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IN THE SUPREME COURT OF FLORIDA

MICHAEL HASPEL,)
)
 Petitioner,)
)
v.)
)
STATE OF FLORIDA,)
)
 Respondent.)

)

No.

On Discretionary Review from the District Court of Appeal,
Fourth District of Florida

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case arises from convictions for various offenses including sexual battery of a child under the age of 12. The defendant seeks discretionary review of the decision of the lower court on the ground that it expressly and directly conflicts with decisions of other district courts of appeal and of this Court on the same question of law. Art I, § 3(b)(3), Fla. Const. The court issued its opinion on rehearing on October 1, 2014. App. 1. Notice of intent to seek discretionary review was timely filed on October 16, 2014.

The alleged offenses did not come to light until the alleged victim was 17 years old. App. 2.

At trial, the investigating detective testified without objection that he determined that the alleged incidents occurred as early as 2001. App. 2. This testimony "sought to establish the earliest date that the 'alleged' incidents occurred, as the time was relevant to the issue of the age of the victim." App. 2.

On direct appeal, the defendant argued that trial counsel was ineffective in that he failed to object to this testimony. App. 1-2. The Fourth District ruled against the defendant, holding that the detective's testimony on this point was admissible:

Appellant was charged and convicted of sexual battery against his step-daughter, beginning when she was eight years old and continuing on a regular basis. She

did not report the crimes until she was seventeen. When confronted, appellant made multiple incriminating statements both to his ex-wife and on a recorded telephone call.

At the trial, the investigating detective was asked, "[D]uring the course of your investigation, did you determine that the alleged incidents occurred as early as 2001?" He responded, "Yes." No objection was made, but on appeal, appellant claims that this amounted to the detective giving an improper opinion on the appellant's guilt. In no way do we find that the question and answer could be construed as the detective giving his opinion on the guilt of the appellant. The question merely sought to establish the earliest date that the "alleged" incidents occurred, as the time was relevant to the issue of the age of the victim.

This is entirely different than *Battle v. State*, 19 So. 3d 1045 (Fla. 4th DCA 2009), upon which appellant relies. There, the officer was allowed to testify that, although he had not witnessed the burglary, "[d]efinitely, one hundred percent, [Battle] is the guy that committed the burglary." *Id.* at 1046. We concluded that this was clearly opinion evidence and could have conveyed to the jury the impression that the officer had other evidence of Battle's guilt. *Id.* at 1047-48. In the present case, however, the officer's comment was not opinion evidence, nor did it convey to the jury that the detective may have possessed additional information which led to a conclusion of appellant's guilt. As this did not constitute opinion evidence, appellant's contention lacks merit.

App. 2.

SUMMARY OF THE ARGUMENT

The decision below expressly and directly conflicts with cases of other district courts of appeal and of this Court on the same question of law - what constitutes an improper opinion as to guilt.

ARGUMENT

THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND OF THIS COURT ON THE SAME QUESTION OF LAW.

The detective testified that during his investigation he determined the alleged offenses occurred as early as 2001. This testimony went directly to an element of capital sexual battery - the age of the alleged victim. § 794.011(2)(a), Fla. Stat.

The Fourth District did not dispute that it would be ineffective assistance of counsel to fail to object to this testimony if it was inadmissible opinion evidence.

It ruled instead that this testimony could not "be construed as the detective giving his opinion on the guilt" of the defendant because it "merely sought to establish the earliest date that the 'alleged' incidents occurred, as the time was relevant to the issue of the age of the victim." App. 2. It held that the testimony was not an improper opinion because the officer did not say something along the lines of "[d]efinitely, one hundred percent, [the defendant] is the guy that committed" the crime under prior Fourth District case law. App. 2.

The Fourth District's decision as to what constitutes an opinion of guilt clashes with decisions of other District Courts of Appeal. Those courts have held that a witness gives an improper opinion on guilt even if the witness does not actually say in so many words that the defendant is guilty.

In *Sosa-Valdez v. State*, 785 So.2d 633 (Fla. 3d DCA 2001), the defendants contended that the victim (Lagru) had faked the alleged crime. To rebut this claim, a detective testified that, based on his investigation, the victim was not involved in a setup. *Id.* at 634. The Third District held this testimony violated the rule that "a witness' opinion as to the guilt or innocence of the accused in a criminal case is not admissible." *Id.* at 634-35.

The Third District continued: "The fact that Detective Hladky did not directly state, 'I think the defendants are guilty,' is a distinction without a difference," since "[b]y testifying that Lagru was not involved in some sort of set up, the officer was in effect saying that the defendants were guilty." *Id.* at 635 (e.s.).

Likewise, in *Bartlett v. State*, 993 So.2d 157 (Fla. 1st DCA 2008), a murder case, an officer testified "about the facts he had observed or learned from other sources before concluding that self-defense was not a viable defense in Appellant's case." *Id.* at 160. The First District held that the testimony was an improper opinion as to guilt, since "whether self-defense was a viable defense for Appellant was not personally observed by [the officer]." *Id.* at 160. The court agreed with the defendant's argument that the evidence violated the rule that "a witness's opinion as to the guilt or innocence of the accused is not ad-

missible," holding that the officer's opinion "in effect, answered a question that the jury itself was supposed to resolve: did Appellant act with justifiable force in self-defense?" *Id.* at 164.

At bar, the officer was not present at the time of the alleged sexual offenses (when the child was less than age 12), which occurred long before the investigation was commenced (when the child was 17). Hence, his testimony was opinion evidence under *Sosa-Valdez* and *Bartlett*.

Similarly, the decision at bar conflicts with *Spradley v. State*, 442 So.2d 1039 (Fla. 2d DCA 1983), where the defense to manslaughter was that the killing was an accident rather than a criminal homicide. The Second District held inadmissible the medical examiner's testimony and statement on the death certificate that the murder was a "homicide" rather than an "accident," which violated the rule forbidding opinions as to the guilt of the accused since it negated the defense:

In any event, by marking on the death certificate and testifying that Munn's demise was caused by a "homicide," not an "accident," Dr. Schultz effectively eliminated appellant's viable defense of excusable homicide, thereby implying in very clear terms for the jury that appellant was guilty of one of the degrees of homicide. A witness, however, cannot offer an opinion as to the guilt or innocence of an accused person. *Gibbs v. State*, 193 So.2d 460 (Fla. 2d DCA 1967); *Farley v. State*, 324 So.2d 662 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 1184 (Fla.1976).

Id. at 1043.

Finally, the Fourth District's holding is contrary to the rule established by this Court almost a hundred years ago, when it held that an officer's testimony that he had sufficient evidence to convict was opinion testimony "so flagrantly improper" that it should be "stricken by the court of its own motion":

While we will not undertake to recite all the improper remarks and proceedings that appear in the record, we will advert to some of them. On cross-examination, Sheriff Sutton was asked if he had not repeatedly said he would 'break their necks,' to which he replied, 'Well, I said, if the law said so.' He also volunteered the information that he said he 'had the evidence.' On redirect examination the following testimony was placed before the jury by the assistant state attorney:

'Mr. Stokes: Q. You said you thought you had the evidence to do so? A. Yes, sir. Q. You still think so? A. Yes, sir. Q. You still think you have the evidence before the jury? A. Yes, sir.'

Although there was no objection by the defense to this opinion of the sheriff that there was sufficient evidence before the jury to convict the prisoners, it was so flagrantly improper that it should have been stricken by the court of its own motion. But it remained in, and the jury carried with them into the jury room the opinion of the sheriff, who is a man of great influence in the county, that there was sufficient testimony before them upon which to find a verdict of guilty.

Blackwell v. State, 79 So. 731, 739 (Fla. 1918).

The foregoing decisions are directly and expressly contrary to the decision of the Fourth District at bar finding admissible the testimony that, during his investigation, the officer "determine[d] that the alleged incidents occurred as early as 2001," where the date of the incidents was an element of the

crime, even though the officer did not directly say he believed the defendant was guilty.

At bar, the defendant maintained below and maintains here that he was deprived of effective assistance of counsel under the Counsel and Due Process Clauses of the state and federal constitutions because he failed to act to exclude this inadmissible evidence. The Fourth District ruled that counsel was not ineffective because the evidence was admissible.

In holding that the evidence was admissible, the decision directly and expressly conflicts with the decisions of other district courts of appeal and of this Court, and opens the door to a wide variety of previously inadmissible testimony. Investigators cannot testify that they investigated the alleged facts or a crime or tort and determined they occurred.

Review should be granted and the decision below should be reversed.

CONCLUSION

The decision of the Fourth District conflicts with decisions of other district courts of appeal and this Court on the same question of law. This Court should grant discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 22 October 2014 a copy hereof has been efiled with this Court and served by email on Jeanine M. Germa-nowicz, Esq., Assistant Attorney General, Counsel for Respondent, Department of Legal Affairs, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-2299 at:

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/s/ Gary Lee Caldwell
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CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

/s/ Gary Lee Caldwell
Attorney for Petitioner