IN THE SUPREME COURT OF FLORIDA

THOMAS WAYNE SLAUGHTER,

Petitioner,

v.

CASE NO. 73,743

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the opinion of the lower tribunal.

II STATEMENT OF THE CASE AND FACTS

The charges are accurately stated in the opinion of the lower tribunal:

> Appellant was convicted, pursuant to trial by jury, of the following seven crimes upon his 14-year-old daughter:
>
> Counts II, III and IV - sexual battery by force not likely to cause serious personal injury (Section 794.011(5), Florida Statutes (1985)).
>
> Counts V and VI - engaging in sexual activity with child 12 to 18 years old by person in familial or custodial authority (Section 794.041(2)(b), Florida Statutes (1985)).
>
> Count VII - aggravated battery with deadly weapon (knife) (Section 784.045(1)(b), Florida Statutes (1985)).
>
> Count VIII - incest (Section 826.04, Florida Statutes (1985)).

Appendix at 1-2.

On appeal, petitioner argued, inter alia, that:

> the trial court erred in imposing multiple punishments for the commission of crimes which were grounded upon only one act. He asserts that as a result of one act, he was convicted and sentenced for (1) sexual battery per vaginal intercourse (Count II); (2) sexual battery per vaginal intercourse in a person in familial authority (Count V); and (3) incest (Count VIII). Likewise, he asserts that as a result of another single act, he was convicted and sentenced for (1) sexual battery per oral penetration by defendant's penis (Count IV); and sexual activity per oral penetration by defendant's penis by person in familial authority (Count VI). Appellant claims that such multiple punishments for single acts is [sic] contrary to the Florida Supreme Court's holding in Carawan v. State, 515 So.2d 161 (Fla.1987).

Appendix at 2-3; footnotes omitted. The lower tribunal held that multiple punishments for sexual battery and sexual battery by familial authority were authorized (Appendix at 3-6), finding that otherwise, "the defendant would enjoy a windfall." Appendix at 6.

The lower tribunal further held that multiple punishments for sexual battery by familial authority and incest were authorized. Appendix at 6-7.

Petitioner further argued that his sentencing guidelines scoresheet contained the improper assessment of 100 points for victim injury:

> 20 points were scored for one count involving "contact but no penetration" and 80 points were scored for two counts involving "penetration or slight injury."

Appendix at 11, footnote 8. Petitioner argued that at the time of his crimes in August of 1985, the guidelines rule did not allow victim injury to be scored unless it was an element of the offense, and that the subsequent 1986 rule change could not be applied retroactively. Appendix at 7-8. The lower tribunal held:

> The appellant claims that since the amendment was made subsequent to the date of the offenses, application of the amended language to him would be a proscribed ex post facto application. We disagree.
>
> As indicated in the above quoted footnote to the Supreme Court's April 11, 1985 opinion, the change in the committee note was merely a clarification of the intent of Rule (d)(7. We therefore reject the appellant's claim that the trial court erroneously scored victim injury.

Appendix at 9.

A timely notice of discretionary review was filed on February 20, 1989.

III SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the decision of the lower tribunal is in express and direct conflict with Carawan v. State, supra, as well as subsequent cases, on the question of whether multiple punishments may be imposed for sexual battery by slight force, sexual battery by familial authority, and incest, because to allow such multiple punishment would be to subject the defendant to double punishment in violation of double jeopardy and the rule of lenity.

Petitioner will also argue in this brief that the decision of the lower tribunal is in express and direct conflict with a plethora of cases which hold that changes to the sentencing guidelines rule cannot be applied retroactively, because to do so would be to impose an ex post facto punishment on the defendant by making his punishment more severe. This Court must accept review to resolve these conflicts.

IV ARGUMENT

THE OPINION OF THE LOWER TRIBUNAL IS IN DIRECT AND EXPRESS CONFLICT WITH PRIOR DECISIONS WHICH HOLD THAT CRIMES COMMITTED IN THE SAME CRIMINAL ACT CANNOT BE PUNISHED SEPARATELY, AND WITH PRIOR DECISIONS WHICH HOLD THAT THE AMENDMENTS TO THE GUIDELINES RULE CANNOT BE APPLIED RETROACTIVELY.

In its opinion, the lower tribunal found that the court was not prohibited by Carawan from imposing judgments and sentences for sexual battery by slight force, sexual battery by familial authority and incest, where there was a single act of intercourse at the same time between father and daughter.

In Carawan, this Court held that a defendant could not be convicted and sentenced for attempted manslaughter and aggravated battery, where a single shotgun blast was directed at the same victim. This Court held that the two crimes were addressing essentially the same evil and so the Legislature did not intend to punish them separately. This court further held that the rule of lenity embodied in Section 775.021(1), Florida Statutes, must be construed in favor of the accused.

Likewise, in State v. Crumley, 512 So.2d 183 (Fla. 1987), this Court found that aggravated battery and battery on a law enforcement officer could not be punished separately, because they both address the same evil. The same should be true of sexual battery of a daughter with slight force and sexual battery by familial authority.

As to sexual battery by familial authority and incest, this Court has recognized for the last 80 years that the crime of incest requires no particular amount of force by the father

against his child, because the very nature of the familial relationship implies that the daughter will submit to the demands of her father:

> In the crime of incest there may be a certain force or power exerted, resulting from the age, relationship or circumstances of the parties, which overcomes the objections of the female, without amounting to that violence which would constitute rape.

McCaskill v. State, 55 Fla. 117, 122, 45 So. 843 (Fla. 1908). Thus, because both incest and familial authority contain the same element of submission by the daughter, they are not mutually exclusive crimes, Huckaby v. State, 343 So.2d 29 (Fla. 1977); the Legislature did not intend to punish them separately and so the rule of lenity comes into play in favor of the defendant.

The lower tribunal has misconstrued Carawan and its progeny. This Court must accept review.

In its opinion, the majority of the lower tribunal also found that there was no problem in applying the 1986 guidelines rule change on victim injury to petitioner's 1985 crimes. This decision must be reviewed by this Court because it conflicts with a long line of cases holding to the contrary.

Petitioner's crimes were all alleged to have occurred in 1985. At that time, Fla. R. Crim. P. 3.701(d)(7) prohibited the scoring of victim injury unless it was an element of the offense. The rule was amended in 1986 to allow victim injury to be scored if it existed, even if it was not an element of the crime. Chap. 86-273, Laws of Florida.

Once the United States Supreme Court held that revisions to the guidelines cannot be applied retroactively to cause a harsher sentence that that called for by the guidelines in effect on the date of the crime, Miller v. Florida, 428 U.S. , 107 S.Ct. 2446, 96 L.Ed. 351 (1987), this Court followed suit in Wilkerson v. State, 513 So.2d 664 (Fla. 1987); Booker v. State, 514 So.2d 1079 (Fla. 1987); and State v. McGriff, case no. 71,718 (Fla. January 19, 1989).

Two other appellate districts of this state have properly ruled that the revision to the scoring of victim injury may not be applied retroactively. See, Williams v. State, 14 FLW 250 (Fla. 2nd DCA January 20, 1989); Jackson v. State, 533 So.2d 888 (Fla. 3rd DCA 1988); and Rubier v. State, 530 So.2d 523 (Fla. 3rd DCA 1988).

The lower tribunal has thrown into confusion all of the recent decisions on retroactive guidelines amendments, a question which many thought had finally been settled. This Court must accept review.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court accept jurisdiction to review the erroneous interpretation of the law by the lower tribunal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief on Jurisdiction has been furnished by delivery to A. E. Pooser IV, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #110359, Post Office Box 1100, Avon Park, Florida, 33825, this 27 day of February, 1989.

P. DOUGLAS BRINKMEYER