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IN THE SUPREME COURT OF FLORIDA

JOSEPH THOMPSON,

Petitioner,

v. CASE NO. 83,064

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO. 0513253

TABLE OF CONTENTS

		PAGE(S)
TABLE OF CONTENTS		i
TABLE OF CITATIONS		ii
I	PRELIMINARY STATEMENT	1
II	STATEMENT OF THE CASE AND FACTS	2
III	SUMMARY OF ARGUMENT	3
IV	ARGUMENT	4
	ISSUE PRESENTED	
	APPELLANT'S CONVICTION OF TWO COUNTS OF SEXUAL BATTERY FOR ONE ACT OF SEXUAL BATTERY VIOLATES DOUBLE JEOPARDY.	4
V	CONCLUSION	11
CERTIFICATE OF SERVICE		11

TABLE OF CITATIONS

CASES	PAGE(S)
Baker v. State, 425 So. 2d 36 (Fla. 5th DCA 1982) approved in part, quashed in part, 456 So. 2d 419 (Fla. 1984)	8,9
Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)	6,8,9
Bryant v. State, 480 So. 2d 665 (Fla. 5th DCA 1985)	7
Carawan v. State, 515 So. 2d 161 (Fla. 1987)	6
George v. State, 488 So. 2d 589 (Fla. 2d DCA 1986)	8,9
Gould v. State, 577 So. 2d 1302 (Fla. 1991)	6
Houser v. State, 474 So. 2d 1193 (Fla. 1985)	8
Knight v. State, 338 So. 2d 201 (Fla. 1976)	8
Llanos v. State, 401 So. 2d 848 (Fla. 5th DCA 1981)	7
Lowry v. Parole and Probation Comm'n, 473 So. 2d 1248 (Fla. 1985)	7
Mills v. State, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986)	8
Sirmons v. State, ___ So. 2d ___, 19 Fla.L.Weekly S71 (Fla. Feb. 3, 1994)	4,5
Slaughter v. State, 538 So. 2d 506 (Fla. 1st DCA 1989), cause dism., 557 So. 2d 34 (Fla. 1990)	4,5,7
State v. Chapman, 625 So. 2d 838 (Fla. 1993)	7,8
Thompson v. State, 627 So. 2d 74 (Fla. 1st DCA 1993)	1,2,4

STATUTES

Section 794.005, Florida Statutes (1992 supp.)	6
Section 794.011(4)(f), Florida Statutes	4
Section 794.041, Florida Statutes	9
Section 794.041(2)(b), Florida Statutes	4

CONSTITUTIONS

Florida Constitution, Article I, section 9	4
United States Constitution, Amendment V	4
United States Constitution, Amendment XIV	4

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Respondent.	:	
	:	

INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal below, Thompson v. State, 627 So.2d 74 (Fla. 1st DCA 1993).

Petitioner, appellant in the district court and defendant in the circuit court, will be referred to by name or as petitioner. Respondent, appellee in the district court and prosecutor in the circuit court, will be referred to as the state.

II STATEMENT OF THE CASE AND FACTS

For a single act of sexual battery, petitioner, Joseph Thompson, was convicted of two counts of sexual battery - on a physically incapacitated person and by a person in custodial authority - and was sentenced to concurrent 9-year prison terms.

On appeal, the First District Court affirmed on the basis of its previous opinion in Slaughter, infra, which affirmed multiple convictions for a single act of sexual battery on the basis of a Blockburger, infra, analysis. While affirming, the First District nevertheless recognized apparent conflict with George, infra, wherein the Second District held that only one sexual battery conviction was proper where the evidence established only one act of penetration. The First District distinguished George on the grounds 1) it involved charges of sexual battery with great force and slight force sexual battery, and the second is a "permissive lesser-included offense to the first," and 2) it was decided before enactment of the anti-Carawan, infra, amendment. Thompson, 627 So.2d at 74.

Rehearing was denied December 20, 1993, petitioner filed a notice to invoke, and March 18, 1994, this court accepted jurisdiction and ordered briefs to be filed.

III SUMMARY OF ARGUMENT

In George, infra, the Second District held that a single act of sexual battery would support only a single conviction of sexual battery. In the instant case, the First District affirmed dual convictions of sexual battery on the basis of a single act of sexual battery.

After the instant case was decided, this court decided Sirmons, infra, in which it held that, where convictions are merely degree variants of a single core offense, dual convictions cannot stand. As petitioner's two sexual battery convictions are degree variants of a single core offense, his dual convictions are also improper.

Even without the Sirmons decision, petitioner contends that a single act of sexual battery supports only a single conviction of sexual battery, that the First District reached the wrong result on this issue, and the Second District's decision in George was correct. The explanation behind this deceptively simple-appearing conflict between George and the instant case ranges over a wide area. It includes the effect of the statute which overruled this court's decision in Gould, infra, on the previous decision of the First District in Slaughter, infra, which approved dual convictions of slight force and familial authority sexual battery for a single act. With or without Sirmons, a person can be convicted of only a single crime of sexual battery for a single act of sexual battery, and one of petitioner's convictions must be vacated.

IV ARGUMENT

ISSUE PRESENTED

APPELLANT'S CONVICTION OF TWO COUNTS OF SEXUAL BATTERY FOR ONE ACT OF SEXUAL BATTERY VIOLATES DOUBLE JEOPARDY.

For a single act of sexual battery, petitioner, Joseph Thompson, was convicted of two counts of sexual battery - on a physically incapacitated person and by a person in custodial authority. §§ 794.011(4)(f); 794.041(2)(b), Fla.Stat. Both are first-degree felonies. The victim was a profoundly retarded, physically handicapped, non-ambulatory 14-year-old girl, and Thompson was an employee of the care facility where she lived. Petitioner contends his dual convictions violate the double jeopardy clauses of the federal and state constitutions. U.S. Const., ams. V, XIV; Fla.Const., art. I, § 9.

The question here is whether a defendant can be convicted of two counts of sexual battery for a single sexual act. The First District has addressed the issue before and held that dual convictions were permissible. Slaughter v. State, 538 So.2d 506 (Fla. 1st DCA 1989), cause dism., 557 So.2d 34 (Fla. 1990). It reached the same result here. Thompson v. State, 627 So.2d 74 (Fla. 1st DCA 1993).

While this court has not yet addressed precisely this issue, it recently decided Sirmons v. State, ____ So.2d ____, 19 Fla.L.Weekly S71 (Fla. Feb. 3, 1994), which addressed the same type of issue: when is a single act more than a single crime? Sirmons issued after the district court opinion here, so the opinion did not discuss it.

Sirmons was convicted of grand theft auto and robbery with a weapon. Both convictions arose from a single taking of a car at knifepoint. This court characterized the armed robbery and grand theft auto convictions as "merely degree variants of the core offense of theft." Id. The court continued:

> The degree factors of force and use of a weapon aggravate the underlying theft offense to a first-degree felony. Likewise, the fact that an automobile was taken enhances the core offense to grand theft. In sum, both offenses are aggravated forms of the same underlying offense distinguished only by degree factors. Thus, Sirmons' dual convictions based on the same core offense cannot stand.

Id. Similarly, the two sexual battery convictions here are based on different degree factors added to a single core offense. As in Sirmons, "both offenses are aggravated forms of the same underlying offense distinguished only by degree factors." Thus, the dual convictions cannot stand.

Even before this court decided Sirmons, it should have reached the same result - a single act of sexual battery supports only a single conviction of sexual battery. Moreover, as petitioner will argue, infra, the two aggravators here - physical incapacitation and abuse of custodial authority - are virtually the same thing in the context of this case.

Slaughter, supra, addressed a question similar to the one here. For two acts of sexual battery, Slaughter was convicted of two counts of sexual battery by slight force, two counts of sexual battery by a person in familial authority, and one count of incest. Since Slaughter was decided while Carawan was

extant, the district court applied a Blockburger test (the different elements test) and concluded that each sexual battery charge contained an element which the other did not, and approved the dual convictions. 538 So.2d at 511; Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Carawan v. State, 515 So.2d 161 (Fla. 1987). The district court's conclusion was based heavily on its analysis that the two statutory sections addressed different evils. 538 So.2d at 509-10. The basis for this conclusion has been called into question by a seemingly unrelated sequence of events.

In Gould v. State, 577 So.2d 1302 (Fla. 1991), this court held that slight force sexual battery was not a lesser-included offense of sexual battery on an incapacitated person, because the latter required no force at all. As a consequence, because the state had failed to prove the victim was in fact physically incapacitated, and slight force sexual battery was not a lesser-included offense, Gould could be convicted only of the sole necessarily-included lesser offense, which was misdemeanor battery.

In response to Gould, the legislature created a new statute, codified at section 794.005, Florida Statutes (1992 supp.), effective April 8, 1992. Ch. 92-135, Laws of Fla. It provides:

> Legislative findings and intent as to basic charge of sexual battery. The Legislature finds that the least serious sexual battery offense, which is provided in s. 794.011-(5), was intended, and remains intended, to serve as the basic charge of sexual battery and to be necessarily included in the

> offenses charged under subsections (3) and (4), within the meaning of s. 924.34; and that it was never intended that the sexual battery offense described in s. 794.011(5) require any force or violence beyond the force and violence that is inherent in the accomplishment of "penetration" or "union."

Assuming arguendo that the explicit language of the statute were not sufficient, it is also a rule of statutory construction that, when a statute is amended soon after controversy arises concerning its interpretation, the court should treat the amendment as a statement of legislative intent as to the original law, and not a substantive change thereto. Lowry v. Parole and Probation Comm'n, 473 So.2d 1248 (Fla. 1985). Ergo, slight force sexual battery is a lesser-included offense of all sexual batteries, contrary to the First District's ruling in Slaughter.

Petitioner, of course, was not convicted of slight force sexual battery, but he contends that the statutory amendment supports his argument that one act of sexual battery supports only one conviction of sexual battery.

Florida courts have previously held that a single act of aggravated battery will support only one conviction of aggravated battery, even though battery can be "aggravated" in two different ways - great bodily harm, or use of a deadly weapon - both of which can occur in a single act of aggravated battery. Bryant v. State, 480 So.2d 665 (Fla. 5th DCA 1985); Llanos v. State, 401 So.2d 848 (Fla. 5th DCA 1981).

It has also been long settled that one death will support only one conviction of homicide. State v. Chapman, 625 So.2d

838 (Fla. 1993) (reaffirming Houser post-Carawan); Mills v. State, 476 So.2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986) (no dual convictions of aggravated battery and murder); Houser v. State, 474 So.2d 1193 (Fla. 1985) (no dual convictions of DWI manslaughter and vehicular homicide); Knight v. State, 338 So.2d 201 (Fla. 1976) (no dual convictions of felony murder and premeditated murder). See also, generally, Baker v. State, 425 So.2d 36, 59-60 (Fla. 5th DCA 1982), for Judge Cowart's discussion in his dissent concerning how attempted and completed acts, felony murder and the underlying felony, and degree offenses, such as homicide, fail a literal interpretation of Blockburger, but yet must be found to be mutually exclusive crimes to have any rational criminal code, approved in part, quashed in part, 456 So.2d 419 (Fla. 1984).

Petitioner contends the rule of Houser should apply to sexual batteries also. While there may be a number of ways to determine what constitutes discrete crimes (different kinds of sex acts, oral and vaginal for example, or the same kind of acts, but separated in time), where there is only one act of sexual battery, there should be only one conviction of sexual battery. In fact, Houser was the basis for the Second District's decision in George, that dual convictions for slight force and great force sexual battery were invalid where there was only one act of sexual battery. George v. State, 488 So.2d 589 (Fla. 2d DCA 1986). In its opinion in the instant case,

the First District ignored George's reliance on Houser and, instead, distinguished George on a different basis.

The issue here transcends a Blockburger analysis. It is an example of how Blockburger can lose sight of the forest (legislative intent), while it is counting trees (that is, statutory elements). Petitioner reminds the court that its decision in Houser, for example, would not withstand a rigorous Blockburger analysis, but this only demonstrates that Blockburger is not a be-all and an end-all in double jeopardy analysis, and on any given issue, may obstruct rather than carry out legislative intent. See also Baker, infra.

Unquestionably, the two charges here are each aggravated versions of a single core act of sexual battery. They are aggravated, on the one hand, by the physical and mental infirmities of the victim, and on the other, by the authoritative position of the person in custodial authority, which enhances his ability to coerce the victim to submit, or in this case, just to have access to the victim. On the facts of the instant case, the two aggravators are virtually indistinguishable. The victim's physical and mental disabilities, on the one hand, and the defendant's position as caretaker, on the other hand, are two sides of a single fact which unfortunately made her vulnerable to the offense, and put him in the position to commit the offense. These unfortunate facts hardly mean, however, that petitioner should be convicted of two counts of sexual battery for a single act of sexual battery.

Before 1984, sexual battery by one in familial or custodial authority was in the same statutory section as the other kinds of sexual battery. It was changed by chapter 84-86, Laws of Florida, codified as section 794.041, Florida Statutes. Sexual battery by one in familial or custodial authority was placed in a separate statute not to allow dual convictions, but for two reasons - to omit the element of lack of consent and to criminalize not only the sex act itself, but even the solicitation of a sex act. The statute provides in its enacting clause:

> WHEREAS, the defense of consent is inappropriate if a defendant charged with a sexual offense stands in familial or custodial authority over a young victim....

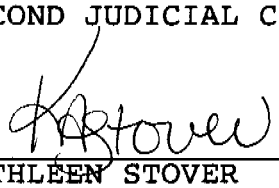
Likewise, sexual battery on a physically incapacitated person does not include the element of lack of consent. There is no indication the legislature intended, however, to permit dual convictions of sexual battery where the victim was incapacitated and the defendant had custodial authority over her.

The principle petitioner asks this court to adopt is a simple one - a single act of sexual battery can result in only a single conviction of sexual battery. This court has already reached a similar conclusion where homicide is concerned, and the Fifth District has reached a similar conclusion where aggravated battery is concerned. Petitioner's dual convictions violate the double jeopardy clause and one of them must be vacated.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court reverse one of his convictions because dual convictions violate double jeopardy.

Respectfully submitted,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

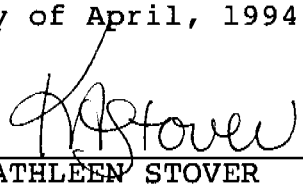


KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Joseph Thompson, inmate no. 563337, Jackson Correctional Institution, P.O. Box 4900, Malone, FL 32445, this 12 day of April, 1994.



KATHLEEN STOVER