

IN THE SUPREME COURT OF FLORIDA

CARL DUKE,  
Petitioner,

v.

STATE OF FLORIDA,  
Respondent.

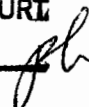
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JUN 18 1984

CLERK, SUPREME COURT

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Chief Deputy Clerk



Case No. 64, 876

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

BRIEF OF THE RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Carl Duke, was the defendant at trial and the Appellant on appeal to the Second District Court of Appeal. Respondent, State of Florida, was the plaintiff/prosecution at trial and the appellee on appeal to the Second District Court. The parties will be referred to as they appear before this Court or by their proper names.

STATEMENT OF THE FACTS

Inasmuch as the only issue presently before this Court is whether petitioner Carl Duke's, actions constituted a single violation of the sexual battery statute, Respondent, State of Florida will rely on the following relevant facts:

Linda Sexton was living at the Shady River Mobile Home trailer park on November 26, 1980. (R134-135) Linda had her three children living with her at the time: Darron, age fifteen; Milissa, age nine; and Angela, age five. (R135) Appellant was a neighbor in the trailer park. (R135) On the 26th Linda left the trailer park for about 45 minutes, when she returned there was "extreme turmoil." (R138-139) Angela was coming from the bathroom and she could hardly walk. (R139) Linda took Angela to the hospital where she was examined by Dr. Nawab. (R140)

The jury was cleared from the courtroom and seven-year-old Angela Mahan was questioned. (R141-146) Angela was qualified to testify; the courtroom was cleared of all non-essential persons; the jury was returned to the courtroom. (R146-148) On November 26, 1980, Angela was playing at the trailer park with Darron, Missy, Toby and Bobby. (R150) Appellant was called Tex by the children. (R151) The children went to Appellant's trailer to get some matches. (R152) Angela and Tex were sitting at the kitchen table when Tex told her to come to the bathroom because he wanted to talk to her. (R152-153) When Angela followed Tex into the bathroom he told her not to tell anybody, especially her mother. (R154) Tex took off his clothes, then he took off Angela's clothes. (R154-155) Tex made Angela lay on her back. (R155) He stuck his penis in her vagina, then he told her to lay on her stomach and he stuck his penis in her anus. (R156-157) After he did these things he took some "green stuff" that smelled like perfume and put it on Angela's back. (R159) Tex told Angela not to tell anybody or he would take her away from her mom. (R159-160) Paul Warnaki, whose nickname was "Buzz", was sitting at Appellant's kitchen table and asked, "What's going on, buddy" (R162-163) Angela and Tex were inside the bathroom and Tex told Buzz, "Just wait a minute." (R163)

Melissa Mahan went with Darron, Angela, Toby and Bobby to Appellant's trailer. (R169-170) When Angela and Tex were in the bathroom Melissa went over and tried to open the door.

(R171) Melissa couldn't get the bathroom door open so she called Darron. He told her to look under the door where there was a three inch gap between the door and floor. (R172) Angela was on her back without any clothes on and Tex didn't have any clothes on. (R173) Darron tried to open the door. (R173) Melissa saw Angela's legs up against Appellant's shoulders. (R174) Appellant had his mouth up against her vagina. (R174) Melissa left the trailer to get Buzz, an adult who lived with Joyce Hall. (R175) When Angela came out of the trailer she was crying. (R175)

Bobby Hale was with Toby, Darron, Melissa, and Angela when they all went to Appellant's trailer for some matches. (R177-178) When Angela and Appellant went into the bathroom Bobby went over and looked under the door. (R179) Bobby saw Appellant's pants down to his feet and he could see Angie's feet. (R180) Bobby went to get Buzz who then went to Appellant's trailer. (R181) Angela came out of the trailer crying and all of them went to the trailer where Angela lived. (R182) Later, Appellant was at the back door trying to get in, then he left. (R183-184)

Dr. Rehana Nawab was an associate medical examiner for the Sixth Judicial Circuit of Florida. (R185) Dr. Nawab qualified as an expert in the field of forensic pathology. (R187) Dr. Nawab examined Angela. He did not find any injury to the vagina, but did find a small superficial tear in the skin outside the rectal area. (R188) Dr. Nawab by using an

anal scope observed a small abrasion of the lining of the rectum inside the sphincter. (R189) The findings were consistent with the introduction of an object in the anus area. (R189) Dr. Nawab found no evidence of semen in the vaginal area or anal area. (R190)

Toby Hale was playing with Darron, Melissa, and Angela when they all went over to Appellant's trailer to get some matches. (R219-220) Appellant and Angela went in the bathroom; Toby opened the door; Appellant closed the door and locked it. (R223-225) Toby saw Angie and Appellant on the floor of the bathroom with no clothes on. (R226) Toby saw Appellant's penis in contact with Angela's vagina. (R228) Toby went out of the trailer to get Buzz. (R229)

Darron Lee was at Appellant's trailer when the incident occurred. (R231-233) Darron looked under the door and neither Angela nor Appellant had any clothes on. (R234) Darron observed Appellant attempt penetration of Angela's anus. (R234) After Angela came out of Appellant's trailer they went to Angela's trailer. (R236-237) Tex came over to Angela's trailer and tried to open the door. When he couldn't he left. (R238-241)

Paul Warnaki, nicknamed Buzz, lived with Joyce Hale, and her sons Bobby and Toby. (R252-243) Buzz got Appellant a job where he worked and the two drove back and forth to work daily. (R243-244) At about 10:00 p.m. three or four kids yelled at Buzz that Appellant had Angela. (R245) Buzz went to

Appellant's trailer, called him and Appellant answered from the bathroom, "I will be out in a minute." (R245) When Angela and Appellant came out of the bathroom Appellant said "well, she came down here crying and was missing her mother." (R246) Later Buzz talked to Appellant outside Angela's trailer and told him to stay away. (R247)

Joyce Hale saw Appellant the night of the incident. He was sober. (R252-253) Joyce followed Buzz to Appellant's trailer; Angie came out of the trailer crying. (R254) She ran to Joyce and said Appellant stuck his thing in her behind and it hurt. (R256) Joyce left the children at Angela's trailer. (R256-257)

Deputy Donn Gallahue assisted Detective Gallion in the arrest of Appellant. (R258-259) The officers were at Appellant's trailer for 10 minutes beating on the side with their flashlights and night sticks. (R260-261) Gallahue looked in one corner of the room. (R262) Eventually Appellant opened the front door. (R263) Officer Gallahue did not detect any drug or alcohol impairment of Appellant. (R264)

Deputy Tom Gallion placed Appellant under arrest for sexual battery. (R266-269) Gallion read Appellant his constitutional rights. (R270-271) Appellant said he was taking a shower and Angela walked in on him when he was nude. He denied any sexual activity with Angela. (R272)



ISSUE

I.

WHETHER THE OFFENSE OF ATTEMPTED SEXUAL  
BATTERY OF A PERSON OF ELEVEN YEARS OF  
AGE OR YOUNGER IS PROPERLY CLASSIFIED  
AS A FIRST-DEGREE FELONY (As restated by Respondent)

Petitioner's first issue has been resolved in State v. Hogan, \_\_\_ So.2d \_\_\_, 9 FLW 211, Case No. 63,515, Opinion filed June 7, 1984. In Hogan, this Honorable Court determined that attempted sexual battery of a person eleven years of age or younger is properly classified as a first-degree felony. In so doing, this Court stated:

...[The degree of the crime is what the legislature says it is, and, just because a portion of a crime designated "capital" cannot be carried out, the degree is not lessened, at least not for the purposes of setting penalties for "attempt" crimes. Id., 9 FLW at 211

In the instant case, Petitioner, Carl Duke, was properly sentenced to thirty years imprisonment for each conviction.

ISSUE

II.

WHETHER THE ATTEMPTED PENETRATION OF THE FIVE-YEAR OLD VICTIM'S VAGINA AND THE ATTEMPTED PENETRATION OF THE VICTIM'S ANUS CONSTITUTED A SINGLE VIOLATION OF THE SEXUAL BATTERY STATUTE.

Petitioner, Carl Duke, was found guilty of committing two first-degree felonies. Count I of the information charged that Appellant attempted to insert his penis into the anus of five year old Angela Mahan. Count II of the information charged that Carl Duke attempted to insert his penis into the vagina of five year old Angela Mahan.

Carl Duke argued before the trial court and the appellate court that the attack on the five year old victim constituted only a single violation of the sexual battery statute and therefore the trial court erred in sentencing him for both offenses. Both the trial court and the Second District rejected Duke's claim that the elapsed period of time (a matter of seconds) was insufficient to separate one attempted penetration from the other. Duke v. State, 444 So.2d 492, 494 (Fla. 2d DCA 1984) ; (R109-120)

§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 battery shall not include acts done for bona fide medical purposes.

The statute clearly indicates that each act is a sexual battery of a separate character and type which logically requires different elements of proof. In the opinion rendered below and authored by Judge Boardman, the Second District went on to state: ... "Clearly, penetration of the vagina and penetration of the anus are distinct acts necessary to complete each sexual battery. Therefore, notwithstanding the short interval of time involved here, we believe each act is a separate criminal offense." Id. at 494.

Duke's reliance on Wade v. State, 368 So.2d 76 (Fla. 4th DCA 1979) is misplaced. As recognized by the Second District, Wade did not articulate any of the facts relied upon by the Court in making its determination; therefore, we cannot conclude whether Wade is applicable to the instant factual situation. See Duke, 444 So.2d at 494.

Likewise, Mixon v. State, 54 So.2d 190 (Fla. 1951) does not support Duke's argument that only one offense was committed. Count I of the information in Mixon charged that the defendants "... did unlawfully conduct a lottery for money, and by means of a lottery did dispose of money, and did sell tickets in a certain lottery for money...." The second count charged that the defendants "... did unlawfully and feloniously have in their possession certain tickets in a certain lottery ..." The court in Mixon, relying on language from Bueno v. State, 40 Fla. 160, 23 So 862, 863 (Fla. 1898) to the effect that "... because the counts did not charge separate and distinct

offenses, but the same offense . . .", determined that the information charged only one violation of the lottery statute, §849.09, Florida Statutes (1941), and thus only one sentence was justified. Mixon, 54 So.2d at 193.

Sub judice, Duke was properly charged with attempting to perform two separate and distince offenses against 5-year old Angela; each attempted crime required proof of a factor which the other did not. (See R-119) In Bass v. State, 380 So.2d 1181 (Fla. 5th DCA 1980), the defendant forced his victim to perform oral sex upon him while he was driving his car. After reaching his destination, Bass then raped his victim. As in the instant case, though the time interval between one act and the other was minimal, each episode was a separate criminal transaction from the other and Bass was properly convicted of two counts of sexual battery.

An analagous situation was recently presented in Grappin v. State, \_\_\_ So.2d \_\_\_, 9 FLW 177, Case No. 63,450, Opinion filed May 10, 1984. In Grappin, the defendant was charged in a five-count information with committing five separate acts of second degree grand larceny by stealing five firearms during the course of a single burglary. The firearms were owned by the same individual and were taken from the same place at the same time.

This Court, in construing the statutory language, determined that the legislature intended to make each firearm a separate unit of prosecution. Pursuant to Grappin, multiple thefts of

firearms taken during a single episode are to be considered separate crimes. Likewise, at bar, each attempted sexual battery of the 5-year old victim may be punished as a separate crime under the statute.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the decision of the Florida District Court of Appeal, Second District, should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Petitioner, Carl Duke, #085730, P. O. Box 221, Raiford, Florida 32083 this 14th day of June, 1984.

*K. Blanco*  
\_\_\_\_\_  
Of Counsel for Respondent