IN THE SUPREME COURT OF THE STATE OF FLORIDA,

ANTHONY DARVILLE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC05-2014

****
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant and Respondent was the appellee in the Florida Fourth District Court of Appeal. The issue on appeal was whether Petitioner was legally convicted and sentenced. In particular, Petitioner argued that the constitutional prohibition against double jeopardy prevented him for being sentenced for both lewd and lascivious conduct and sexual battery.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

IB = Petitioner's Initial Brief on the Merits

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

The procedural history and facts on which the Fourth District Court of Appeal relied in making its decision are found in Darville v. State, 912 So.2d 63 (Fla. 4th DCA 2005), which Respondent adopts as its statement of the case and facts. A copy of the Fourth District Court of Appeal's decision is attached hereto for the convenience of this Court.

SUMMARY OF THE ARGUMENT

Petitioner was convicted of fondling the victim's breasts, and then penetrating her vagina with his finger and then with his penis. The facts in the case at bar clearly show the encounter between the defendant and the victim to be a series of discrete acts that proceeded in a deliberate, progressive and escalating manner. Given those facts, there can be no question that there was one improper touching, and two separate penetrations: three separate crimes arising from three separate acts, between each of which the "defendant had time to pause, reflect, and form a new criminal intent between the occurrences." Accordingly, the decision of the Fourth District Court of Appeal should be affirmed.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN ADJUDGING PETITIONER GUILTY OF TWO COUNTS OF SEXUAL BATTERY AND ONE COUNT OF LEWD MOLESTATION WHERE EACH COUNT AROSE FROM ACTS COMMITTED DURING A SINGLE EPISODE AGAINST A SINGLE VICTIM.

Petitioner was convicted of two counts of sexual battery by a person in familial or custodial authority and one count of lewd and lascivious molestation. He contends the convictions violate constitutional strictures against double jeopardy. Respondent respectfully disagrees.

The written opinion of the Fourth District Court of Appeal clearly states that, although the incident lasted "approximately five minutes," the victim testified that Petitioner (1) fondled her breasts, (2) penetrated her with his finger, and (3) touched her vagina with his penis. There is no question that section 800.04(5)(a) Florida Statutes makes it a crime to intentionally touch "in a lewd or lascivious manner the breasts . . . or the clothing covering them, of a person less than 16 years of age." See State v. Paul, 934 So.2d 1167 (Fla. 2006). However here, unlike Paul, the Petitioner was convicted of only one "touching" offense. The two other crimes of which he was convicted consisted of penetrating the victim with his finger and touching her vagina with his penis.

This Court has made it absolutely clear that the prevailing standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature "intended to authorize separate punishments for the two crimes." See State v. Paul, supra, at 1171 -1172; M.P. v. State, 682 So.2d 79, 81 (Fla.1996); State v. Anderson, 695 So.2d 309, 311 (Fla.1997) ("Legislative intent is the polestar that guides our analysis in double jeopardy issues····"). Courts employ the Blockburger[1] test only when there is an absence of a clear statement of legislative intent to authorize separate punishments for two crimes.

In the case of Florida, legislative intent could not be more clear. Section 775.021(4), Florida Statutes (2005) provides:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection,

[1] Blockburger v. United States, 284 U.S. 299 (1932).

offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Section 794.011(8)(b), Florida Statutes, provides that "a person who is in a position of familial or custodial authority to a person less than 18 years of age and who . . . [e]ngages in any act with that person while the person is 12 years of age or

older but less than 18 years of age which constitutes sexual battery under paragraph (1)(h) commits a felony of the first degree . . .” Section 793.01 defines sexual battery as “oral, anal or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object . . .” It is well settled law that sexual battery can be accomplished by either union with or penetration of the victim’s body. “Union permits a conviction based on contact with the relevant portion of the anatomy, whereas penetration requires some entry into the relevant part, however slight.” See Seagrave v. State, 802 So.2d 281, 287 n.7 (Fla. 2001)(emphasis in the original); Richards v. State, 738 So.2d 415, 418 (Fla. 2nd DCA 1999) (a defendant's finger is an “other object,” which must penetrate and not merely have union with the relevant part).

It is indisputable that the Petitioner in the case under review committed three separate acts resulting in three separate crimes: (1) fondling the victim’s breasts in violation of section 800.04(5), Florida Statutes; (2) penetrating her with his finger in violation of section 794.011(8)(b), Florida Statutes; and (3) touching her vagina with his penis (i.e., having “union” with her) in violation of section 794.011(8)(b), Florida Statutes. It is possible to violate each one of those subsections without automatically violating any other section, and therefore, each crime is utterly distinct.

Petitioner's argument that the crimes of which he was convicted happened in the course of a single criminal episode is equally flawed. "In order to determine whether offenses occurred during a single criminal episode, courts look to whether there are multiple victims, whether the offenses occurred in multiple locations, and whether there has been a 'temporal break' between offenses." See State v. Paul, supra, at 1173.

It is well settled that in order for crimes to be considered to have occurred in more than one criminal episode, there must be a sufficient temporal break between the two acts in order to allow the offender to reflect and form a new criminal intent for each offense. See, e.g., Cabrera v. State, 884 So.2d 482, 484 (Fla. 5th DCA 2004); Eaddy v. State, 789 So.2d 1093, 1095 (Fla. 4th DCA 2001). In addition, Florida courts have distinguished between violations which take place at the same time (and thus constitute a single act), and violations which consist of multiple acts within a single episode. See, e.g., Danestan v. State, 939 So.2d 1132 (Fla. 4th DCA 2006) (holding that where defendant got on top of the victim, kissed her, unbuckled and took off and took off his pants, and ejaculated on her); Leyva v. State, 925 So.2d 393, 395 (Fla. 4th DCA 2006) (the acts of pushing the victim down on the bed and rubbing her leg constituted one incident).

The facts in the case at bar clearly show the encounter between the

defendant and his victim to be a series of discrete acts that proceeded in a logical, deliberate and progressive manner. Petitioner began with the least offensive type of contact – touching her breasts – and escalated his actions a step at a time until his penis finally was in union with her vagina. Given those facts, there can be no question that there was one improper touching, and two separate penetrations: three separate crimes arising from three separate acts, between each of which the "defendant had time to pause, reflect, and form a new criminal intent between the occurrences." See, e.g., Eaddy v. State, supra.

Clearly, the facts of the case at bar show a series of discrete, separate acts which under Florida law must be punished separately. There was no error in the Fourth District Court of Appeal's decision, and it should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent respectfully contends the decision of the Fourth District Court of Appeal should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" was sent by courier to TAJANA OSTAPOFF, Esq., Assistant Public Defender, The Criminal Justice Building, 421 3rd Street/Sixth Floor, West Palm Beach, FL 33401 and by e-mail to appeals@pd15.state.fl.us on January 9, 2007.

_____

JOSEPH A. TRINGALI,
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Respondent/Appellee hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

_____

JOSEPH A. TRINGALI,
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APPENDIX

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