IN THE SUPREME COURT OF FLORIDA

CARL DUKE, :

Petitioner, :

v. : CASE NO. 64,876

STATE OF FLORIDA, :

Respondent. :

BRIEF OF PETITIONER

CARL DUKE #085730
Post Office Box 221
Raiford, Florida 32083

Petitioner, pro se

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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 as they appear before this court.

The symbol "R" followed by a number will refer to the Record on Appeal. The symbol "A" followed by a page number will refer to the Appendix filed by the petitioner containing the opinion filed by the Second District.

STATEMENT OF THE CASE

On December 23, 1980, Carl Duke was charged by information with two counts of attempted sexual battery on a five year old child; in violation of Sections 794.011(2) and 777.04 Florida Statutes (R 8-9).

On April 21, 1981 pursuant to a motion to determine competency, the trial court appointed two experts, Don Delbeato, Ph.D., and Otsenre Matos, M.D. (R 19-25). On May 21, 1981 the State and defense stipulated that Duke was incompetent to stand trial; Edward H. Bergstrom, Jr., Circuit Judge, ordered and adjudged Duke incompetent to stand trial and he was involuntarily hospitalized (R 26-27).

On September 30, 1981, a competency hearing was held, based on testimony of Dr. Fallon, Judge Bergstrom found Duke competent to stand trial (R 38).

On November 5, 1981 pursuant to a motion to determine competency, the trial court appointed two experts, James A. Fesler, M.D., and Richard L. Meadows, M.D. (R 39-40). On January 18, 1982 the State and defense stipulated that Duke was incompetent to stand trial; Gerald J. O'Brien, Jr., Circuit Judge, ordered and adjudged Duke incompetent to stand trial and he was, again, involuntarily hospitalized (R 51-52).

On April 23, 1982 a competency hearing was held after Judge O'Brien denied Duke's written motion for continuence; Judge O'Brien found Duke competent to stand trial based on the

testimony of Dr. McClaren (R 54-57).

On May 14, 1982 Duke entered his notice of intent to rely on the defense of insanity (R 59).

On June 21, 1982 a hearing was held on the Public Defender's motion to withdraw, which was denied (R 66-69, 582-615). On June 21, 22, 23 and 24, 1982 Duke was tried by jury before the Honorable Gerard J. O'Brien, Jr., Circuit Judge (R 70-75, 131-574). Duke was found guilty as charged in both counts (R 574-575).

On August 16, 1982, after denying Duke's motion for a new trial, sentencing was scheduled for August 30, 1982 (R 80, 84).

On August 30, 1982, after denying Duke's motion for a continuence of sentencing, Duke was sentenced to thirty years on each count to run consecutive (R 86-90, 96-129). The court retained jurisdiction over one third of the sentence (R 88-89).

On September 28, 1982, Duke filed his notice of Appeal (R 91). The Public Defenders of the Sixth and Tenth Judicial Circuits were appointed to represent Duke on appeal.

On January 11, 1984 the Second District Court of Appeal affirmed the judgments and sentences in an opinion written by Chief Judge (acting) Boardman. (A 1).

On May 14, 1984, this court granted certiorari.

STATEMENT OF THE FACTS

Linda Sexton, the victim's mother was living at the Shady River Motor Home Trailer Park on November 26, 1980 (R 134-135). Ms. Sexton had her three children living with her at the time: Darron, aged fifteen; Melissa, aged nine; and Angela, aged five (R 135). Carl Duke was also a resident of the trailer park and was a neighbor of the Sextons (R 137). On the above date, Linda Sexton left the trailer park for approximately 45 minutes. When she returned there was extreme turmoil (R 138-139).

During Ms. Sexton's absence, Angela was playing with her brother and sister and two of her friends: Toby and Bobby (R 150). The group of children went to the trailer of Carl Duke to get some matches (R 152). Entering the trailer, Angela sat at the kitchen table with Duke. Duke told her to come to the bathroom with him because he wanted to talk to her (R 152-153). When Angela followed Duke into the bathroom he told her not to tell anybody, especially her mother (R 154). Duke took off his clothes, then took off Angela's clothes (R 154-155). Duke made Angela lay on her back (R 155) and attempted to stick his penis in her vagina, then he told her to lay on her stomach and he attempted to stick his penis in her anus (R 156-157). He then took some "green stuff that smelled like perfume" and put it on Angela's back (R 159). Duke again told Angela not to tell anybody or he would take her away from her mother (R 159-160).

Dr. Rehana Nawab is an associate medical examiner for the

Sixth Judicial Circuit of Florida (R 185). Dr. Nawab qualified as an expert in the field of forensic pathology (R 187). 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 (R 188). Dr. Nawab, by using an anal scope, observed a small abrasion of the lining of the rectum inside the sphincter (R 189). The findings were consistent with the introduction of an object in the anal area (R 189). Dr. Nawab found no evidence of seman in either the vaginal or anal areas (R 190).

Duke was placed under arrest for sexual battery and advised of his constitutional rights by Detective Tom Gallion (R 266-269). Detective Gallion testified that following his arrest Duke stated that he was taking a shower when Angela entered the bathroom and found him nude. He denied any sexual contact with Angela (R 272).

At the close of the State's case, Duke moved for a judgment of acquittal as to count two (R 287) contending that there was no evidence to support the charge of sexual battery by attempting to "assert (sic) his penis in the vagina of the victim" (R 287), and as to count one contended that the State failed to prove a prima facie case (R 287).

The motion was denied (R 287).

Duke's defense presentation was on the issue of his sanity at the time of the offense, and is not relevant to the issues presented in this brief.

The facts relating to the sanity issue, should the court choose sua sponte to review it, are fully presented in Duke's Initial Brief on Appeal, pp. 2-12.

I

FOLLOWING THIS COURT'S DECISION IN BUFORD v. STATE, 403 So.2d 943 (Fla. 1981) AN OFFENSE CHARGED PURSUANT TO SECTION 794.011(2) FLORIDA STATUTES BECAME A LIFE FELONY NOTWITHSTANDING THE SENTENCING PROVISO OF SECTION 775.082(2) AND AN ATTEMPT TO COMMIT SUCH AN OFFENSE BECAME A SECOND DEGREE FELONY.

In affirming Duke's thirty year sentences for each of two attempted sexual batteries, charged pursuant to section 794.011 (2) Florida Statutes, the Second District Court of Appeal, relying upon its earlier decision in Rusaw v. State, 429 So.2d 1378 (Fla. 2d DCA 1983), held:

> Therefore, applying our analysis in Rusaw to the instant case, appellant committed two first degree felonies, Section 774.04 (4)(a) Fla. Stat., and therefore was correctly sentenced to thirty years for each violation. Section 775.082(3)(b).

Duke v. State, 444 So.2d 492, 9 FLW 170 (Fla. 2d DCA 1984).

The analysis referred to is that:

> ...even though sexual battery under section 794.011(2) is not a capital crime in the sense that it may result in the imposition of the death penalty, the punishment for that crime must still be imposed under section 775.081(1) to its constitutional limits. This means that one convicted under section 794.011(2) must be automatically " punished by life imprisonment and shall be required to serve no less than 25 years before parole." Section 775.082(1).

Duke v. State, 444 So.2d 492, 9 FLW 170 (Fla. 2d DCA 1984).

Duke first contends that the Fourth District Court of Appeal's holding that all facets of sexual battery as a capital

offense disappeared when the death penalty for that offense was abolished in Hogan v. State, 427 So.2d 202 (Fla. 4th DCA 1983) is correct in its entirety.

Alternatively, Duke contends that even assuming, arguendo, that Hogan misconstrues the sentencing aspect of section 794.011(2) Florida Statutes as it relates to a completed offense; its holding that the offense has become a life felony for all other purposes is correct.

In Donaldson v. Sack, 265 So.2d 499 (Fla. 1972) this court held that once the death penalty is removed as a possible sanction, an offense is no longer capital, and cited a substantial body of authority supporting this position.

The Second District Court of Appeal has reasoned that even though sexual battery under section 794.011(2) "is not a capital crime... the punishment for that crime must still be imposed under section 775.082(1) to its constitutional limits."

Assuming this reasoning to be correct, it has no applicability to this case. Duke was not convicted of sexual battery under section 794.011(2) Florida Statutes wherein section 775.082(2) might be applied, but of attempted sexual battery under section 777.04(1) wherein section 775.082(2) is totally irrelevant.

The punishment annexed to an offense is not determinative of the offense's degree. See e.g. section 787.01(2) Florida Statutes (Kidnapping, a first degree felony, punishable by life imprisonment). Thus, the Second District Court of Appeal's

holding that because a violation of section 794.011(2) Florida Statutes is punishable by life imprisonment (under section 775.082(1)), an attempted violation is subject to enhanced punishment is misplaced. Following this court's holding in Buford v. State, 403 So.2d 943 (Fla. 1981) a violation of section 794.011(2) Florida Statutes is no longer a capital felony. See Donaldson v. Sack, 265 So.2d 499 (Fla. 1972); Bell v. State, 360 So.2d 6 (Fla. 2d DCA 1978) certiorari denied 372 So.2d 445 (Fla. 1979), and, the punishment annexed to a completed violation notwithstanding, an attempted violation can only be punished as a second degree felony. See section 775.04(4)(b) Florida Statutes; Hogan v. State, 427 So.2d 202, 203 (Fla. 4th DCA 1983).

II

THE ATTEMPTED SEXUAL BATTERY OF THE VICTIM CONSTITUTED BUT A SINGLE VIOLATION OF THE SEXUAL BATTERY STATUTE AND THE DEFENDANT WAS SUBJECT TO ONLY A SINGLE SENTENCE.

The Second District Court of Appeal held that because section 794.011(1)(f) defines alternative methods of committing sexual battery

> ...each act is a sexual battery of a separate 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 v. State, 444 So.2d 492, 9 FLW 170 (Fla. 2d DCA 1984).

Duke was charged in count one with attempting to insert his penis in the victim's anus; in count two with attempting to insert his penis in the victim's vagina. The act alleged is attempted sexual battery; the violation is of section 794.011 (2) Florida Statutes. The mere fact that section 794.011(1)(f) defines the act of sexual battery as capable of being accomplished in different ways does not mean that each way gives rise to a separate offense. An attempt to commit a crime involves an incomplete act as distinguished from a completed act necessary for the crime. Gustine v. State, 97 So. 207 (Fla. 1923). An attempt involves two essential elements: specific intent to commit the crime, and a separate; overt, ineffectual act done toward its commission. Tittles v. State, 384 So.2d 744 (Fla. 1st DCA 1980). The crime intended in the isntant case was

sexual battery, the separate overt, ineffectual act was attempted penetration of the anus and vagina.

Duke contends that the holding of the Second District Court of Appeal is erroneous, and that a single attack, against a single victim, occurring at the same time and place, constitutes but one offense. Wade v. State, 368 So.2d 76 (Fla. 4th DCA 1979).

This court held in Mixon v. State, 54 So.2d 190 (Fla. 1951) that only one sentence is justified when an information charges one offense, "though in several counts it was charged to have been committed by different methods embraced within the provisions of the statute." As in this case, the defendant was charged with violating alternative provisions of a single statute. This court held that only one conviction and sentence were proper

> ...because the counts did not charge separate and distinct offenses, but the same offense.

Here, Duke attempted to commit sexual battery, albeit by alternative methods. The fact remains, however, that the intent was to commit sexual battery -- a singular crime.

The result reached by the Second District Court of Appeal, carried to its logical conclusion, has the effect of over-broadening each statutory prohibition which includes alternative methods of commission. There is simply no evidence that the Legislature intended such a construction.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner, Carl Duke, respectfully requests this Honorable Court to (1) vacate the sentence(s) of thirty years imposed on the theory that attempted sexual battery, as proscribed by Sections 794.011(2) and 777.04(1) Florida Statutes, is a first degree felony, (2) vacate the judgment(s) and sentence(s) for two counts of attempted sexual battery, imposed on the theory that alternative methods of committing an offense give rise to separate, punishable, crimes, and order that one sentence be imposed for the second degree felony of attempted sexual battery, and (3) grant whatever other relief the Court deems appropriate.

Respectfully submitted,

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CD/cts

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to Katherine V. Blanco, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, on this 23 day of May, 1984.

Carl Duke

CARL DUKE, Petitioner pro se