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IN THE SUPREME COURT OF FLORIDA

JOSEPH L. WISE,

Petitioner,

v.

CASE NO. 72,915

FRANK WANICKA, Sheriff of Lee County, Florida,

Respondent.

_____/

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

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVIS G. ANDERSON, JR.
Assistant Attorney General
Florida Bar No. 160260
1313 Tampa Street, Suite 804
Tampa, Florida 33602-1050
(813) 272-2670

COUNSEL FOR RESPONDENT

/jmw

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts for the purposes of this action. There is no dispute that the trial court refused to consider the possibility for post trial release for Petitioner in view of the fact that he had been convicted of capital sexual battery relying on Batie v. State, 521 So.2d 295 (Fla. 1st DCA 1988). Nor, is there any dispute that the court below denied relief on the basis of the same decision.

SUMMARY OF THE ARGUMENT

The court has already resolved the only question presented by this case in Respondent's favor with its decision in Batie v. State, No. 72,060 (Fla. Dec. 1, 1988)[13 F.L.W. 681].

QUESTION PRESENTED

ARGUMENT

WHETHER THE COURT'S OF THE STATE ARE AUTHORIZED TO GRANT POST TRIAL RELEASE TO A PERSON CONVICTED OF CAPTIAL SEXUAL BATTERY?

This court resolved the only qustion presend by this case with its decision in Batie v. State, No. 72,060 (Fla. Dec. 1, 1988) [13 F.L.W. 681] in Respondent's favor. Appellant's attack focuses around whether this is a question for the court or for the legislature contending that it is for this court and that Rule 3.691 of The Florida Rules of Criminal Procedure does not preclude post trial release for offenders who stand convicted of what has come to be know as captial sexual battery.

Petitioner's argument is without merit in light of this court's recent decision in Batie. The court did not need to resolve that question because it found that post trial release was not authorized by either rule or legislation.

It is clear that the court reached the right result. There is no constitutional right to post trial release. Gallie v. Wainwright, 362 So.2d 936, 939 n. 13 (Fla. 1978). But, as a matter of practice both the legislature and this have addressed the question and post trial release is authorized in certain circumstances. Whether post trial release is properly classified as substantive and therefore for the legislature or procedural and for the courts has been the subject of some conflict. For example, the Second District held that it was procedural in Bamber v. State, 300 So.2d 269 (Fla. 2d DCA 1974) and therefore within this court's power to control. On the other hand, the

Fourth District has taken the opposite position holding that post trial release is subject to legislative control. Hart v. State, 405 So.2d 1048 (Fla. 4th DCA 1981). It is respondent's position that this debate shows that it is the intent of both the legislature and this court that this offense should be treated as capital for the purposes of post trial release.

Bamber had, pursuant to the then existing version of Fla. R. Crim. P. 3.691, authorized convicted felons to seek post trial release on bail that statutory law, the then existing Section 903.132, would have precluded. The legislature was not amused. It repealed the Rule to the extent that it was inconsistent with the statute. Ch. 76-138, §2 Laws of Fla. The legislature has also enacted Section 903.133 precluding post trial release of those convicted of certain enumerated felonies of the first degree, including those found guilty of sexual batteries only slightly less heinous than the offense in this case. Hart upheld this provision against a Bamber like attack in a drug case where it was applicable finding the matter was substantive and for the legislature.

The point of this recitation is that the legislature has shown no reluctance to preclude post trial release in cases it thinks it appropriate. The legislature has not specifically found the need to articulate a prohibition for keeping capital sexual batterers off the streets pending resolution of their appeals. The state submits that the legislature could only have been relying on the prohibition of Rule 3.691 against admitting those convicted of capital offenses to post trial release on bail

as capital offense has been interpreted in Rowe v. State, 417 So.2d 981 (Fla. 1982). Rowe had ruled that a first degree murder conviction carrying only the twenty-five year mandatory minimum sentence instead of a death sentence was capital for the purpose of Rule 3.691 and that Rowe consequently could not be admitted to post trial release on bail. It simply does not make sense to conclude that the legislature would have mandated no post trial release for those convicted of first degree sexual battery while allowing for the post trial release for those convicted of capital sexual battery.

Although not exactly on point, the state submits that Rowe is also evidence that this court intended the prohibition of Rule 3.691 against the post trial release of capitally convicted offenders to cover all who face either death or the twenty-five year mandatory minimum sentence that is imposed when death is not an option.

Both Rowe and the apparent legislative reading of it are persuasive that this court's decision in Batie reached the right result. It seems clear that if Rule 3.691 were read in the way that Nussdorf and the dissent in Batie reads it, the legislature would have moved to amend Section 903.133 to include a provision against post trial release on bail for those offenders convicted of capital sexual battery. It is also persuasive that in all the time since death has no longer been a penalty for sexual battery that no decision beside Nussdorf has recognized any authority for post trial release for an offender in petitioner's position. It the language from Reino v. State, 352 So.2d 853, 858 (Fla. 1977)

quoted in the concurring opinion in Nussdorf were taken literally then Rowe never would have reached the result it did.

CONCLUSION

WHEREFORE, respondent asks the court to affirm the decision of the lower tribunal finding that post trial release is not authorize for offenders convicted of capital sexual battery.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVIS G. ANDERSON, JR.
Assistant Attorney General
Florida Bar # 160260
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Peter D. Ringsmuth, Esq., P.O. Box 2446, Fort Myers, Florida 33902 on this 8th day of December, 1988.

OF COUNSEL FOR RESPONDENT