IN THE SUPREME COURT OF FLORIDA

CARL DUKE, :

Petitioner :

vs. : Case No. 64,876

STATE OF FLORIDA, :

Respondent. :
_____/

ON PETITION FOR DISTRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Carl Duke, was the defendant at trial and the appellant on appeal. Respondent, State of Florida, was the prosecution at trial and the appellee on appeal. Parties will be referred to in this brief as they appear before this Court. The symbol "A" followed by a number will refer to the Appendix filed by Respondent containing the opinion filed by the Second District.

ISSUE I

WHETHER THIS COURT SHOULD ACCEPT JURISDICTION TO REVIEW THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN DUKE v. STATE, ___ So. 2d ___, 9 F.L.W. 170 (Fla. 2 DCA, Opinion rendered January 11, 1984), BASED UPON A CONFLICT WITH THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN HOGAN v. STATE, 427 So.2d 202 (Fla. 4th DCA 1983).

In a two-count information, Petitioner was charged with one count of attempting to insert his penis in the anus of a five year old female child, and a second, separate count of attempting to insert his penis in the vagina of the child. Petitioner was sentenced to thirty years on Count I and thirty years on Count II. The Second District Court of Appeal relied on its earlier opinion in Rusaw v. State, 429 So.2d 1378 (Fla. 2 DCA 1983)[1], and the opinion of this Honorable Court in Donaldson v. Sack, 265 So.2d 499 (Fla. 1972), in determining that the appellant committed two first-degree felonies, §774.04(4)(a), Florida Statutes, and therefore was correctly sentenced to thirty years for each violation. §775.082(3)(b). Attached hereto as Respondent's Exhibit A is a copy of the Opinion rendered by the Second District Court of Appeal in Duke v. State.

1. Question certified as being in direct conflict with the decision in Hogan v. State, 427 So.2d 202 (Fla. 4th DCA 1983), on the same question of law.

The opinion of the Second District in Rusaw properly recognized that even though sexual battery under §794.011(2) is not a capital crime in the sense that it may result in the imposition of the death penalty, punishment for that crime must still be imposed under §775.082(1) to its constitutional limits. 429 So.2d at 1380. In so holding, the Court followed the dictates of Donaldson v. Sack, supra, wherein this Honorable Court preserved the sentencing under §775.082(1) and stated:

> "We find no difficulty with a continuation of the sentencing for these former "capital offenses" under §775.082(a) as automatically life imprisonment upon conviction, inasmuch as that is the only offense left in the statute . . . . The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances. 265 So.2d at 502, 503, Duke, 9 F.L.W. 170.

Respondent respectfully requests that this Court decline to accept jurisdiction in the instant case; or, in the alternative, stay the proceedings pending resolution of the conflict between Rusaw v. State, supra, and Hogan v. State, 427 So.2d 202 (Fla. 4th DCA 1983).

ISSUE II

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN DUKE v. STATE, ___So.2d___, 9 F.L.W. 170 (Fla. 2 DCA, decided January 11, 1984), IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION IN WADE v. STATE, 368 So.2d 76 (Fla. 4th DCA 1979), AND MIXON v. STATE, 54 So.2d 190 (Fla. 1951).

Petitioner alleges an express and direct conflict between the decision in the instant case and that of the cases of Wade v. State, 368 So.2d 76 (Fla. 4th DCA 1979), and Mixon v. State, 54 So.2d 190 (Fla. 1951). Petitioner, Carl Duke, contends that the attack on the five year old victim constituted only a single violation of the sexual battery statute and therefore the court erred in sentencing him for both offenses. §794.011(1)(f) defines sexual battery as follows:

> "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual batter shall not include acts done for bona fide medical purposes.

As the statute indicates and the court properly concluded, each act is a sexual battery of a separate character and type which logically requires different elements of proof. Clearly, penetration of the vagina and penetration of the anus are distinct acts necessary to complete each sexual battery. Duke, 9 F.L.W. at 170. Duke's reliance on Wade v. State, 368 So.2d

76 (Fla. 4th DCA 1979) is not dispositive. As the Second District stated in the instant case, the opinion in Wade did not articulate the facts relied upon by the court in making its determination; and, therefore, the Second District was unable to conclude whether the case is applicable to the factual situation before the court.

For this Honorable Court to assume jurisdiction, the conflict must be inevitable: direct and express. In other words, all paths of harmony must be foreclosed. Such is not the case at bar. As recognized in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), the term "express" will be strictly interpreted. The Jenkins decision cited with approval from Gibson v. Maloney, 231 So.2d 823 (Fla. 1970) and reiterated:

> " . . . It is conflict of decision, not conflict of opinion or reasons that supplies jurisdiction for review by certiorari."

In Mixon v. State, 54 So.2d 190 (Fla. 1951), the defendant was convicted on two counts charging violation of the lottery statute. This court determined that the information only charged one violation of the lottery statute and that only one sentence was justified. The court in Mixon determined that but one sentence was justified and relied on its earlier opinion in Bueno v. State, 40 Fla. 160, 23 So. 862, and recognized:

> ". . . [T]he punishment prescribed by the statute was the same for a conviction upon one count only as it would have been for a conviction upon all, because the counts did not charge separate and distinct offenses but the same offense. . ." Id. at 193, citations omitted.

Sub judice, the Second District Court of Appeal properly recognized that each act constitutes a sexual battery of a separate character and type which logically requires different elements of proof. There is no express and direct conflict herein. It is apparent that Petitioner is seeking a second appeal to this Honorable Court. The mere fact that he disagrees with the District Court, however, does not constitute a basis for invoking jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to Carl Duke, #085730, Post Office Box 221, Raiford, Florida 32083 on this the 5th day of March, 1984.

K. Blanco
Of Counsel for Respondent