Third District Court of Appeal

State of Florida

Opinion filed July 31, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2358
Lower Tribunal No. 15-17935

Jorge L. Pena-Vazquez,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Stephen T. Millan, Judge.

Carlos J. Martinez, Public Defender, and Natasha Baker-Bradley and James Odell, Assistant Public Defenders, for appellant.

Ashley Moody, Attorney General, and Natalia Costea, Assistant Attorney General, for appellee.

Before EMAS, C.J., and LOGUE and SCALES, JJ.

EMAS, C.J.

Following a jury trial, Jorge L. Pena-Vazquez was convicted of two counts of lewd or lascivious molestation of his stepdaughter (a child over twelve but less than sixteen years of age) and one count of attempt to engage in a sexual act with his stepdaughter.[1] He was sentenced to three consecutive terms of ten years' imprisonment, followed by community control and probation.

Pena-Vazquez raises four issues on appeal. We affirm, and write to address one of the issues raised.[2]

Pena-Vazquez contends that his convictions and sentences for the two counts of lewd or lascivious molestation violate double jeopardy. These two counts (Counts Two and Six of the Amended Information), are identically worded and allege in pertinent part:

> And the aforesaid Assistant State Attorney, under oath, further information makes JORGE LUIS PENA-VAZQUEZ, on or between August 18, 2009 and August 18, 2011, in the County and State aforesaid, being a person of the age of (18) years or older, did unlawfully and intentionally touch the breasts, genitals, genital area, or buttocks, or the clothing covering the breasts, genitals, genital area, or buttocks, of C.P., a minor, a person 12 years of age or older, but less than 16 years of age, in violation of s.

[1] Pena-Vazquez was acquitted of two additional counts of lewd or lascivious molestation, as well as two counts of sexual activity with a child by a person in familial or custodial authority.

[2] We affirm without discussion Pena-Vazquez's remaining claims: the State's improper (but unobjected-to) closing arguments rose to the level of fundamental error; a State witness improperly testified (without objection) to certain hearsay statements contained in a report prepared by the Department of Children and Families; and the trial court erred in admitting, over objection, two photographs of the child victim.

> 800.04(5)(c)2, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

Pena-Vazquez contends that, because these two counts are identical in language, and allege a two-year timeframe for the commission of the crimes, it is impossible to rule out the possibility that the jury relied upon one act of lewd or lascivious molestation as a basis to return two convictions for violating the very same criminal statute.

We find Pena-Vazquez's contention without merit. We first note this claim does not involve the question of whether Pena-Vazquez is exposed to successive prosecutions for a single crime for which he has already been placed in jeopardy. Nor does it involve a claim that the jury convicted him of violating two different statutes (one of which is wholly subsumed within the other) through the commission of a single criminal act; under such circumstances, we would likely be required to employ a Blockburger[3] analysis. See Vizcon v. State, 771 So. 2d 3, 5 (Fla. 3d DCA

[3] Blockburger v. United States, 284 U.S. 299 (1932). See also § 775.021(4), Fla. Stat. (2011). As the Florida Supreme Court recently reaffirmed in Lee v. State, 258 So. 3d 1297, 1301 (Fla. 2018):

> "Despite this constitutional protection [of double jeopardy], there is no constitutional prohibition against multiple punishments for different offenses arising out of the same criminal transaction as long as the Legislature intends to authorize separate punishments." Valdes [v. State], 3 So. 3d [1067,] at 1069 [Fla. 2009]. Where "there is no clear statement of legislative intent to authorize or to prohibit separate punishments," courts employ the Blockburger same-elements test,

2000) (observing, under circumstances similar to the instant case, that "the issue before us does not concern the double jeopardy preclusion of successive prosecutions, as to which the contents of the respective charging documents are determinative, but whether the defendant has been unconstitutionally punished in the same prosecution more than once for only one criminal act").[4]

Instead, and more precisely, the question presented is whether the Amended Information was fundamentally defective where it alleged two counts of violating the same statute, using identical language and relying upon a two-year range of dates for the commission of both offenses. We answer that question in the negative.

It is true that the State used identical language in charging Counts Two and Six. And although this may not represent a best practice, this alone does not render the counts defective or the convictions improper. See, e.g., Brugal v. State, 217 So.

> codified in section 775.021(4), Florida Statutes (2018), to determine if there is a double jeopardy violation. Valdes, 3 So. 3d at 1070. "This test 'inquires whether each offense contains an element not contained in the other; if not, they are the same offense,' and double jeopardy principles prohibit separate convictions and punishments based upon the same conduct." Shelley, 176 So. 3d at 918 (quoting M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996)).

[4] The distinction is important because true double jeopardy violations can constitute fundamental error which may be raised for the first time on appeal. See Vizcon v. State, 771 So. 2d 3, 5 n.4 (Fla. 3d DCA 2000); Novaton v. State, 634 So. 2d 607 (Fla. 1994). In the instant case, as discussed infra, this is not a true double jeopardy claim and, because it was not raised below, it is waived and may not be raised for the first time on appeal.

3d 134 (Fla. 3d DCA 2017); Vizcon, 771 So. 2d at 6; Nicholson v. State, 757 So. 2d 1227 (Fla. 4th DCA 2000); Collins v. State, 489 So. 2d 188 (Fla. 5th DCA 1986). Nor does the fact that the two counts merely tracked the statutory language render the Amended Information defective. See, e.g., Price v. State, 995 So. 2d 401 (Fla. 2008); Cantrell v. State, 403 So. 2d 977 (Fla. 1981); Martinez v. State, 368 So. 2d 338 (Fla. 1978); Cason v. State, 508 So. 2d 448 (Fla. 3d DCA 1987); State v. Mena, 471 So. 2d 1297 (Fla. 3d DCA 1985).

Reduced to its essence, this aspect of Pena-Vazquez's claim is the bare assertion that the Amended Information is defective because it failed to allege a specific date for the criminal act alleged in each count, and instead alleged a range of dates (from August 18, 2009 to August 18, 2011).

That this is the essence of Pena-Vazquez's claim can best be illustrated by the following example. Assume that Counts Two and Six of the Amended Information alleged as follows:

> Count Two
> Pena-Vazquez on August 18, **2009**, did unlawfully and intentionally touch the breasts, genitals, genital area, or buttocks, or the clothing covering the breasts, genitals, genital area, or buttocks, of C.P., a minor, a person 12 years of age or older, but less than 16 years of age, in violation of s. 800.04(5)(c)2, Fla. Stat., upon C.P.
>
> Count Six
> Pena-Vazquez on August 18, **2011**, did unlawfully and intentionally touch the breasts, genitals, genital area, or buttocks, or the clothing covering the breasts, genitals, genital area, or buttocks, of C.P., a minor, a person 12

> years of age or older, but less than 16 years of age, in violation of s. 800.04(5)(c)2, Fla. Stat., upon C.P.

The only difference between the actual Amended Information and the example above is that, instead of alleging that each offense was committed sometime during a two-year timeframe, each count alleges a specific (and different) date on which the crime was committed. Under the above example, Pena-Vazquez surely would have no viable claim of a defective charging document or double jeopardy violation. Thus Pena-Vazquez's claim is, in reality, merely an assertion that the time frame in the Amended Information is too expansive and should have been narrowed to avoid the potential error he now claims occurred.

However, such a claim cannot be raised for the first time after trial, and Pena-Vazquez failed to avail himself of the procedural remedies crafted for just such a circumstance. Had Pena-Vazquez believed that the time frames (or other allegations) in the Amended Information were so vague and indefinite as to mislead or hamper him in the preparation of his defense or expose him to the possibility of multiple convictions and punishments for violating the same statute by a single act, he should have filed a motion to dismiss or for a statement of particulars. As Florida Rule of Criminal Procedure 3.140(n) and (o) provide:

> **(n) Statement of Particulars.** The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense. The statement of particulars

> shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.
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> **(o) Defects and Variances.** No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.

Compare Miles v. State, 418 So. 2d 1070 (Fla. 5th DCA 1982) (noting that defendant, charged in two identically-worded counts, with willfully failing to appear in court on the exact same date, properly preserved the issue by moving for a statement of particulars and subsequently moving to dismiss the charges).

By failing to seek a statement of particulars to factually differentiate between the identically-worded counts, or otherwise narrow the timeframe for each count, and by failing to otherwise challenge the allegedly defective or insufficient nature of the charging document, Pena-Vazquez has waived that issue and may not raise it for the first time on appeal.[5] Vizcon, 771 So. 2d at 3 n.4; Tucker v. State, 417 So. 2d 1006 (Fla. 3d DCA 1982); Nicholson, 757 So. 2d at 1228.

[5] The exception to this rule (inapplicable here) is where the charging document wholly fails to charge a crime. See Carillo v. State, 463 So. 2d 450 (Fla. 2d DCA 1985); Haselden v. State, 386 So. 2d 624 (Fla. 4th DCA 1980).

To the extent Pena-Vazquez asserts the jury may have improperly relied upon proof of one act to find him guilty of two counts of lewd or lascivious molestation, we hold that this is a question of "evidentiary sufficiency" rather than "constitutional sufficiency,"[6] and may therefore be resolved by reviewing the trial record rather than limiting our review to the charging document. In this respect, the instant case is distinguishable from the Florida Supreme Court's recent decisions in Lee v. State, 258 So. 3d 1297 (Fla. 2018),[7] and State v. Shelley, 176 So. 3d 914 (Fla. 2015).

In Shelley, 176 So. 3d at 919, the question presented was whether "dual convictions for solicitation and traveling after solicitation based upon the same conduct" violated double jeopardy. Ultimately, the Court answered that question in the affirmative, determining that the Legislature did not explicitly state its intent to authorize separate convictions and punishments for conduct that constitutes both solicitation and traveling after solicitation; and further, applying the Blockburger

[6] Lee v. State, 258 So. 3d 1297, 1304 (Fla. 2018) (quoting Lee v. State, 223 So. 3d 342, 374 (Fla. 1st DCA 2017) (Makar, J., concurring in part, dissenting in part) (quashed by Lee, 258 So. 3d at 1304)).

[7] The Florida Supreme Court issued its decision in Lee after briefing had been completed in the instant appeal. This court ordered supplemental briefing on the applicability of Lee to the instant case.

"same elements" test,[8] the offense of solicitation[9] was entirely subsumed by the offense of traveling after solicitation,[10] and constituted the "same offense" for double jeopardy purposes. Id. at 919.

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[8] As Shelley noted: "This test 'inquires whether each offense contains an element not contained in the other; if not, they are the same offense,' and double jeopardy principles prohibit separate convictions and punishments based upon the same conduct." Id. at 918 (quoting M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996)).

[9] The solicitation statute, section 847.0135(3)(b), Florida Statutes, provides in pertinent part:

> (3) CERTAIN USES OF COMPUTER SERVICES OR DEVICES PROHIBITED.—Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
> ...
> (b) Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct, commits a felony of the third degree. . . .

[10] The traveling after solicitation statute, section 847.0135(4)(b), Florida Statutes, provides in pertinent part:

> (4) TRAVELING TO MEET A MINOR.—Any person who travels any distance either within this state, to this state, or from this state by any means, who attempts to do so, or who causes another to do so or to attempt to do so for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
> ...

In Lee, 258 So. 3d at 1304, the Florida Supreme Court elaborated on the proper scope of review to be undertaken by an appellate court in analyzing the type of double jeopardy claim presented in Shelley, 176 So. 3d at 919. In applying the Blockburger "same elements" test to determine the permissibility of multiple convictions for separate crimes based upon the same conduct, the Court held "the reviewing court should consider only the charging document—not the entire evidentiary record." Lee, 258 So. 3d at 1304.

Here, by contrast, Pena-Vazquez was not charged with or convicted of violating two separate criminal statutes (one of which is subsumed within the other) based upon the same conduct. Instead, Counts Two and Six allege that Pena-Vazquez, over the course of the same two-year period, engaged in acts upon the same victim that violated the exact same criminal statute.

At no time did the State allege or contend that Pena-Vazquez committed these two offenses by engaging in a single act. In point of fact, the State charged a total of **four** counts of lewd or lascivious molestation (Counts Two, Four, Six and Seven) and used the identical language, wording and two-year timeframe in each of these

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> (b) Solicit, lure, or entice or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct, commits a felony of the second degree. . . .

counts. Two propositions logically follow from this: (1) there can be no little doubt, based upon these four identically-worded counts, that the State intended to prosecute Pena-Vazquez for four distinct and separate acts of lewd or lascivious molestation upon C.P., committed over the course of the two-year timeframe; and (2) the jury had no apparent difficulty in differentiating among the counts and in determining whether Pena-Vazquez violated the same criminal statute on separate dates by engaging in distinct and separate acts upon C.P. over the two-year period—the jury convicted him of two counts of lewd or lascivious molestation and acquitted him of two counts of lewd or lascivious molestation.[11]

Because this claim is distinguishable from the double jeopardy claim at issue in Shelley and Lee, our resolution of the merits of this claim properly includes a review not only of the charging document and the verdict form, but also the evidence presented at trial, as we have done in Vizcon, 771 So. 2d at 6, and, more recently, in Brugal, 217 So. 3d at 136, a case which is in all relevant respects on all fours with the instant case.

[11] Given the nature of the offenses, the delay in reporting (the evidence established that C.P. waited nearly five years before reporting the incidents), and the youth of the victim (C.P. testified that she was 12 and 13 years old when Pena-Vazquez committed the four separate acts), it may well be that the State alleged as best it could the range of dates during which Pena-Vazquez engaged in separate and distinct acts constituting the offense of lewd or lascivious molestation. Of course, we cannot know this with certainty given the defendant's failure to seek a statement of particulars from the State.

Here, the evidence presented at trial differentiated the acts of lewd or lascivious molestation, in terms of time, place and circumstance, and established by competent substantial evidence that Pena-Vazquez engaged in distinct acts of lewd or lascivious molestation on C.P., on separate dates and under identifiably different circumstances during the two-year time period alleged in the Amended Information. Accordingly, we affirm.

Affirmed.