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 JURISDICTION

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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;

JB = Petitioner's Initial Brief on Jurisdiction

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 for the purpose of determining jurisdiction in this appeal. 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 has failed to show conflict with any decision of this Court or the settled rule of law. The cases cited by Petitioner all involve multiple counts of lewd and lascivious conduct based on touching the victim, and in each case the appellate court's focus was not so much on the spatial and temporal aspects of the multiple occurrences, as it was in analyzing the occurrences to determine whether the defendant had time to pause, reflect, and form a new criminal intent between them.

The case at bar is completely different. Here, the Fourth District considered a case in which the defendant fondled the victim's breasts, and then penetrated 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 logical, deliberate 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."

His petition for review should be denied.

ARGUMENT

PETITIONER HAS IMPROPERLY INVOKED THE JURISDICTION OF THIS COURT; THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR WITH THE SETTLED RULE OF LAW.

Petitioner asks this Court to use its power of discretionary jurisdiction to review a decision of the Florida Fourth District Court of Appeal. Petitioner clams the Fourth District opinion conflicts with the opinions of the Second District Court of Appeal in *Mormon v.* State, 811 So.2d 714 (Fla. 2nd DCA 2002), the Third District Court of Appeal in *Cabanella v. State,* 871 So.2d 279 (Fla. 3rd DCA 2004) and with its own opinion in *Eaddy v. State,* 789 So.2d 1093 (Fla. 4th DCA 2001). Respondent strenuously disagrees.

To properly invoke the conflict jurisdiction of this Court, Petitioner must demonstrate that there is express and direct conflict between the decision challenged therein, and those holdings of other Florida appellate courts or of this Court on the same rule of law so as to produce a different result than other state appellate courts faced with the substantially same facts. Article V, §3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(iv). This Court has stated that "conflict between decisions must be expressed and direct, i.e., it must appeal within the four corners of the majority opinion." *Reaves v. State,* 485 So. 2d 829, 830 (Fla. 1986).

In *Mormon v. Acosta*, 811 So.2d 714 (Fla. 2nd DCA 2002), the Second District was faced with a situation in which the defendant was convicted of four counts of lewd and lascivious conduct for molesting the victim on two separate days: touching her breasts and buttocks on Friday night, and on Saturday rubbing his body against her and squeezing her chest. The Second District held that the focus of section 800.04, Florida Statutes "is on conduct involving sexual activity and not upon the individual acts that comprise lewd and lascivious activity in the same spatial and temporal zone." (emphasis added) Based on the facts, the Court found that "within each day's episode there was practically simultaneous touching of two proscribed areas," and held that upon remand the trial court "must strike two convictions as violating double jeopardy."

In *Cabanela v. State*, 871 So.2d 279 (Fla. 3rd DCA 2004), the Third District considered a case in which a defendant had been four counts of lewd assault upon a child under the age of sixteen; specifically as follows: Count I-sexual battery by placing his mouth in union with the vagina of the victim and/or placing his tongue in union with the vagina of the victim; Count II-fondling and/or handling and/or touching and/or rubbing the vagina; Count III-fondling and/or handling and/or touching and/or rubbing the breasts of the victim; Count IV-placing his tongue and/or lips in union with the breast of the victim and/or licking the breast of the

victim. The Third District concluded that "double jeopardy considerations preclude multiple convictions and sentences for lewd and lascivious behavior which arise out of a single criminal episode where there is no significant spatial and/or temporal break in the episode. 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." (*Cabanela,* 871 So.2d at 282, emphasis added). Likewise in *Eaddy v. State,* 789 So.2d 1093 (Fla. 4th DCA 2001), the Fourth District held that a defendant could not be convicted of two counts of lewd and lascivious conduct for touching the breasts and vagina of the victim during a trip to the sugar cane fields, saying, "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. (citations omitted). 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." The Court followed the same

rationale in its opinion in *Paul v. State,* 912 So.2d 8 (Fla. 4th DCA 2005), which was argued in this Court on January 9, 2005. In *Paul* the Fourth District said, "[W]here a defendant is charged with lewd and lascivious battery, the different acts of touching are to be viewed with reference to the spatial and temporal aspects of the surrounding circumstances in order to determine whether the defendant had time to pause, reflect and form a new criminal intent between occurrences." *Paul,* id., at 10.

A close examination of all of the opinions cited by Petitioner shows they are factually consistent: they all involve multiple counts of lewd and lascivious conduct based on touching the victim, and in each case the appellate court's focus was not so much on the spatial aspects of the multiple occurrences, as it was in analyzing the occurrences to determine whether the defendant had time to pause, reflect, and form a new criminal intent between them. In each case the court refused to engage in geographic demarcation of the victim's body; it held that when the defendant moved "his hands up and down over her person," he was engaging in one act of lewd and lascivious conduct regardless of how many off-limits zones he covered.

The case at bar is completely different. Here, the Fourth District considered a case in which the defendant fondled the victim's breasts, and then penetrated 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 logical, deliberate and progressive 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." *Eaddy*, 789 So.2d at 1095); *Paul*, 912 So.2d at 10.

The opinion of the Fourth District Court of Appeal in the case at bar is a logical extension of its opinion in *Eaddy*, and is not in conflict with the holding of the holding of the Second District in *Mormon* or the Third District in *Cabanela.* Accordingly, there is no conflict with any decision of this Court or any of the district courts of appeal. Petitioner's petition for discretionary review should be denied.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent respectfully contends the decision of the Fourth District Court of Appeal is not in conflict with any decision of this Court or any of the district courts, and, therefore, this Court should decline jurisdiction in the premises.

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 Jurisdiction" 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 _____, 2006.

_____

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,
Assistant Attorney General
Counsel for Respondent

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APPENDIX

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