IN THE SUPREME COURT OF FLORIDA

GARY GOULD, :

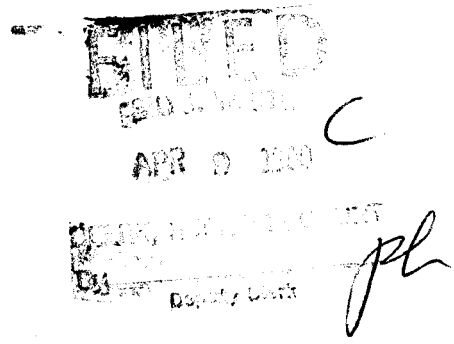
Petitioner, :

vs. : Case No. 87-2068

STATE OF FLORIDA, :

Respondent. :

75,833



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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

On March 14, 1990, the District Court of Appeal of Florida, Second District, issued it's opinion in the instant case. The appeal was brought to the Second District by Petitioner as a result of the verdict entered against him following a jury trial. The facts of the case are stated in the opinion as follows:

> On October 26, 1986 Appellant taped the victims hands and feet with duct tape. He slapped her five or six times and stated he hated her and was going to cut her hair off, which he proceeded to do. He made [the victim] hop into the bathroom where he began shaving her head. Next he removed the duct tape and tied T[redacted] with bed sheets to fixtures in the bathroom. Appellant tore off her underwear and hit her again [Appellant then committed] 3 sexual batteries. T[redacted] resisted these activities, told Appellant to stop and tried to talk to him...she screamed and asked Appellant to "please stop"...In addition to the sexual batteries Appellant blindfolded T[redacted] and beat her with a spatula until it broke, and he struck T[redacted] in the fact with what she believed was a hammer...After he untied T[redacted] he held a knife to her throat and told her to perform oral sex on him. He then took her into the bedroom and again forced her to perform oral sex on him after he bound her hands behind her back. Appellant then fell asleep.
>
> Gary Gould appeals from his convictions and sentences for kidnapping, sexual battery while threatening to use a deadly weapon, 2 counts of sexual battery while threatening to use force or violence likely to cause serious personal injury, two counts of sexual battery on a victim physically helpless to resist, and three counts of battery.

Gould v. State, 15 FLW 730 (Fla. 2d DCA, opinion filed March 14, 1990).

The district court reversed the convictions for sexual battery on a physically helpless victim but ruled that sexual battery with slight force as defined in Section 794.011(5), Florida Statute was a necessarily lesser included offense of sexual battery on a physically helpless victim as defined in Section 794.011(4)(b), Florida Statutes. The district court ruled that Section 924.34, Florida Statutes (1987) permits an appellate court to look directly at the evidence presented at trial and make an independent evaluation of that evidence. The district court then concluded that the evidence supported convictions for sexual battery with slight force and directed a judgment be entered for those offenses. The district court held that Section 924.34, Florida Statutes (1987) permits this result even if the jury is not read an instruction on the lesser offense. In the instant case, the defense requested the instruction, the State objected, and the request was denied.

Petitioner now asks this court to review the Second District's decision.

SUMMARY OF THE ARGUMENT

I. The second district's decision that sexual battery with slight force is a necessarily included lesser offense of sexual battery on a physically helpless victim conflicts with the Schedule of Lessers. The court's holding that it is a necessarily included lesser but that reversal is not required even though the jury was not instructed on sexual battery with slight force is in conflict with Wilcott v. State, 509 So.2d 261 (Fla. 1987).

II. The entering of a judgment against Petitioner for sexual battery with slight force by the Appellate Court after defense counsel requested the instruction and the State successfully objected to the instruction being given is a conflict with Bean v. State, 469 So.2d 768 (Fla. 5th DCA 1984), which held the State's failure to request verdict forms at the trial level, thus permitting the jury to consider the charge waived the State's right to have those offenses considered as appropriate convictions by the appellate court.

III. The Second District's interpretation of Section 924.34, Florida Statutes (1987) expressly declares valid the entry of a judgment against a criminal defendant by an appellate court for a crime he has never been charged with or tried upon and in doing so found that the due process provisions of the State and Federal Constitution were applicable.

IV. The instant decision is in conflict with Penny v. State, 140 Fla. 135, 191 So.2d 190 (Fla. 1939) in that it allows a conviction to be entered against Petitioner of a similar offense

in violation of the Florida Constitution which prohibits convictions for an offense different than that which the accused is indicted for.

ARGUMENT

ISSUE I

THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE MATTER OF THE USE BY THE TRIAL COURTS OF THE STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, 431 SO.2D 594 (FLA. 1981) AND WILCOTT V. STATE, 509 SO.2D 261 (FLA. 1987).

The instant opinion holds that sexual battery with slight force is a necessarily lesser included offense of sexual battery on a victim physically helpless to resist. The Schedule of Lesser Included offenses lists sexual battery with slight force as a category 2 permissive lesser included offense to be given by the court only if the evidence and accusatory pleadings support the charge. The ruling of the Second District conflicts with the Schedule of Lesser offenses as adopted by this court at 431 So.2d 594 (Fla. 1981). The Second District opinion is in conflict with this court's decision in Wilcott v. State, 509 So.2d 261 (Fla. 1987) which held that when a category 2 lesser offense is required, it is reversible error for the court to fail to instruct the jury on it. The district court found that the instruction was necessary, and therefore should have been given, but held reversal was not required.

ISSUE II

THE INSTANT DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEALS IN BEAN V. STATE, 469 SO.2D 768 (FLA. 5TH DCA 1984).

According to the instant opinion, Gould may be convicted of the crime of sexual battery with slight force even though the jury was not instructed on this offense and even after Gould requested the instruction and the State successfully objected to it's being given. This holding is in conflict with Bean v. State, 469 So.2d 768 (Fla. 5th DCA 1984), wherein the court held that the State's failure to request verdict forms on kidnapping or attempted kidnapping waived the State's right to have those offenses considered as appropriate convictions by the appellate court and could not obtain a judgment for them. The instant opinion's interpretation of Section 924.34, Florida Statutes (1987) is directly contrary to the Bean holding.

ISSUE III

THE INSTANT DECISION EXPRESSLY DECLARES VALID A STATE STATUTE OR EXPRESSLY CONSTRUES A PROVISION OF THE STATE AND FEDERAL CONSTITUTION.

Gould contended that Section 924.34, Florida Statutes (1987) did not permit the appellate court to enter a judgment against him for a crime he had not been charged with or tried upon. The decision of the Second District expressly declared that Section 924.34, Florida Statutes (1987) does permit the appellate court to enter such a judgment and that such an act is valid.

Gould further challenged the application of Section 924.34, Florida Statutes (1987) as being violative of the due process provisions of Article I, Section 9 of the Florida Constitution and the 14th Amendment to the United States Constitution. The Second District in construing Section 924.34 and in it's application of said section to the instant case expressly rejected Petitioner's due process argument and in so doing construed the due process clauses as inapplicable to the instant proceedings.

The opinion of the Second District ignores the principal that notice of a specific charge and a chance to be heard at trial on the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state and federal. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). The holding of the Second District opinion violates the minimum requirement of due process.

ISSUE IV

THE INSTANT DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION IN PENNY V. STATE, 140 FLA. 135, 191 SO.2D 190 (FLA. 1939).

The Second District opinion holds that Gould may be convicted of a crime he was not charged with, was not tried on, and that the jury did not consider in ordering that a conviction for sexual battery with slight force be entered against him. This holding conflicts with Penny v. State, 191 So.2d 190, 193 (Fla. 1939), which held that the Florida Constitution guarantees to every accused the right to know the nature and cause of the accusation against him and that the accused cannot be indicted for one offense and convicted and sentenced for another, even though the offenses are closely related and of the same general nature or character and punishable by the same grade of punishment.

CONCLUSION

Petitioner asks this Court to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 5 day of April, 1990.

Respectfully submitted,

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