

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTHONY DARVILLE,)	
)	
Petitioner,)	
)	
vs.)	CASE NO.
)	
STATE OF FLORIDA,)	
)	
Respondent.)	
)	
_____)	

PETITIONER’S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner as the Appellant in the Fourth District Court of Appeal and the defendant in the lower tribunal. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of sexual battery by a person in familial or custodial authority and lewd and lascivious molestation. At trial, the State adduced evidence that Petitioner fondled the breasts of the victim, penetrated her with his finger, and touched her vagina with his penis. All three acts occurred within minutes of each other, with the entire incident lasting only about five minutes.

On direct appeal, Petitioner argued that his multiple convictions for sex offenses based on the single episode were barred by the double jeopardy clause. Despite its own ruling supporting Petitioner's argument under similar circumstances in Eaddy v. State, 789 So. 2d 1093 (Fla. 4th DCA 2001), the Fourth District Court of Appeal affirmed all of Petitioner's convictions in the instant case, over the dissenting opinion of Judge Stone. The decision of the appellate court was rendered on September 28, 2005.

On October 21, 2005, Petitioner noticed his intent to seek discretionary review of the district court's opinion in this Court. This jurisdictional brief follows.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case directly and expressly conflicts with the decisions of other district courts of appeal on the issue of whether the double jeopardy clause bars multiple convictions of sexual battery and lewd assault where there is only a single episode of sexual activity.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE ISSUE OF WHETHER THE DOUBLE JEOPARDY CLAUSE BARS MULTIPLE CONVICTIONS FOR SEXUAL BATTERY AND LEWD ASSAULT WHERE THERE IS ONLY A SINGLE EPISODE OF SEXUAL ACTIVITY.

In Eaddy v. State, 789 So. 2d 1093 (Fla. 4th DCA 2001), the Fourth District Court of Appeal held that the double jeopardy clause barred a defendant's convictions for multiple counts of lewd and lascivious conduct based on a single episode in which the defendant touched the victim's vagina and also touched her breasts. The Court held:

In determining what qualifies as a distinct act for purposes of deciding whether multiple acts can be charged in a single count, the spatial and temporal aspects of the multiple occurrences must be analyzed in order to determine whether the defendant had time to pause, reflect, and form a new criminal intent between the occurrences. Here, the record fails to reflect that, during the first trip to the sugar cane fields, the Defendant had time to pause, reflect and form a new criminal intent. Although the victim testified the Defendant touched her breasts and vagina during the first trip, she did not testify as to how much time, if any, elapsed between the inappropriate touchings. Accordingly, to deem the acts separate and distinct in this case, as the State argues, would violate the Defendant's right to be free from double jeopardy. *See Pryor v. State*, 755 So. 2d 155 (Fla. 4th DCA 2000).

Id. at 1095.

Eaddy's reasoning was adopted by the Second District Court of Appeal in Mormon v. State, 811 So. 2d 714 (Fla. 2d DCA 2002), when it found that double jeopardy barred the defendant's multiple convictions for touching the victim's bottom and breasts during a single episode of sexual activity, and that it likewise barred multiple convictions for a second incident where the defendant rubbed his clothed penis against the victim's vagina and squeezed her chest.

Within each day's episode there was practically simultaneous touching of two proscribed areas (breast and buttocks areas on Friday, and breast and genital areas on Saturday). Thus, the various lewd and lascivious acts were not sufficiently discrete for them to be deemed separate offenses within each episode. Upon remand, the court must strike the two convictions as violating double jeopardy.

Id. at 717. *See also* Gisi v. State, 848 So. 2d 1278, 1282 (Fla. 2d DCA 2003) (finding appellate counsel ineffective for failing to argue that two out of defendant's three convictions were barred by double jeopardy prohibition, where episode constituted a single course of conduct).

The same conclusion was reached by the Third District Court of Appeal in Cabanela v. State, 871 So. 2d 279 (Fla. 3rd DCA 2004). The defendant in that case was charged with four counts of lewd assault upon a child by (1) placing his mouth or tongue in union with the victim's vagina; (2) fondling the victim's vagina; (3) fondling the victim's breasts; and (4) placing his tongue or lips in union with the victim's breast.

In the instant case, it is clear to us that all of the acts for which Cabanela was charged, convicted, and sentenced arose out of a single criminal episode which the victim agreed occurred in a short period of time. There was no significant spatial and/or temporal break between and of the activities for Cabanela to pause, reflect, and form a new criminal intent to commit separate offenses. For this reason, three of his four convictions and sentences must be vacated.

Id. at 282.

In the present case, the single sexual contact between the victim and Petitioner similarly occurred within a period of mere minutes and in a single location. Nevertheless, the Fourth District Court of Appeal affirmed Petitioner's multiple convictions, relying in part on its own prior decision in Paul v. State, 912 So.2d 8 (Fla. 4th DCA 2005). But that case affirmed convictions for acts were spatially separated: some of them occurred in the living room and some in the bedroom. No such spatial separation occurred in the instant case.

The Fourth District Court of Appeal also sought support for its decision in the instant case from another case recently decided by it, Schwenn v. State, 898 So. 2d 1130 (Fla. 4th DCA 2005), which, however, involved separate acts of sexual battery, i.e., penetration. In Schwenn, the Court had held:

Even though there were three events of vaginal penetration and three of anal penetration, each was separated from a similar event by another type of sexual battery. Thus, they were distinct in character and temporally separated, which gave the defendant sufficient

time between each penetration to reflect and from a new criminal intent.

Id. at 1132. But while an argument may be made that sexual batteries involving *penetration* could not all physically be committed at the same time by a single person, the same cannot be said for the acts committed by Petitioner in the instant case, only one of which involved actual penetration: the second act consisted of union with the victim's vagina, and the third was fondling (touching) her breasts.

Factually, then, the instant case was like those which resulted in decisions reversing the multiple convictions in the Second, Third and Fifth Districts, rather than those relied on by the Fourth District to justify its contrary decision below. Moreover, the reasoning employed by the Fourth District in these cases and those cited by it does not provide a sufficient basis for distinguishing them from the cases decided by the other district courts of appeal. In fact, this Court has accepted discretionary jurisdiction of Paul based on the direct conflict certified in that case between it and Hunsicker v. State, 881 So. 2d 1166 (Fla. 5th DCA 2004). State v. Paul, Case No. SC05-656 (oral argument scheduled January 9, 2006). That the decision relied on by the Fourth District Court of Appeal in support of its conclusion in the instant case is presently pending before this Court provides further compelling grounds for this Court to accept jurisdiction of the instant appeal to clarify the parameters of the double jeopardy clause in cases like this one, involving multiple convictions based on a single episode of sexual activity. *Cf.*

Williams v. State, 639 So. 2d 614 (Fla. 1994). Consequently, this Court should exercise its discretion so that the confusion in this area of the law may be resolved.

CONCLUSION

Based on the foregoing argument and the authorities cited, Appellant requests that this Court exercise its discretion and accept jurisdiction of the instant cause for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joseph A. Tringali, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of NOVEMBER, 2005.

Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2), this ____ day of NOVEMBER, 2005.

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