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IN THE SUPREME COURT OF FLORIDA

JOSEPH THOMPSON,

Petitioner,

vs. CASE NO.: 83,064

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Petitioner, Joseph Thompson, defendant below, will be referred to herein as petitioner. Respondent, the State of Florida, will be referred to herein as the State. References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner's statement is incomplete. The state supplements with the following.

Petitioner was charged with two counts of sexual battery pursuant to sections 794.011(4)(f) and 794.041(2)(b), Florida Statutes (1991). R 35-36. The victim was a 14-year-old, profoundly retarded and physically handicapped girl, who was unable to communicate and was non-ambulatory. R 39. She was a resident at McCauley Cluster, a Tallahassee care facility where petitioner worked as an attendant. R 39. She was discovered to be 17 weeks pregnant and delivered a non-viable 19 week fetus. R 39. Through DNA testing, petitioner was identified as the father. R 39. Initially, he denied having sex with the child but later confessed that he had. R 40. He also said, at first, that it only happened once but later admitted that he also simulated intercourse on other occasions by rubbing his penis between her legs. R 40. He also claimed to have not fully penetrated her but had put his penis in union with her vagina. R 40.

Petitioner pled no contest to the charges reserving the right to appeal on the theory that a single act could not be the basis for multiple convictions. R 42-43, R 45-46, R 3-10, R 15-19.

Petitioner was sentenced to nine years imprisonment within the recommended range of the guidelines. R 47-56.

On appeal to the district court, petitioner's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) acknowledging that pursuant to statute and case law there was no error in convicting and sentencing for the two separate offenses.

The district court affirmed both convictions and sentences by opinion issued on 19 November 1993 but new counsel for petitioner abandoned the Anders position and sought rehearing and certification. The district court denied both on 20 December 1993. The decision of the district court, reported as Thompson v. State, 627 So. 2d 74 (Fla. 1st DCA 1993) pointed out that State v. George, 488 So. 2d 589 (Fla. 2d DCA 1986) was distinguishable.

> 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.

Id.

Petitioner then sought and obtained review here based on a claim of conflict with State v. George.

SUMMARY OF ARGUMENT

Section 775.021(4), Florida Statutes (1991) mandates that separate convictions be entered when an act or acts constitutes one or more separate offenses. Each of the two offenses here contains a unique statutory element not present in the other, pursuant to section 775.021(4), and each is a separate offense.

ARGUMENT

ISSUE

ARE THE OFFENSES AT ISSUE SEPARATE OFFENSES PURSUANT TO SECTION 775.021(4)?

Petitioner argues that a single act cannot be the basis for two convictions. This argument is simply a resurrection of the holding in Carawan v. State, 515 So. 2d 161 (Fla. 1987) that a single act cannot be the basis for multiple convictions. Carawan was based on this Court's statutory interpretation of section 775.021(4), Florida Statutes (1985) and emphasized the importance of "act," as "a discrete event arising from a single criminal intent." Carawan, 515 So. 2d at 170, n.8.

The Florida Legislature promptly overruled Carawan in its entirety by enacting Chapter 88-131, S7, Laws of Florida, which amended section 775.021(4) to make it clear that no distinction would be drawn between an act or acts which constituted separate offenses as defined in section 775.021(4) and that "[t]he intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode." Section 775.021(4), Fla. Stat. (Supp. 1988) and thereafter.

This Court promptly recognized the obvious in State v. Smith, 547 So. 2d 613, 615 (Fla. 1989).

> It is readily apparent that the legislature does not agree with our interpretation of legislative intent and the rules of construction set forth in *Carawan*. More specifically:

(1) The legislature rejects the distinction we drew between act or acts. Multiple punishment shall be imposed for separate offenses even if only one act is involved.

(2) The legislature does not intend that (renumbered) subsection 775.021(4)(a) be treated merely as an "aid" in determining whether the legislature intended multiple punishment. Subsection 775.021(4)(b) is the specific, clear, and precise statement of legislative intent referred to in *Carawan* as the controlling polestar. Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, *all* criminal offenses containing unique statutory elements *shall* be separately punished.

(3) Section 775.021(4)(a) should be strictly applied without judicial gloss.

(4) By its terms and by listing the only three instances where multiple punishment shall not be imposed, subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense, it clearly does not. However, the statutory element test *shall* be used for determining whether offenses are the same or separate. Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity.

Id. (emphasis in original. Footnote omitted).

State v. Smith, which presented the question of whether a single act of simultaneously possessing and selling a single rock of cocaine would support convictions for the separate offenses of possession with intent to sell and actual sale, is dead onpoint. Will a single act of intercourse support convictions for separate offenses of sexual battery of a physically incapacitated person and sexual battery by a person in custodial authority of a child? The answer in both cases, pursuant to section 775.021(4), is yes, as this Court held in Smith.

Petitioner's reliance on George, which the district court below distinguished, is misplaced. First, George issued in 1986. The reliance in George on a single act was consistent with Carawan and section 775.021(4), Florida Statutes (1985) as interpreted by Carawan. However, the district court here was applying section 775.021(4) as it was amended to overrule Carawan. Thus, there is no conflict, we are dealing with two entirely different statutory provisions.

Second, the two offenses in George were sexual battery by force or violence likely to cause serious personal injury, section 794.011(4)(b), Fla. Stat. (1983), and sexual battery by force or violence not likely to cause serious personal injury, section 794.011(5). For obvious reasons, a person could not be guilty of both of these offenses based on a single act because force not likely to cause serious personal injury is encompassed within the greater force likely to cause serious personal injury. In other words, the former is a lesser included offense of the

latter, as the district court below found. The George offenses do not have unique statutory elements under section 775.021(4) and are not separate offenses. Thus, there is no conflict of decisions.

Petitioner's reliance on Gould v. State, 577 So. 2d 1302 (Fla. 1991) and the subsequent legislative action in Chapter 92-135, Laws of Florida, is misplaced. In Gould, this Court held that slight force sexual battery was not a necessarily lesser included offense of sexual battery on an incapacitated person because the latter required no force at all. The Legislature then enacted Chapter 92-135, Laws of Florida, creating section 794.005, Florida Statute (Supp. 1992) to make clear its contrary intent that the slight force in section 794.011(5) did not require any force or violence beyond that force inherent in accomplishing "penetration" or "union" with the sexual organs of another. Thus, Gould was overruled.

Chapter 92-135 has no relevance to the two offenses here but it does have relevance to the George decision because it supports the state's argument above, and the district court's holding below, that section 794.011(5) is a lesser included offense of, e.g., 794.011(4)(b). Moreover, it is a necessarily lesser included offense, as the state argued here in its jurisdictional brief, not a permissive lesser included offense as the district court below said.

Petitioner also cites Sirmons v. State, 19 Fla. L. Weekly S71 (Fla. Feb. 3, 1994), for the proposition that a single act

cannot support multiple convictions for a core offense with variants of the core offense. This argument is simply a rehash of the Carawan argument that a single act and a single evil cannot support multiple convictions. The legislature overruled Carawan and its single act, single evil, reasoning, as this Court recognized in the extended quote above from State v. Smith.

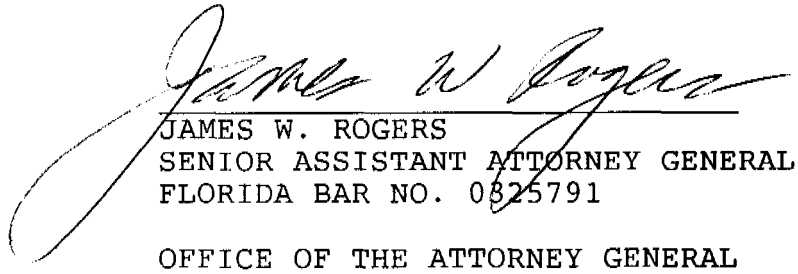
In summary, the plain language of section 775.021(4) mandates that separate convictions be entered for the separate offenses here. Although an explanatory opinion would be useful, it is clear that there is no direct and express conflict of decisions on which to base discretionary jurisdiction.

CONCLUSION

The district court decision below should be approved with an explanatory decision denying review.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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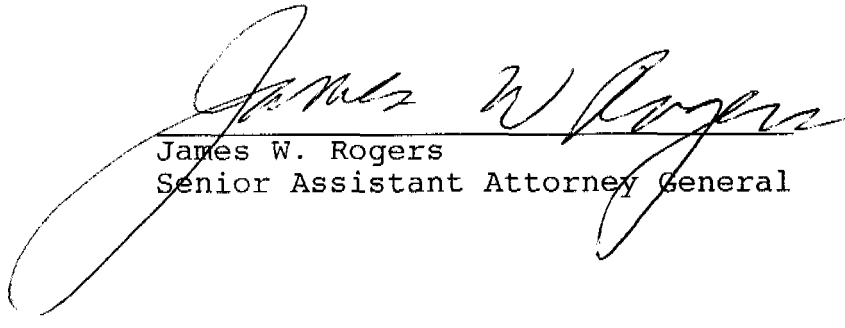
CERTIFICATE OF SERVICE

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, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of May, 1994.



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