IN THE SUPREME COURT OF FLORIDA

JOSEPH THOMPSON,

Petitioner,

vs. CASE NO. 83,064

STATE OF FLORIDA,

Respondent.
_____/

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This is a petition for discretionary review pursuant to article V, section 3(b)(3), Florida Constitution, based on a claim that the decision below expressly and directly conflicts with a decision of another district court.

The express and direct conflict must be based on the decisions themselves, not the opinions, and the only relevant facts are those within the four corners of the majority opinions. Reaves v. State, 485 So. 2d 829 (Fla. 1986).

STATEMENT OF THE CASE AND FACTS

Petitioner's statement contains analysis of the opinion here and in other cases best left to the argument section of the brief. The state supplements with the following neutral statement.

The facts from the decision below are that appellant was convicted of sexual battery on a physically incapacitated victim, section 794.011(4)(f), Florida Statutes (1991), and sexual activity with a child while in a position of custodial authority, section 794.041(2)(b), Florida Statutes (1991). Both offenses are felonies of the first degree. He was sentenced to concurrent nine-year terms. The district court rejected a claim that one of the convictions should be reversed because both were based on a single sexual act. The court concluded that State v. George, 488 So. 2d 589 (Fla. 2d DCA 1986) was factually and legally distinguishable.

This petition for discretionary review followed.

SUMMARY OF ARGUMENT

The cases cited, or analyzed, by petitioner are all legally and/or factually distinguishable from the decision below because they involve different statutes and different facts. There is no express and direct conflict.

ARGUMENT

ISSUE

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION IN GEORGE V. STATE, 488 SO. 2d 589 (FLA. 2d DCA 1986).

There are two fatal flaws in petitioner's analysis and claim of conflict. First, the George decision, issued in 1986, was purportedly grounded on the proposition that a single act could not be the basis for multiple convictions because the legislature did not intend multiple convictions for the same act. This single act theory was most prominently displayed in Carawan v. State, 515 So. 2d 161 (Fla. 1987). There, this Court held that multiple gunshots were a single act and, because the legislature did not intend multiple convictions for a single act, the multiple shotgun blasts would not support convictions for both attempted manslaughter and aggravated battery even though each of these offenses contained unique statutory elements. The Court held they would support convictions for only one of these offenses. Inexplicably, the Court also affirmed a separate conviction for shooting into an occupied structure based on the same act/gunshots. Footnote 8, 515 So. 2d at 170 emphasized that the holding applied only to an act not a transaction: Justice Shaw dissented in Carawan, primarily on the ground that the legislature had unambiguously prescribed unique statutory elements as the test for determining whether separate convictions and sentences should be imposed and the majority was simply

ignoring the plenary constitutional authority of the legislature by substituting its own view for that of the legislature. Justice Shaw's views were subsequently enacted into law by Chapter 88-131, section 7, Laws of Florida which, inter alia, modified section 775.021(4), Florida Statutes to reiterate that it was the intent of the legislature that offenses with separate statutory elements be separately convicted and punished regardless of whether they were based on single or multiple acts and that the rule of lenity should not be used to determine legislative intent on whether multiple or single convictions were required. The correct application of the statute was illustrated by three exceptions where multiple convictions were not intended: (1) offenses with identical statutory elements; (2) degree offenses as provided by statute and (3) lesser offenses with statutory elements subsumed by a greater offense, i.e., so-called "necessarily" lesser included offenses. Numbers one and three were straightforward applications of the plain meaning of section 775.021(4) while number two created a true exception for crimes which have unique statutory elements but are explicitly identified by statute as degree crimes of each other[1]. This

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[1] The most prominent example of statutorily identified degree crimes is murder where each degree has statutory elements unique to itself. Where only one victim is unlawfully killed, only one murder conviction would be permitted. See, section 782.04, with its respective statutory provisions of "murder in the first degree," "murder in the second degree," and "murder in the third degree." As this is written, this Court has plunged back into the Carawan morass in Sirmons v. State, No. 80,545, (Fla. February 3, 1994), by impermissibly going behind the statutory elements of Theft and Robbery into the accusatory pleadings and proof adduced at trial to conclude that grand theft and armed robbery are "merely degree variants" of each other and, thus, on the basis of a single act, cannot be subject to separate

Court recognized the impact of the Carawan override in State v. Smith, 547 So. 2d 613 (Fla. 1989) but declined to retroactively apply the amended statute to multiple convictions for the same act.

The convictions here, based on a single act, are controlled by Florida Statutes (1991), which is post chapter 88-131 and Smith, both of which overrode the single act theory of Carawan and of George. Thus, it is both nonsense and a *non sequitur* to claim conflict between current caselaw based on statutory amendments rejecting the single act theory and case law based on the single act theory which has been rejected by both the legislature and this Court. Thus, the decisions here and in George are legally unrelated and cannot present express and direct conflict.

Second, the decisions here and in George are factually unrelated. In George, the two offenses at issue were sexual battery by force or violence likely to cause serious personal injury (§794.011(4)(b), Fla. Stat. (1983)), and sexual battery by force or violence not likely to cause serious personal injury (§794.011(5)). The district court below described the latter offense as a permissive lesser included offense of the former.

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convictions and punishment. This is done even though the Court acknowledges that each contains unique statutory elements. Moreover, there is no statutory authority for concluding that Theft (§ 812.014) and Robbery (§812.13) are, as section 775.021(4)(b)2 requires, "[o]ffenses which are degrees of the same offense as provided by statute." (e.s.). The terms used in Sirmons, "degree factors" and "merely degree variants" to justify rejecting the plain legislative language are simply "Carawanese" or Carawan *redux*, as Justice Grimes' dissent shows.

In fact, when the somewhat convoluted wording of the statutes is analyzed, the latter offense, subsection (5), is a necessarily lesser included offense of sexual battery by force or violence likely to cause serious personal injury, subsection (4)(b). The stated absence of a potential element is not itself a statutory element. Section 794.011(4)(b) contains a unique statutory element not present in section 794.011(5) but the latter offense does not contain a unique statutory element and is thus necessarily included in the former. Moreover, section 794.011(5) is a second degree felony and is thus a lesser offense to section 794.011(4)(b), a first degree felony. It is a true lesser included offense. If the discredited single act theory is discarded, George was correctly decided under section 775.021(4) as that statute existed in both 1983-1987 and as it exists today. The decision was correct, the opinion erred in attributing significant legislative intent to the use of act[2].

Here, in contrast to George, each offense contains a unique statutory element and both are felonies of the first degree. Thus, neither is included in the other nor is one a lesser of the other. This analysis, pursuant to legislative mandate, is limited to the statutory elements enacted by the legislature[3].

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[2] The single act theory is also contrary to the rules for the construction of statutes set out by the legislature in chapter 1, Florida Statutes. Indeed, the theory overlooks the very first rule of statutory construction: "The singular includes the plural and vice versa." §1.01(1), Florida Statutes.

[3] The legislature limited analysis to the statutory elements because it accurately and wisely recognized that reliance on

Appellant's analysis of the problems of Gould v. State, 577 So. 2d 1302 (Fla. 1991) and Slaughter v. State, 538 So. 2d 506 (Fla. 1st DCA 1989), cause dismissed, 557 So. 2d 34 (Fla. 1990), is interesting but irrelevant to the question of whether the decision here conflicts with a decision of this Court or another district court. Because it disagreed with this Court's conclusion in Gould that section 794.011(5), Florida Statutes (1985) was not a (necessarily) lesser included offense of section 794.011(4)(a), Florida Statutes (1985), the legislature enacted chapter 92-135, §2, Laws of Florida, creating section 794.005, Florida Statutes (Supp. 1992), which expresses legislative intent that section 794.011(5) is a lesser included offense of sections 794.011(3) and (4). Section 794.011(5) was reworded but is still awkward. Its meaning is clear from sections 794.005 and 794.011(6)[4]. Similarly, Slaughter also involves 1985 statutes.

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accusatory pleadings and proof adduced at trial would inevitably create major problems. First, chaos in charge conferences, jury instructions, and jury deliberations because of surplusage in accusatory pleadings and evidence introduced at trial tending to prove both charged and uncharged offenses. Simply determining what greater, necessarily lesser included, and permissively lesser included, offenses have been charged becomes a major source of confusion and error. Second, by prohibiting reliance on accusatory pleadings and proof adduced at trial, the legislature intended to preserve its authority to define offenses, both greater and lesser, and to determine what offenses are separate and what offenses are lesser included. Unfortunately, the judicially created permissive lesser included offenses containing unique statutory elements from the greater charged offense have frustrated legislative intent and created chaos in both trial and appellate courts. If one were searching for the simplest measure with the greatest positive impact on criminal trials and appeals, eliminating permissive lesser included offenses would almost certainly be the choice. See, Justice Shaw's dissent in Wilcott v. State, 509 So. 2d 261 (Fla. 1987).

[4] Gould may well have frustrated legislative intent but it

Even if we assume that chapter 92-135 should be retroactively applied to 1985, contrary to this Court's decision in Smith, and that both Gould and Slaughter were wrongly decided, neither has any relevance to the case at hand because both involve different offenses and different statutes than the case at hand.

The decision of the district court below was correct, the opinion irrelevantly erred in describing George and in relying on Slaughter. There is no conflicting decision to review and thus no basis for discretionary jurisdiction.

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appears to be a correct reading of the statutory language as it existed in 1985. Sexual battery without consent is a crime period. There is no force or violence required beyond that inherent in penetration or union. Properly worded, section 794.011(5) would have stopped after "without consent" and omitted entirely any reference to force or violence. So worded, it would clearly be a necessarily lesser included offense of all the offenses set out in subsections (3) and (4) and there would have been no need to explicitly state legislative intent. The plain words and an accurate application of section 775.021(4) would have sufficed.

CONCLUSION

There is no express and direct conflict in decisions and no jurisdictional ground for review. The petition for discretionary review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 8th day of February, 1994.

JAMES W. ROGERS

IN THE SUPREME COURT OF FLORIDA

JOSEPH THOMPSON,

Petitioner,

vs. CASE NO. 83,064

STATE OF FLORIDA,

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_____/

APPENDIX TO

JURISDICTIONAL BRIEF OF RESPONDENT

92-112304-TCR
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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JOSEPH THOMPSON, Appellant,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.
vs.	)	CASE NO. 92-3331
STATE OF FLORIDA, Appellee.	)	

Opinion filed November 19, 1993.

An Appeal from the Circuit Court for Leon County. N. Sanders Sauls, Judge.

Nancy A. Daniels, Public Defender, Abel Gomez, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, Laura Rush, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

ERVIN, J.

Appellant was convicted of sexual battery on a physically incapacitated victim, in violation of Section 794.011(4)(f), Florida Statutes (1991), and sexual activity with a child while in a position of custodial authority, in violation of Section 794.041(2)(b), Florida Statutes (1991), and sentenced to concurrent

nine-year terms. He urges reversal of one of the two convictions, because both offenses were based on a single sexual act. We affirm the convictions and sentences based on Slaughter v. State, 538 So. 2d 509 (Fla. 1st DCA 1989), appeal dismissed, 557 So. 2d 34 (Fla. 1990), in which this court, after applying a Blockburger[1] analysis, affirmed separate convictions and sentences for sexual battery by force not likely to cause serious personal injury and sexual activity with a child by a person in familial authority based on evidence of a single penetration.

In so doing, we recognize that our decision appears to be in conflict with State v. George, 488 So. 2d 589 (Fla. 2d DCA 1986), wherein the Second District held that only one sexual battery conviction was proper once the evidence established only one penetration. We consider George distinguishable, because it involved charges of sexual battery by force or violence likely to cause serious personal injury and sexual battery by force or violence not likely to cause serious personal injury, the latter being a permissive lesser-included offense to the first. Moreover, George was decided before the enactment of Section 775.021(4)(b), Florida Statutes, wherein the legislature stated its intent to convict and punish for each crime.

AFFIRMED.

JOANOS and WOLF, JJ., CONCUR.

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[1]Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).