IN THE SUPREME COURT OF FLORIDA

GARRETT STATLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. SC21-119
DCA CASE 1D19-0264
LT NO. 01-2016-CF-1306

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Garrett Statler was the Defendant in the trial court and the Appellant in the District Court of Appeal. He will be referred to in this brief by his proper name or Petitioner. The record on appeal will be referred to using Roman numerals for the volume number followed by the page number.

STATEMENT OF THE CASE AND THE FACTS

Petitioner was charged with sexual battery on an adult without force likely to cause injury, Section 794.011(5)(b). (I-53) Both parties to the incident were university students over age 18.

In the District Court of Appeal, Petitioner argued that given the unique and unusual facts of this case, the jury should have been permitted to consider the question whether Petitioner knew or reasonably should have known of lack of consent, and that without such consideration, the statute under which he was charged and convicted is facially unconstitutional and a violation of due process, because it omits the requirement of mens rea. The District Court of Appeal rejected this argument, instead relying on a decades old case from the First District, Watson v. State, 504 So. 2d 1267 (Fla. 1st DCA 1986), which stated without any relevant analysis, and in a different factual context, that "whether a defendant knew or should have known that the victim was refusing sexual intercourse is not an element of the crime of sexual assault as defined in Section 794.011(3), Florida Statutes." Petitioner's motion for rehearing and certification was denied.

The undisputed facts of the case include the following: A.B., age 22 at the time, met Petitioner's roommate, Tait, while drinking at a bar on a Friday night just before college graduation. They decided to "hook up," proceeded to his apartment, and had sexual intercourse several times. (II-210) By her own account, A.B. had consumed several alcoholic drinks, was tipsy, and would not have been able to drive a car. (II-317) At one point after they had intercourse, Tait told her to wait there, he would be right back. Shortly thereafter, A.B. felt hands on her hips and, assuming it was Tait, had intercourse again from behind. Meanwhile, Tait had gone to Petitioner's room, bragged about having sex with A.B., and told Petitioner, "you can try if you want." Petitioner then went into Tait's room and had intercourse with A.B. (II-705, 732)

At trial A.B. acknowledged that while having sex with Petitioner she told him "harder" several times, told him it felt good, made pleasurable sounds, and had an orgasm. However, when she turned and saw it was not Tait but Petitioner, she accused Petitioner of rape. (II-245) Confused, Petitioner replied that no, they were just partying. He appeared shocked by the accusation. When A.B. became hysterical, Tait took her phone and tossed it outside

and told her to leave the apartment. (II-251) A.B. admitted Petitioner did nothing to obstruct her view of him or keep her from turning around, and he did not tell her not to look at him. The lights were on in the room. (II-305) She was not blacked out and nothing was covering her head.

During argument on the motion for judgment of acquittal in the present case, the defense raised the question of imposing criminal liability without a requirement of criminal intent. (II-769-771) The court stated its understanding that a defendant's reasonable belief as to consent was not an element of the offense of sexual battery or a factor to be considered. The court stated, "Whether he believes he has consent is not a defense." (II-771) In the District Court of Appeal, Petitioner argued that, if the trial court's reading of the statute is correct, the statute imposes criminal liability without a requirement of guilty knowledge, and that without some mechanism for the court or jury to consider mens rea, the statute violates due process of law.

The District Court ruled that the statute was not unconstitutional as argued by Petitioner. Significantly, the District Court acknowledged in a footnote that: "Although the Court in

[State v.] Adkins, 96 So. 3d 412, 420 (Fla. 2012), noted that a defendant could raise an affirmative defense of lack of knowledge, we recognize that under this Court's holding in Watson, Appellant was not permitted to argue that he did not know or should not have known the victim did not consent to sexual intercourse."

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeal expressly declared valid a state statute, Section 794.011(5)(b), when presented with the argument that Section 794.011(5)(b), is facially unconstitutional, and a violation of due process, U.S.Const.Amend. XIV, because it omits the requirement of mens rea.

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ARGUMENT

I. The decision of the First District Court of Appeal expressly declared valid a state statute, Section 794.011(5)(b), providing a basis for this Court's exercise of discretionary jurisdiction, Florida Rule of Appellate Procedure 9.030(2)(A)(i).

"The constitutionality of a statute is a question of law subject to de novo review." Crist v. Ervin, 56 So. 3d 745, 747 (Fla. 2010), as revised on reh'g (Jan. 20, 2011).

"At common law, all crimes consisted of both an act or omission coupled with a requisite guilty knowledge, or mens reas. . . . Hence, as a general rule, guilty knowledge or mens rea was a necessary element in the proof of every crime." See, e.g., State v. Giorgetti, 868 So. 2d 512 (Fla. 2004)("Because scienter is often necessary to comport with due process requirements, we ascribe the Legislature with having intended to include such a requirement"), citing United States v. Balint, 258 U.S. 250 (1922). There is a presumption in favor of a guilty knowledge element absent an express provision to the contrary. Id. at 515. "[W]e will ordinarily presume that the Legislature intends statutes defining a

criminal violation to contain a knowledge requirement absent an express indication of contrary intent." Id. at 516. "[C]riminal sanctions are ordinarily reserved for acts of intentional misconduct." Id.

Petitioner has found little Florida case law discussing this particular problem with the statute. The First District stated in Watson v. State, 504 So. 2d 1267 (Fla. 1st DCA 1986), with no analysis, that "whether a defendant knew or should have known that the victim was refusing sexual intercourse is not an element of the crime of sexual assault as defined in Section 794.011(3), Florida Statutes." The Watson court was addressing a different provision of the sexual battery statute, dealing with the use of great force, and was not responding to a constitutional challenge. In the present case, the charge is sexual battery of an adult without force likely to cause injury. The context in Watson was a request for a jury instruction as the defendant's knowledge of non-consent in a case charging sexual battery with great force. See also Watson v. Duggar, 945 F.2d 367 (11th Cir. 1991). Petitioner has located no other Florida case law on the subject.

Petitioner has located cases from other jurisdictions discussing the very problem identified here, which take into account the mens rea requirement. These other jurisdictions have looked at this issue and required a jury instruction in order to avoid the due process problem of a de facto strict liability statute where none was intended. In State v. Smith, 554 A.2d 713 (Conn. 1989), the court considered this issue, noting that "[r]easonable conduct ought not to be deemed criminal." 554 A.2d at 717:

> While the word "consent" is commonly regarded as referring to the state of mind of the complainant in a sexual assault case, it cannot be viewed as a wholly subjective concept. Although the actual state of mind of the actor in a criminal case may in many instances be the issue upon which culpability depends, a defendant is not chargeable with knowledge of the internal workings of the minds of others except to the extent that he should reasonably have gained such knowledge from his observations of their conduct. The law of contract has come to recognize that a true "meeting of the minds" is no longer essential to the formation of a contract and that rights and obligations may arise from acts of the parties, usually their words, upon which a reasonable person would rely. E. Farnsworth, Contracts § 3.6. Similarly, whether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed. If the conduct of the complainant under all the

> circumstances should reasonably be viewed as indicating consent to the act of intercourse, a defendant should not be found guilty because of some undisclosed mental reservation on the part of the complainant. Reasonable conduct ought not to be deemed criminal. (e.s.)

The Smith court pointed out that under that state statute, as in the Florida statute, sexual assault (battery in Florida) is a general intent crime, not a specific intent crime, and it is not a strict liability crime when it involves adults. See also Efstathiadis v. Holder, 119 A.3d 522 (Conn. 2015). Under the Connecticut statute, provision is made to consider a reasonable good faith mistake of fact as to consent, using a sanctioned jury instruction to the effect that "the state must prove beyond a reasonable doubt that the conduct of the complainant would not have justified a reasonable belief that she had consented."

> It is likely that juries in considering the defense of consent in sexual assault cases, though visualizing the issue in terms of actual consent by the complainant, have reached their verdicts on the basis of inferences that a reasonable person would draw from the conduct of the complainant and the defendant under the surrounding circumstances. It is doubtful that jurors would ever convict a defendant who had in their view acted in reasonable reliance upon words or conduct of the complainant indicating consent, even

> though there had been some concealed reluctance on her part. If a defendant were concerned about such a possibility, however, he would be entitled, once the issue is raised, to request a jury instruction that the state must prove beyond a reasonable doubt that the conduct of the complainant would not have justified a reasonable belief that she had consented. (e.s.) Id. at 717.

Were such an instruction available in Florida, it might save the statute from a due process challenge, but under Watson, no such instruction or argument is available.

> The absence of words in a statute requiring a certain mental state does not warrant the assumption that the Legislature intended to impose strict liability. To the contrary, at least for an offense as serious as sexual assault, it should be presumed that the Legislature intended to follow the usual mens rea requirement unless excluded expressly or by necessary implication. See 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.1(b) (1986). (e.s.)

State v. Koperski, 578 N.W.2d 837 (Neb. 1998). See also People v. Sojka, 196 Cal.App.4th 733 (Cal. Ct. App. 2011)("no reason to conclude that consideration of Sojka's reasonable, but mistaken, belief the victim consented to intercourse was subsumed in other instructions. This is not a case where jurors were ever instructed on the legal effect mistaken belief in consent could have on the

defendant's guilt in another, albeit unrelated instruction. . . . The evidence concerning the sexual interaction between Sojka and his victim was hotly disputed, and some particulars of the victim's account were obviously insufficient to fulfill the prosecution's burden of proof. In the circumstances, it was wrong for the trial court to entirely discount Sojka's testimony when considering whether to instruct on his possible mistaken belief in her consent to intercourse."); People v. Mayberry, 542 P.2d 1337 (Cal. 1975)("The severe penalties imposed for those offenses . . . and the serious loss of reputation following conviction make it extremely unlikely that the Legislature intended to exclude as to those offenses the element of wrongful intent. If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite under Penal Code section 20 to a conviction of either kidnaping (s 207) or rape by means of force or threat (s 261, subds. 2 & 3).")

Likewise, there is no indication that the Florida Legislature intended to create a strict liability statute here. Consent is a factor. The question is whether and how a jury may analyze that factor.

The District Court rejected Petitioner's argument, choosing instead to rely on Watson, a case which does not answer the question posed. In doing so, the District Court expressly declared valid a state statute which imposes criminal liability regardless of mens rea.

CONCLUSION

Based on the foregoing, Petitioner requests the Court to exercise its discretionary jurisdiction to review the decision of the First District Court of Appeal.

CERTIFICATES

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on Steven Woods, Assistant Attorney General, at crimapptlh@myfloridalegal.com, on January 29, 2021.

Respectfully submitted,

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