IN THE SUPREME COURT OF FLORIDA

ROGER LEO DAUTEL,

Petitioner,

v. CASE NO. 84,848

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant, Roger Leo Dautel, defendant below, will be referred to herein by name or as "appellant." Appellee, 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

The State generally accepts the Petitioner's statement but would add the following:

> (1) The trial court received a presentence investigation ("PSI") report regarding Mr. Dautel's crimes in Ohio. The report states that Mr. Dautel was convicted of "Gross Sexual Imposition" against his 14 year old daughter, while noting that the daughter had repeatedly been victimized from age 9. (R 399) The record does not indicate how many specific events formed the basis for Dautel's conviction.
>
> (2) Mr. Dautel never argued the issue of whether the 1983 or current versions of §800.04, Fla. Statutes, should be applied to the facts adduced at sentencing.

SUMMARY OF ARGUMENT

The trial court was required by Rule 3.701, Fla.R.Cr.P., to examine the Petitioner's Ohio conviction in context with analogous Florida statutes. The comparison of inexact things for the sake of drawing an "analogy" requires the consideration of underlying facts if an accurate result is to be obtained. Florida caselaw clearly supports the examination of the underlying facts of an out-of-state conviction to facilitate guidelines sentencing, and the practice should be affirmed.

ARGUMENT

ISSUE I

MAY THE TRIAL COURT CONSIDER THE UNDERLYING FACTS IN DETERMINING WHETHER AN OUT-OF-STATE CONVICTION IS ANALOGOUS TO A FLORIDA STATUTE FOR THE PURPOSE OF CALCULATING POINTS FOR A SENTENCING GUIDELINES SCORESHEET.

This cause is before the Court on the following certified question:

> "May The Trial Court Consider The Underlying Facts In Determining Whether An Out-Of-State Conviction Is Analogous To A Florida Statute For The Purpose Of Calculating Points For A Sentencing Guidelines Scoresheet?"

The certified question does not address the issue of whether the out-of-state conviction should be compared to current or former Florida statutes because that issue was never argued at trial or in District Court. Rather, the question addresses the scope of any statutory comparison to be drawn under Fla.R.Crim.P. 3.701(d)(5)(B), which states:

> (B) When scoring federal, foreign, military, or out-of-state convictions, assign the score for the analogous or parallel Florida Statute.

The procedure advocated in Mr. Dautel's brief would utilize a "lowest common denominator" approach rather than any form of comparative analysis. Under this mechanical approach the sentencer would:

> (A) List the statutory elements of the [Ohio] offense.

(B) Compare these elements with Florida statutes.

(C) Eliminate any Florida statutory crime having an element not precisely set forth in the Ohio statute.

(D) Rest the comparison on the first Florida statute having nothing but common "elements" with the Ohio statute.

The benefits of this process (to criminals) are obvious. Since few state statutes are identical, major components of a given crime will be conveniently discarded in any case where they are not duplicated in exact form in the Florida statute. This case is a prime example of the potential injustice in such an approach.

In Ohio, Dautel was convicted of a "gross sexual imposition" against his own daughter, who was 14 when he was convicted. To subdue his little girl, Dautel gave her drugs. Using a "common denominator" approach, Dautel rejects §800.04 because (in 1983) it required the victim to be less than 14 years old and it did not involve the use of drugs. Thus, Dautel finds no absolute common ground (i.e., "touching") until he gets to (misdemeanor) "battery." Thus, Dautel avoids the fact that a sexual offense is involved and avoids both Ohio's and Florida's intent to punish sexual contact more harshly than simple battery.

The key deficiency in this "lowest common denominator" approach is that it misapprehends the terminology used in Rule 3.701. The rule does not require an exact or absolute "duplication" of elements, nor does the rule call for the

rejection of any statute due to the presence of a dissimilar element. The rule says that the court should use "analogous" or parallel statutes.

"Analogous" does not mean "exact." The term "analogous" means "similar or alike in a way that permits the drawing of an analogy."[1] The word "Analogy" is a noun defined as:

> "Correspondence in some respects between things otherwise dissimilar."[2]

By giving the requisite "plain meaning" to the words used in Rule 3.701, it is patently obvious that a Florida statute defining an "analogous" crime is not required to match the [Ohio] statute point-for-point, and is not to be rejected over a matter such as the "age of the victim" in the context of this case.

This brings us to the certified question. If statutes (crimes) are to be compared, and if no exact duplication of statutory "elements" is present, how can an analogy be drawn? Since, again, the concept of "analogy" involves "dissimilar" things, the only things left to compare besides statutory elements are the facts of the crimes, to see if they are "parallel."

In Forehand v. State, 537 So. 2d 103, 104 (Fla. 1989) this Court stated:

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[1] The American Heritage Dictioinary, 2nd Ed., verba "Analogous" at 106 (1985).

[2] id., [verba "analogy"]

> "We agree with the district court that the elements of the subject crime, not the stated degree or the sentence received, control in determining whether there is a Florida statute analogous to an out-of-state crime. The various jurisdictions may choose to punish the same acts differently, so the elements of a crime are the surest way to trace that crime."

The only analysis rejected by Forehand is a comparison of "degrees" (of offense) or "sentences." Interestingly, Forehand goes on to mention that the facts of the Texas case would have been germane to the inquiry in the trial court; to wit:

> [3] We agree with the trial court that any error here is not apparent on the face of the record. Forehand could have objected at sentencing and introduced facts showing the Texas conviction not to have been for a life felony. Facts which might show the scoresheet to be erroneous are not apparent on the record, however, and the failure to object at sentencing is fatal to Forehand's claim on appeal. We therefore answer the second question in the negative and reiterate our holding in *Whitfield*: "Sentencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal." 487 So. 2d at 1046.
>
> Id. at 105.

In Rotz v. State, 521 So. 2d 355, 356 (Fla. 5th DCA 1988) the District Court discussed the analogizing process as follows:

> [2] Assuming that the appropriate Indiana robbery statute is the same as that reproduced in *Brown v. State of Indiana*, 178 Ind. App. 38, 381 N.E. 2d 500 (1978), the defendant's argument that the statute cannot be analogized to Florida's has no merit. Sentencing guidelines intended to treat "conduct as it would be treated in Florida . . ." *See Frazier v. State*, 515 So. 2d 1061 (Fla. 5th DCA 1987). Thus, it

> is the nature of the prior crime that is to be considered when attempting to find an analogous Florida statute. *See Samples v. State*, 516 So. 2d 50 (Fla. 2nd DCA 1987). The penalty is not the determining factor. Unless the offense defined in the appropriate Indiana statute is significantly different from that in *Brown*, Rotz' prior conviction should be scored as a second degree felony as there is not third degree felony in Florida for an analogous robbery offense. *See* § 812.13, Fla. Statutes (1985).

The district court was correct in looking for parallel crimes rather than mechanical comparisons of statutes. In fact, in Mohammed v. State, 561 So. 2d 384 (Fla. 1st DCA 1990) a similar approach actually benefitted the defense.

In Mohammed, the defendant was convicted of felony "sodomy" under a Georgia statute after engaging in private, consensual, oral sex with a woman in a motel. This was a felony conviction, and a strict "elemental" analysis resulted in an application of §800.02, Fla. Stat., whose very general language -- when compared to the facts of the case, was criticized as overbroad (criminalizing noncriminal conduct) and an invasion of privacy. Thus, the Georgia conviction was not scored at all, with the Court noting:

> The "transition of language" and the fact that "People's understandings of subjects, expressions and experiences are different than they were even a decade ago" (257 So. 2d at 23), has most assuredly continued apace at an accelerated rate since 1971, when *Franklin* was decided, and similarly cautions today against applying the imprecise language of section 800.02 to make a criminal offense out of the facts involved in the Georgia prosecution against appellant.

Id. at 387.

In Frazier v. State, 515 So. 2d 1061 (Fla. 5th DCA 1987), the Court again held that the Florida "guidelines" look to conduct, rather than simply recorded statutes, so that under Rule 3.701(d)(5) noncriminal conduct under Florida law will not be scored at all, while only "analogous" Florida statutes will be applied in other cases.

In Samples v. State, 516 So. 2d 50, 51-52 (Fla. 2nd DCA 1987) the state, again, could not find a Florida statute duplicating as foreign statute. The district court stated:

> The appellant notes that the Florida trafficking statute contains a specific pound requirement, while the federal statute does not. In addition, while the federal statute proscribes possession with intent to sell, the Florida trafficking statute does not. The Florida Statute (§ 893.13(1)(a)(2), Fla. Stat. (1985)) advanced by the appellant does contain that language.
>
> Florida Rule of Criminal Procedure 3.701(d)(5)(a)(2) clearly intends that convictions, not acts, are to be scored. For this reason, the specific facts of the prior offense are not normally considered. If there is any question, however, as to the severity, "[t]he burden . . . is on the state to clearly demonstrate the nature of the prior crime, . . . otherwise, as the rules provide, the benefit of the doubt goes to the defendant." *Rodriguez v. State*, 472 So. 2d 1294, 1296 (Fla. 5th DCA 1985).
>
> There was a question as to severity here because there is no precisely parallel Florida Statute. Accordingly, the state here introduced into evidence DEA reports of the appellant's prior federal conviction. Those reports revealed that the appellant was convicted of conspiring to possess and deliver over one hundred pounds of marijuana. Under

> these circumstances, where there is no precisely parallel Florida Statute, we believe that the state met its burden of proving the nature of the crime and that, as a consequence, the court properly found the appellant's prior federal conviction to be most analogous to the Florida offense of trafficking under section 893.135(1)(a)(1), Florida Statutes (1985). The court properly scored the appellant's prior federal conviction, and we uphold the sentence imposed.

Facts tending to establish the severity of the prior offenses to assist in any analogy to current Florida law have been recognized as relevant in Florida cases involving "robbery" (which at one time was not divided into degrees in Florida). Jenkins v. State, 556 So. 2d 1239 (Fla. 5th DCA 1990) (ancient, Florida, robbery conviction scored under modern robbery statutes by reviewing facts of old case); Witherspoon v. State, 601 So. 2d 607 (Fla. 5th DCA 1992); Robbins v. State, 482 So. 2d 580 (Fla. 5th DCA 1986); Collier v. State, 535 So. 2d 316 (Fla. 1st DCA 1988) (facts of Tennessee conviction for sexual battery analogized conviction to mere "attempt" under Florida law).

Collier is interesting because it points out a disadvantage to Mr. Dautel inherent in his "common denominator" approach.

Dautel used various intoxicants to subdue his little girl prior to committing acts of sexual abuse. Accordingly, he was convicted of "Gross Sexual Imposition" under §2907.05(A)(2), Ohio Revised Code. That section reads as follows:

> **§2907.05** Gross sexual imposition.
>
> (A) No person shall have sexual contact with another, not the spouse of the offender; cause

another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's or one of the other persons', judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

The Committee Comment[3] to the statute says:

Committee comment to H511

This section defines an offense analogous to rape, though less serious. Its elements are identical to those of rape, except that the type of sexual activity involved is sexual contact, rather than sexual conduct. See, section 2907.02.

Gross sexual imposition is a felony of the fourth degree when the sexual contact is committed by force or threat or with the use of drugs or intoxicants. When the victim of the offense is under age 13, regardless of the means used to commit the offense, gross sexual imposition is a felony of the third degree.

Mr. Dautel, focusing solely upon the age of his Ohio victim at the time he was convicted (14) argues that §800.04, Fla. Stat., should not be used as the comparable Florida Statute because, back in 1983, the victim had to be "less than 14." Thus, Dautel alleges that lewd sexual activity with 14 year old girls was nothing more than simple battery (in 1983) and can only

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[3] In addition, the notes list "Comparative Legislation" from other states, including this one. The comparable Florida Statute is §800.04, the very statute relied upon below.

be viewed as "simple battery" now.[4] Actually, the Petitioner has overlooked one key factor.

While §800.04, Fla. Stat., is not a necessarily lesser included offense of sexual battery under §794.011, Fla. Stat.,[5] "gross sexual imposition" can be a lesser included offense to sexual battery in Ohio, see State v. Collins, 396 N.E. 2d 221 (O. App. 2d 1977) and is an "allied offense of similar import" to attempted rape. State v. Earich, 447 N.E. 2d (O. App. 3rd 1982).

Now, if we remember that Dautel was convicted of the particularized subsection of 2907.05 dealing with sexual contact after incapacitating his child victim with drugs and/or alcohol, we find a very precise parallel to an attempted sexual battery under §794.011(4)(a)-(d); to wit:

> (4) A person who commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the following circumstances, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084:
>
> (a) When the victim is physically helpless to resist.
>
> (b) When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat.

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[4] Mr. Dautel relies, as well, on the fact that §800.04 prohibits sexual conduct other than sexual battery. This is analogous to Ohio's distinction between "sexual contact" (under §2907.05, O.R.C., and "sexual Conduct" (intercourse)).

[5] State v. Hightower, 509 So. 2d 1078 (Fla. 1987).

> (c) When the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future.
>
> (d) When the offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance which mentally or physically incapacitates the victim.

Thus, if we follow Dautel's instruction to reject §800.04 due to the age of the victim, we still find an applicable second degree felony by comparing the elements of the Ohio and Florida offenses and thus landing on "attempted sexual battery."

If we look outside the guidelines, we can compare the situation at bar with a similar (analogous) problem in Capital litigation. As the Court is well aware, §921.141, Fla. Stat., requires a capital sentencer to consider certain statutory "aggravating factors" when imposing a sentence of death or life. One of the statutory aggravating factors is prior convictions for crimes involving "the use or threat of violence" to the [victim]. §921.141(5)(b). Since generic crimes such as burglary may or may not involve personal violence, this Court allows the capital sentencer to look to the facts of the prior conviction before applying this factor. Padilla v. State, 618 So. 2d 165 (Fla. 1993); Mann v. State, 453 So. 2d 784 (Fla. 1984).

It is indeed difficult to reconcile the concept that the facts of various out-of-state crimes can be reviewed to sentence someone to death but cannot be utilized to sentence someone to

prison. Thus, it is submitted that trial courts can, and in fact should, examine relevant facts regarding prior offenses in order to properly analogize them to Florida law.

In closing, it should be noted that Mr. Dautel insists upon drawing any requisite analogy (between his Ohio conviction and Florida law) to Florida law as it existed in 1983. This request is designed to exclude the "age" factor of §800.04, although the exclusion of that one factor would not, alone, defeat any analogy.

Apparently Mr. Dautel did not raise this issue at trial or on appeal. Thus, it has not been preserved. See, Forehand, supra. Without waiving this point, the State will briefly reply for the sake of completeness.

Mr. Dautel is apparently relying upon an "ex post facto" theory due to the increase in the operative victim age (under §800.04) from 14 to 16. While "age" is a factor for actual prosecution under §800.04 (as opposed to attempted sexual battery), we are not dealing with prosecution, nor are we actually punishing Dautel for a violation of that statute.

Again, the situation involves a sentencing factor. In comparing the Ohio conviction to repealed or amended statutes, bizarre complications could arise given -- as noted in Mohammed, supra, -- changes in societal perceptions, attitudes or even definitions of terms over the course of years. A clear example of this can be found in cases where the prior conviction was for

"robbery." As noted in Jenkins, supra, "robbery" under current Florida law is divided into degrees, but until recent times it was not. Thus, the prior (Florida) robbery conviction in Jenkins had to be re-examined against the present statute to assess a fair guidelines score.

Since we are merely dealing with a sentencing factor and not a substantive prosecution, we can compare the situation to capital litigation yet again.

In Dobbert v. Florida, 432 U.S. 282 (1977) the Court ruled the ex post facto prohibitions did not apply to statutes altering sentencing factors without criminalizing previously protected conduct or substantively changing his sentence. Thus, in Combs v. State, 403 So. 2d 418 (Fla. 1981), the creation of the "new" statutory aggravating factor of "cold, calculated, premeditated" murder was found not to violate the "ex post facto" clause, even though it added another aggravating factor to the case, because the "new" factor, in reality, added nothing "new" to the definition of capital murder but, rather, merely refined and limited sentencing factors.

The same is true is our case. The intent of the guidelines is to examine the nature of the prior offense. It may be that a defendant committed a crime as serious under a precise, new, statute as it was under an older, vague, statute. But, as we have seen, it is also true that defendants frequently benefit from using the analogous new statute in conjunction with the facts (as in Muhammed, supra). Thus, it cannot be said that any

prejudice is suffered by criminal defendants (for ex post facto purposes) since we are dealing with a mere sentencing factor, and not a prosecution or punishment for previously protected conduct.

CONCLUSION

The certified question should be answered in the affirmative.

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 Steven A. Been, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 13 day of February, 1995.

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