IN THE FLORIDA SUPREME COURT

ROBERT EARL DUBOISE, :

Appellant, :

vs. : Case No. 67,~~028~~ 002

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant DuBoise relies on his initial brief in response to the State's answer brief except for the following additions on Issues I, IX and XI. DuBoise answers the cross appeal, Issue XII, in this brief under an argument so numbered.

ARGUMENT

ISSUE I.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE MODELS OF DUBOISE'S TEETH AND ALL TESTIMONY BASED UPON THE COMPARISON OF THOSE MODELS TO THE BITEMARK, SINCE THE MODELS WERE OBTAINED AFTER DUBOISE'S ILLEGAL ARREST, WITHOUT A SEARCH WARRANT AND WITHOUT HIS VOLUNTARY CONSENT IN VIOLATION OF THE FOURTH AMENDMENT.

Initially, the State has not fully stated the law applicable to this issue and has not addressed a factor critical to decision. Not only must the State prove by clear and convincing evidence that a voluntary consent occurred, it must also prove, by the same standard, that such a consent occurred after an unequivocal break between the illegal arrest and the consent. Florida v. Royer, 460 U.S. 491 (1983); Norman v. State, 379 So.2d 643 (Fla.1980); Bailey v. State, 319 So.2d 22 (Fla.1975). Without the unequivocal break, the presumption of an unconstitutional taint on the consent remains. Ibid. The State has not even suggested a factor which could be deemed an unequivocal break between the illegal arrest and the consent.

Such an omission is understandable--no break exists.

On page 7 and 8 of the State's brief, it is argued that DuBoise was anxious to cooperate with the making of the models of his teeth. The State relies upon DuBoise's response to Detective Saladino which, when viewed in isolation, suggests that DuBoise agreed with the procedure. When viewed in context and with the totality of other circumstances, it is apparent that DuBoise merely acquiesced to Saladino's authority.

Saladino went to DuBoise in jail with a search warrant in hand. He then told DuBoise that molds of his teeth were going to be made. (R2684) When asked about the exchange Saladino said,

> Well, we had [the search warrant] prepared. [DuBoise] was waiting for us. And we--I explained our purpose, what we were going to do as far as the bitemark, and what we were going to do with his teeth. We would take him down to the dentist. Explain, basically, what we intended to do. And he says, "Fine, go ahead and do it." He says, "I'll prove to you that I didn't bite the girl. I didn't have anything to do with it."

(Emphasis added). (R2684) The emphasized portions of Saladino's testimony demonstrates that DuBoise was not given the opportunity to refuse. Saladino's explanation of the dental procedure was to merely inform DuBoise of what would take place. Saladino was not seeking DuBoise's consent. Indeed, with a search warrant in hand, Saladino no doubt felt that he did not need DuBoise's consent. Of course, Saladino wanted DuBoise to cooperate. He wanted DuBoise to acquiesce so that physical force would not again be necessary. Acquiescence, not consent, is exactly what Saladino secured.

An argument that the prosecutor did not waive reliance on the search warrant is also forwarded in the State's brief. It is without merit because it is based upon incorrect facts. The detectives never executed the search warrant. (R2605,2674-2677) Consequently, the seizure of the teeth models was not pursuant to a warrant. The prosecutor knew this and never asserted that the unserved warrant justified the seizure. (R1541,1795-1812) Consent was the only arguable theory the prosecutor advanced. (R1795-1812)

ISSUE IX.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN SENTENCING DUBOISE TO DEATH OVER THE JURY'S UNANIMOUS RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE SENTENCE WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

The State relies solely upon the trial court's sentencing order to contest this issue. This reliance is misplaced for several reasons.

Initially, this Court should recognize that the trial judge's sentencing order is void for lack of jurisdiction. The order was signed on September 30, 1985, and filed in the Circuit Court on October 2, 1985. (R2860-2867) Robert DuBoise was sentenced in open court on March 7, 1985. (R1699-1700)(A1-2) A judgment and sentence was rendered on the same date and filed on March 11, 1985. (R2145-2149) DuBoise filed his notice of appeal to this court on May 23, 1985. (R2231) The record on

appeal was prepared and filed in this Court on September 19, 1985. (See order of this court dated September 23, 1985.) Thereafter, on September 30, 1985, when he no longer had jurisdiction over the case, Circuit Judge Coe signs and files his sentencing order. No request was made of this Court to temporarily relinquish jurisdiction for purposes of entering the sentencing order. In fact, the State did not even obtain leave of this Court before ordering the supplemental record including the sentencing order. The order is a nullity.

Assuming this Court gives this order force and effect in this proceeding, it nevertheless fails to establish a basis for overriding the jury's life recommendation. First, the order does not even acknowledge that the strict standard of Tedder v. State, 322 So.2d 908 (Fla.1975) applies in this case. Indeed, the order does not even acknowledge that the jury recommended life, much less that the recommendation had special significance in the sentencing decision. Second, the order failed to consider the numerous factors which could have reasonably led the jury to its recommendation. (See, Appellant's Initial Brief, Issues IX, X and XI.) Finally, the order contains erroneous findings regarding the applicable aggravating and mitigating circumstances. (See, Appellant's Initial Brief, Issue XI.)

The trial judge's decision to override the jury's recommendation was wrong. Contrary to the State's assertion, a review of the belated sentencing order only reinforces the conclusion that the trial court erred in imposing death.

DuBoise urges this Court to reduce the sentence to life.

ISSUE XI - A.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT DUBOISE HAD A PREVIOUS CONVICTION FOR A VIOLENT FELONY.

At the sentencing in open court on March 7, 1985, the trial judge orally stated that he found the aggravating circumstance of a prior conviction for a violent felony. (R1699) (A1) However, in his written sentencing order signed and filed seven months later, he did not make such a finding. (R2860-2861) If this Court gives the written sentencing order force and effect (see, Issue IX of this reply brief), this issue is now moot.

ISSUE XII.

CROSS-APPEAL

THE TRIAL COURT CORRECTLY GRANTED DUBOISE'S MOTION IN ARREST OF JUDGMENT ON THE ATTEMPTED SEXUAL BATTERY VERDICT SINCE THE INDICTMENT FAILED TO CHARGE A FELONY ON THAT COUNT.

Count two of the indictment purported to charge a life felony sexual battery under §794.011(3), Fla.Stat. (1983). (R1966-1967) It did not. At best, the indictment alleged a simple battery; a misdemeanor which would not support a judgment for attempted sexual battery. The trial court correctly refused to impose judgment for attempted sexual battery.

A charging document must allege each essential element of a crime to be valid; no essential element can be left to inference. State v. Dye, 346 So.2d 538,541 (Fla.1977). The indictment in this case alleged:

> The Grand Jurors of the County of Hillsborough, State of Florida, charge that ROBERT EARL DUBOISE, between the 18th day of August, 1983, and the 19th day of August, 1983, in the County and State aforesaid, did unlawfully and feloniously commit sexual battery upon BARBARA GRAMS, a person over the age of eleven (11) years, without the consent of the said BARBARA GRAMS, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 794.011(3).

(R1966-1967) With no allegations concerning the use or threatened use of weapons or force, the crime of sexual battery was not charged.

Section 794.011(3), Florida Statutes reads as follows:

> (3) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury is guilty of a life felony, punishable as provided in s.775.082, s.775.083, or s.775.084.

Essential alternative elements of this offense which must be alleged are: (1) use or threatened use of a deadly weapon, or (2) use of actual physical force likely to cause serious personal injury. Without one of those elements, the crime is not charged. See, Bragg v. State, 433 So.2d 1375 (Fla.2d DCA 1983); Harris v. State, 338 So.2d 880 (Fla.3d DCA 1976). Moreover, no sexual battery is charged without some allegation of threats, use of force or the physical or mental condition of the victim. §794.011(3)(4) and (5), Fla.Stat. (1983).

A simple battery is the only crime conceivably covered by the allegation in the indictment in this case. (R1966-1967) See, Davenport v. State, 429 So.2d 1352 (Fla.2d DCA 1983). While it could be argued that the court should have converted the attempted sexual battery verdict into a judgment for attempted battery in accordance with the crime actually charged, valid reasons for not doing so exist. First, the circuit court does not normally have jurisdiction over misdemeanors, §26.012, Fla.Stat., and any judgment entered on a misdemeanor charge would be void. E.g., Harrington v. Wainwright, 148 So.2d 260 (Fla.1963); Page v. State, 376 So.2d 901 (Fla.2d DCA 1979). Second, if the circuit court had jurisdiction over the misdemeanor because it arose out of the same transaction as a felony also charged, §26.012(2)(d), Fla.Stat. the battery charge in this case would have merged with the homicide and no judgment on attempted battery would be proper.

The circuit court was correct in its decision not to enter a judgment on count two of the indictment in this case. DuBoise asks this Court to affirm the lower court's ruling.

CONCLUSION

Upon the reasons expressed in this Reply Brief and in the Initial Brief, Robert DuBoise asks this Court to reverse his convictions for a new trial, to reverse the orders revoking his probation and to reverse his death sentence should a new trial not be granted. DuBoise further requests that the trial court's order arresting judgment on the attempted sexual battery be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 30th day of April, 1986.

_____
W.C. McLAIN