Electronically Filed 06/26/2013 01:40:36 PM ET

RECEIVED, 6/26/2013 13:43:40, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

SHEDRICK RESHORD JENRETTE-SMITH,	:	
Petitioner,	:	
vs.	:	Case No.
STATE OF FLORIDA,	:	
Respondent.	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

HOWARD L. "REX" DIMMIG,II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN M. GIAMBALVO
Assistant Public Defender
FLORIDA BAR NUMBER O239399

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE FACTS

Petitioner was charged with fourteen counts of promoting a sexual performance by a minor, a violation of section 827.071(3), Florida Statutes. Although this is designated a second degree felony, section 775.0847(2), Florida Statutes was applied to each count which allowed their reclassification to first degree felonies, because petitioner allegedly possessed ten or more images of child pornography and at least one of the images pictured sexual battery involving a minor. The allegations were that petitioner had produced fourteen photographs showing sexual conduct between petitioner and M.S., a girl under the age of eighteen.

Tampa police officer Steven Buchanan was approached by a man identifying himself as "James". He handed Buchanan an envelope which contained twenty photographs. Buchanan determined the identities of the people in the photos and turned his information over to Detective McCaughey.

Detective McCaughey concluded that some of the photos were pornographic. McCaughey also determined the girl in the fourteen

photos on which the charges were based was sixteen year old M.S. and that the man in three of the photos was petitioner Jenrette-Smith. McCaughey could not say whether the photos had been exhibited to anyone.

M.S., a chronic run-away, had met petitioner in 2009 and conducted a consensual, sexual relationship with him. During their relationship, petitioner had taken pictures of them having sex using a disposable camera. According to M.S, these photos had been developed at a Walgreen's Pharmacy and petitioner had paid for the developing. She identified the photos in evidence as those photos and identified petitioner and herself in some of them. M.S. testified that only she and petitioner were present when the photos were taken and that petitioner had not shown or displayed the photos to anyone else and they had been hidden underneath their mattress. M.S. however, could not recall who took charge of the photos at the pharmacy or who had placed them underneath the mattress.

Trial counsel argued the State had failed to prove that the fourteen photos were exhibited before an audience, that there was a "performance", or that petitioner had "promoted" a performance. Counsel also argued that the State had failed to establish that

petitioner had actual possession of the photos. The trial court denied counsel's motions for judgment of acquittal and petitioner was convicted on all fourteen counts.

Petitioner appealed to the District Court of Appeal, Second District. On May 31, 2013, the court issued a written opinion affirming petitioner's convictions. There was a written affirmance, a written concurrence and a lengthy dissent. In its opinion the court relied on a prior ruling in Killian v. State, 761 So.2d 1210(Fla. 2d DCA 2000), which held that exhibition before an audience is not a required element of the offense. It also rejected petitioner's arguments that the State had failed to prove his possession of the photos as to the re-classification issue. Petitioner filed his Notice to Invoke Discretionary Jurisdiction under 9.030, Fla. R. App. Pro. on June , 2013. This jurisdictional brief follows.

SUMMARY OF THE ARGUMENT

The opinion of the Second District Court of Appeal, disregards the legislative direction of section 775.021(1), Florida Statutes and subsequent case law requiring that provisions of the criminal code shall be strictly construed and when the language of the statute is susceptible to differing constructions, it shall be construed most favorably to the accused. As the State failed to prove the photos in question were ever exhibited to an audience as section 827.071(3), Florida Statutes specifically requires, it ignored this directive. Furthermore, petitioner's convictions should not have been re-classified from second to first degree felonies by virtue of section 775.0847(2), Florida Statutes, as the State failed to prove that petitioner was in possession of the offending images.

ARGUMENT
ISSUE

THE SECOND DISTRICT'S OPINION FAILED TO CONSIDER THE RULE OF LENITY IN HOLDING THAT EXHIBITION BEFORE AN AUDIENCE WAS NOT A NECESSARY ELEMENT OF THE STATUTE; AND BY HOLDING THAT THE MERE TAKING OF THE PHOTO WAS SUFFICIENT TO CONSTITUTE POSSESSION OF THE OFFENDING IMAGES

It is all but axiomatic, that a Florida penal statute, if at all ambiguous or subject to more than one interpretation, must be construed in a light most favorable to the defendant. Perkins v. State, 576 So.2d 1310(Fla. 1991); Wallace v. State, 860 So.2d 494 (Fla. 4th DCA 2003). In petitioner's case this rule was ignored, first as to his substantive offense under section 827.071(3), Florida Statutes and second, as to section 775.0847, Florida Statutes which operated to re-classify his offenses from second to first degree felonies.

Looking at petitioner's convictions under section 827.071(1)(b),Florida Statutes, the State failed to present evidence that any of the photos were exhibited to an "audience" therefore, the State failed to prove there was a "performance" as defined in the section. According to the testimony, the only

persons who saw the photos were petitioner and M.S. and they, for lack of a better term, being the "performers" could not be the "audience". As per the statute "performance" is defined as "any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience." Admittedly there is an ambiguity as to whether the phrase "exhibited before an audience" only modifies "any other visual representation" or the entire sentence. If the phrase modifies the entire sentence, this would be the interpretation most favorable to the petitioner, therefore it must overcome the interpretation that the phrase only modifies "any other visual representation". The Second District's opinion in petitioner's case and cases of other district courts have ignored the rule of lenity in favor of holding that the element is not one the State must prove. Furthermore, the case of Firkey v. State, 557 So.2d 582 (Fla. 4th DCA 1989) on which these cases rely held that:

> The defendant also urges us to reverse his conviction for having a child engage in a sexual performance in contravention of section 827.071, Florida Statutes (1987), because the videotape had never been exhibited before an audience as required by section 827.071(1)(b) which states:

> (b) "Performance" means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience.
>
> Conceding that the quoted statutory language might be ambiguous, we choose to interpret it to mean that the making of such a motion picture is in and of itself sufficient **when any of the participants is unaware of what is going on.**

In petitioner's case, both he and M.S. were fully aware of what was going on and that they were being photographed. Unlike, ***Firkey, id.*** the photos were not seen by a third person. In line with common interpretation and understanding, "exhibit" means to put on display or put on view and "audience" means spectators or viewers of something. No reasonable construction of the phrase "exhibited before an audience" can mean that a viewing by the participants or creators of the offending photos alone, would be sufficient to prove the offense. As M.S.'s testimony was the sole evidence of who saw the photos, the only fact that could be definitively established is that M.S. saw them.

The same line of argument can also be applied to the application of the enhancement statute to petitioner's offenses.

Section 775.0847(2), Florida Statutes allows for enhancement of a violation of section 827.071 if:

> (a) The offender possesses 10 or more images of any form of child pornography regardless of content; and
>
> (b) The content of at least one image contains one or more of the following:
>
> 3. Sexual battery involving a child.

Although the Second District found that petitioner's presence with M.S. when the photos were picked up at Walgreen's sufficient evidence of his possession of them, the court went further and held that regardless of who had the actual photos, the offense was complete and petitioner was in "possession" when he took the photos, as the undeveloped film within his camera constituted an "image". Petitioner disputes that would be the common interpretation or understanding of the term "image"; rather an image is a picture or physical representation of something. The dissent noted that the statute did not use the word "photograph", instead it used "image", therefore until the film in the camera was developed by means of chemical processes, there was no "image" in the common understanding of the term.

CONCLUSION

The opinion of the Second District having dispensed with the necessity of proof as to the essential elements for a conviction under section 827.071, Florida Statutes and for an enhancement of the offenses under section 775.084, Florida Statutes, by failing to construe them in the light most favorable to petitioner, as required by the rule of lenity, and prior Florida Supreme Court cases, Petitioner asks this Honorable Court to accept jurisdiction in this case.

APPENDIX

1. Second District Court Of Appeal opinion (Shedrick Reshord Jenrette-Smith 2D10-1031) filed May 31, 2013.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 26th day of June, 2013.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a) (2).

Respectfully submitted,

HOWARD L. "REX" DIMMIG, II
Public Defender 255491
Tenth Judicial Circuit
(863) 534-4200

/S/ALLYN M. GIAMBALVO
Assistant Public Defender
Florida Bar Number O239399
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
agiambalvo@pd10.state.fl.us
dcurl@pd10.state.fl.us

Amg