felony and created a mandatory sentence of either life in prison or 25 years in prison followed by life on sex offender probation. The offense previously carried no mandatory sentence and was subject to sentencing under the Criminal Punishment Code.

Exercising the only choice given a sentencing judge by these provisions, the trial court imposed a life sentence after a jury found Oyarvid guilty of lewd or lascivious molestation under section 800.04(5). “[P]ursuant to the analysis set out in Adaway v. State, 902 So. 2d 746 (Fla. 2002),” the First District rejected a challenge that “as applied, the statutory scheme . . . constitutes cruel and unusual punishment in violation of the state and federal constitutions.” Slip op. at 3. The court did not elaborate on its reliance on Adaway, which concerned a mandatory life sentence for sexual battery by a person 18 or older on a person under 12.

In so holding, the First District expressly declared valid the challenged provisions in sections 775.082 and 800.04, creating grounds for discretionary review under Article V, Section 3(b)(3) of the Florida Constitution. The Court has exercised the authority granted by this provision to address the constitutionality of other sentencing laws. See, e.g., Adaway; Hall v. State, 823 So. 2d 757, 759 (Fla. 2002).

In Banks v. State, 342 So. 2d 469 (Fla. 1976), the Court ruled that a sentence of life imprisonment with parole eligibility after 25 years for oral contact with the

child victim's penis did not violate the Eighth Amendment to the United States Constitution. In Adaway, this Court ruled that a sentence of life imprisonment without parole "is not grossly disproportionate to [the defendant's] crime of oral union with the vagina of a girl under the age of twelve." 902 So. 2d at 750.

Three years after Adaway, Florida enacted sentencing provisions elevating lewd molestation by an adult on a child under 12 from a first-degree felony to a life felony and imposed the mandatory sentences of life in prison or 25 years in prison plus life on parole. The offense requires only a lewd or lascivious touching of the breasts or genital area, "or the clothing covering them." § 800.04(5)(a). As in Adaway, this Court has discretionary jurisdiction to review the constitutionality of sections 775.082(3)(a)4 and 800.04(5).

Discretionary review is appropriate to review the expansion of mandatory sentencing of 25 years or life for conduct which falls short of conduct defined as sexual battery. To petitioner's knowledge, this Court has not passed on the proportionality of sentences imposed under these provisions as amended in 2005. If this Court grants discretionary review, petitioner will argue, as he did in the circuit and district courts, that the sentence is grossly disproportionate to the gravity of the offense; that more harmful offenses are subject to the same sentence of 25 years or life in Florida; and that the sentence is severely disproportionate to the sentence required by numerous other states for comparable conduct.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, appellant requests that this Honorable Court accept this case for discretionary review and direct briefing on the merits.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Michael T. Kennett, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this ____ day of August, 2010. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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