047

FILED
SID J. WHITE
MAY 27 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOSEPH THOMPSON,

Petitioner,

v.

CASE NO. 83,064

STATE OF FLORIDA,

Respondent.

REPLY 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

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JOSEPH THOMPSON,	:	
Petitioner,	:	
v.	:	CASE NO. 83,064
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

REPLY BRIEF OF PETITIONER ON THE MERITS

I ARGUMENT

ISSUE PRESENTED

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

Because the state again asks this court to deny review, it appears the state's main argument is to quibble over whether the decision below really conflicts with that in George v. State, 488 So.2d 589 (Fla. 2d DCA 1986). Petitioner repeats that the district court below recognized apparent conflict with George, the question here is sure to be repeated, and there is no reason for this court not to answer it here and now.

In State v. Smith, 547 So.2d 613 (Fla. 1989), this court held that the 1988 amendment to section 775.021(4), Florida Statutes, overruled its decision in Carawan v. State, 515 So.2d 161 (Fla. 1987). Ch. 88-131, § 7, Laws of Fla. (commonly called the "anti-Carawan amendment"). Smith involved the question of whether a defendant could be convicted of both sale and

possession with intent to sell where he possessed and sold a single crack rock. In this appeal, the state argues Smith is "dead onpoint" [sic] (State's Brief (SB), p.7) with the instant case. The state also argues that petitioner's argument and this court's decision in Sirmons is "simply a rehash of that Carawan. . .single act, single evil, reasoning" which was overruled by the legislature (SB-9).

Petitioner disagrees. The 1988 amendment to section 775.021(4) did not address the distinction between multiple convictions arising from a single core offense and multiple convictions arising from different core offenses, even where only a single act is involved. The state's argument assumes this distinction makes no difference, but the state is speculating about legislative intent on this matter, not analyzing it. The state failed to demonstrate that the distinction between single and multiple core offenses would make no difference under section 775.021(4).

Smith is hardly "dead on point." Because the state fails to acknowledge or accept Sirmons' core offense distinction, it fails to recognize how a core offense analysis would prevent dual convictions in the instant case - of a single act of sexual battery aggravated two different ways - yet reach a different result in Smith, where the offenses were sale and possession with intent to sell cocaine. Sirmons v. State, 634 So.2d 153 (19 Fla.L.Weekly S71) (Fla. 1994). The latter set of offenses either does not have a common core offense, or at least, it is not immediately apparent what the core offense is.

This is a major distinction between Smith and the instant case. Sirmons' core offense analysis clearly precludes dual convictions here, but that result is not clear on Smith's facts.

Nor, as the state claims, is a core offense analysis merely a rehashing of Carawan. A core offense analysis is obviously distinguishable from a single act/single evil analysis. Dual convictions predicated on a single act may or may not involve the same core offense. Here they do; in Smith, they arguably did not.

Further, this court should notice what the state failed to address in its brief, and that is the application of Houser to this question. Houser v. State, 474 So.2d 1193 (Fla. 1985). In Houser, this court held that dual homicide convictions were not permitted for one death. Houser has been reaffirmed post-Carawan and post-anti-Carawan amendment. State v. Chapman, 625 So.2d 838 (Fla. 1993). Houser was the basis for the Second District Court's decision in George, a critical fact completely omitted by the state. Instead, the state distinguished George on a wholly different basis, one which was not the basis for decision in George.

Petitioner believes that Houser holds the key to this case. There was proof here of only a single act of sexual battery. Like the single death which was the subject of Houser, with or without Sirmons, it is the discreteness of the act, the singularity of the act, which permits only a single conviction for a single act, for a single core offense. Houser was decided in 1985. Previously, in 1976, this court had decided

that dual convictions of felony murder and premeditated murder for a single death were not permitted. Knight v. State, 338 So.2d 201 (Fla. 1976). In the 18 years since Knight, the legislature has had ample opportunity to overrule it, if it disagreed with the principle expressed in Houser and Knight. It has not done so. Petitioner believes the principle enunciated in Knight and Houser - that homicide is so discrete an offense that the legislature did not intend dual convictions - applies to certain other discrete and singular offenses, such as the sexual battery here.

II 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 27 day of May, 1994.

KATHLEEN STOVER