64,876

IN THE SUPREME COURT OF FLORIDA

CARL DUKE,	:	
Petitioner,	:	
v.	:	CASE NO. ________
STATE OF FLORIDA,	:	
Respondent.	:	DISTRICT COURT OF APPEAL CASE NO. 82-2087

FILED
SID J. WHITE
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Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

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pro se

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I

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the Second District Court of Appeal. Respondent was the prosecuting authority in the trial court and the Appellee on appeal.

References to the record on appeal are made by the symbol "R" followed by the page number.

STATEMENT OF THE CASE AND FACTS

On December 23, 1980, Petitioner, Carl H. 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. On May 21, 1981 the State and defense stipulated that Petitioner was incompetent to stand trial; Edward H. Bergstrom, Jr., Circuit Judge, ordered and adjudged Petitioner 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 Petitioner competent to stand trial. (R 38).

On November 5, 1981 pursuant to a motion to determine competency, the trial court appointed two more experts. (R 39-40). On January 18, 1982 the State and defense stipulated that Petitioner was incompetent to stand trial; Gerard J. O'Brien, Jr., Circuit Judge, ordered and adjudged Petitioner incompetent to stand trial and he was involuntarily hospitalized. (R 51-52).

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

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

On May 14, 1982 Petitioner 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 Defende r's motion to withdraw, which was denied. (R 66-69, 582-615). On June 21, 22, 23 and 24, 1982 Petitioner was tried by jury before the Honorable Gerard J. O'Brien, Jr., Circuit Judge. (R 70-75) (R 131-574). Petitioner was found guilty as charged in both counts (R 574-575).

On August 16, 1982, Petitioner's motion for a new trial was denied. (R 80, 84).

On August 30, 1982, after denying Petitioner's motion for continuance of sentencing, Judge O'Brien sentenced Petitioner to thirty years on each count to run consecutively. (R 86-90, 96-129). The court retained jurisdiction over one third of the sentence. (R 88-89).

On September 28, 1982, Petitioner filed his notice of appeal. (R 91). On the same date the Public Defenders of the Sixth and Tenth Judicial Circuits were appointed to represent Petitioner on his appeal. (R 92).

On January 11, 1984 the Second District Court of Appeal affirmed the judgements and sentences. See Duke v. State, ___ So.2d ___ (Fla. 2d DCA 1984), 9 FLW 170.

On February 3, 1984 Petitioner filed a Notice to Invoke Discretionary Jurisdiction in the appellate court.

This brief follows.

III

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN HOGAN V. STATE, 427 So.2d 202 (Fla. 4th DCA 1983).

The Second District Court of Appeal's opinion in this case is predicated upon their prior decision in Rusaw v. State, Case No. 82-883 (Fla. 2d DCA April 29,1983) which was certified to be in direct conflict with the decision in Hogan v. State, 427 So.2d 202 (Fla. 4th DCA 1983).

In Hogan v. State, supra, the court reasoned that following this court's decision in Buford v. State, 403 So.2d 943 (Fla. 1981), all facets of sexual battery as a capital offense disappeared, and that sexual battery, under Section 794.011(2) Florida Statutes (1981) is a life felony.

In Rusaw v. State, supra, and this case, the Second District Court of Appeal expressly disagreed with the Hogan decision and held that a violation of Section 794.011(2) remains a capital offense, and that the attempt to commit such an offense is a felony of the first degree.

Because there is a direct conflict in the reasoning and conclusions of the two District Courts of Appeal, which causes a confusion in the law, this Court should act to resolve the conflict.

IV

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN WADE V. STATE, 368 So.2d 76 (Fla. 4th DCA 1979), AND THIS COURT'S OPINION IN MIXON V. STATE, 54 So.2d 190 (Fla. 1951).

The Second District Court of Appeal held in this case that the attempt to commit sexual battery by vaginal penetration and by anal penetration constituted two separate offenses punishable by separate sentences.

Reasoning that since Section 794.011(1)(f) Florida Statutes defines sexual battery as:

> "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....

then each act, or alternate method of committing sexual battery, constitutes a separate offense, the court held that the attempt to commit sexual battery by alternate methods constitutes separate offenses.

The Second District rejected the opinion of the Fourth District Court of Appeal in Wade v. State, 368 So.2d 76 (Fla. 4th DCA 1979), which held that "... two separate violations of Section 794.011(4)(b) Florida Statutes (1975) ... constituted only a single violation of the statute...",

on the basis that the facts were insufficiently articulated for a determination of the applicability of the case.

Wade v. State, supra, however, sufficiently stands for the proposition that a single attack upon a single victim constitutes but one offense, and, thus, is in conflict with the opinion in this case.

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 alternative provisions of the statute."

In Mixon v. State, supra, as in this case, the defendant was charged with violating alternative provisions of a single statute. The Court held that only one conviction and sentence were proper

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

The Second District's holding in this case conflicts with Mixon in that it holds that each alternative provision of a statute creates a separate, punishable, offense. i.e. The defendant can be convicted and punished for each alternative method he used in attempting to accomplish a single offense.

Because there is a clear and direct conflict in the reasoning and interpretation of a question of law between this case and the Wade and Mixon cases, this Court should accept jurisdiction and resolve the conflict.

<u>V</u>

<u>CONCLUSION</u>

For the reasons stated, petitioner, Carl Duke, respectfully requests this court to accept jurisdiction in this cause and to proceed to a full consideration of its merits.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, on this 13th day of February, 1984.

CARL DUKE

CD/cts