Electronically Filed 06/12/2013 10:03:01 AM ET

RECEIVED, 6/12/2013 10:03:32, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

JAMES HOUSTON ROUGHTON, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	Case No. SC12-1719

ON PETITION FOR REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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STATEMENT OF CASE AND FACTS

The State charged James Houston Roughton (petitioner) with one count of sexual battery (Count 1) and three counts of lewd or lascivious molestation (Counts 2-4) of C.H. arising from events that occurred in Orange County, Florida on October 20, 2008. R. 16. The matter was tried to a jury.

C.H. was sick on October 20, 2008 and did not attend school. He arrived at petitioner's home around 6:30 a.m. Petitioner's wife left around 10:30 a.m. Petitioner arrived around 12:30 p.m. and made lunch for C.H. After lunch petitioner and C.H. played computer games for approximately 45 minutes and then watched TV until C.H.'s mother arrived. TR. 240-43, 274-78.

During the drive home C.H. was uncharacteristically quiet. C.H.'s father tried to talk to him but C.H. said nothing happened. His father then asked C.H.'s

aunt to talk with him. C.H. eventually told his aunt and a CPT interviewer that petitioner touched his penis under his clothes and then removed his pants and touched his penis with his hands and mouth. Over appellant's objection a video of the CPT interview was published to the jury. TR. 33-38, 78-81, 105-06, 156-57, 195-207. Petitioner denied touching C.H. TR. 281-82.

At the close of the State's case the trial court granted petitioner's motion for judgment of acquittal on Count 4. The jury found appellant guilty on Counts 1, 2, and 3. At sentencing the State admitted that Count 2 is based upon the same conduct as Count 1 and asked the trial court to adjudicate on Count 2 but not impose a sentence because "if there were something happened [sic] on appeal, then we would reserve the right to sentence him on Count II." The trial court sentenced petitioner to incarceration for life for sexual battery and life with a 25-year mandatory minimum for lewd or lascivious molestation. The sentences are concurrent. Appellant timely appealed. TR. 220-21, R. 285, 288, 301, 320, TR. 220-21.

On appeal petitioner argued that convictions for sexual battery and lewd and lascivious molestation violate double jeopardy. The district court utilized the Blockburger test and determined that lewd and lascivious molestation requires a specific lewd or lascivious intent and that sexual battery requires either

penetration or oral, anal or vaginal union with the sexual organ of another. The court further found that the two offenses are not degrees of the same offense and that one is not subsumed by the other. The court held that because lewd and lascivious molestation and sexual battery are separate statutory offenses not subject to any of the enumerated exceptions, convictions arising from the same act do not violate the prohibition against double jeopardy. The court affirmed the convictions and certified direct and express conflict with Berlin v. State, 72 So.3d 284 (Fla. 1st DCA 2011), Smith v. State, 41 So.3d 1041 (Fla. 1st DCA 2010, Robinson v. State, 919 So.2d 623 (Fla. 2d DCA 2006), and Johnson v. State, 913 So.2d 1291 (Fla. 2d DCA 2005).

SUMMARY OF ARGUMENT

This case involves a single act: petitioner placed his mouth on a child's penis. Under the district court's analysis to support a conviction for lewd and lascivious molestation and a conviction for sexual battery one must conclude that petitioner placed his mouth on the child's penis with a wicked, lustful, unchaste, licentious or sensual intent while simultaneously placing his mouth on the child's penis without that intent. Regardless of petitioner's intent, it is impossible to place one's mouth on a penis without touching the penis.

The present definition of sexual activity for the purpose of section 800.04, Florida Statutes, is virtually identical to the definition of sexual battery for crimes under section 794.011, Florida Statutes. Both are intended to prohibit the same basic conduct. Lewd or lascivious conduct should remain its own charge in Ch. 800 and kept separate from Ch. 794.

ARGUMENT

CONVICTIONS FOR LEWD AND LASCIVIOUS MOLESTATION AND SEXUAL BATTERY BASED UPON A SINGLE ACT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Standard of Review

Determining whether double jeopardy is violated based on undisputed facts is a purely legal determination. The standard of review is de novo. Binns v. State, 979 So.2d 439, 441 (Fla. 4th DCA 2008).

Analysis

This case involves a single act: petitioner placed his mouth on the child's penis. Under the district court's analysis to support a conviction for lewd and lascivious molestation and a conviction for sexual battery one must conclude that petitioner placed his mouth on the child's penis with a wicked, lustful, unchaste, licentious or sensual intent while simultaneously placing his mouth on the child's penis without that intent. Petitioner agrees with the district court that there is no specific statement by the legislature that it intended to punish these offenses separately; however, petitioner questions the logic of distinguishing a single touching when the touching is inherent in the very act. It is impossible to place one's mouth on a penis without touching the penis. This type of analysis

illustrates the difficulty facing Florida courts and the fallacy in the argument that dual convictions for sexual battery and lewd or lascivious molestation based upon a single act is not a double jeopardy violation. Lewd or lascivious conduct should remain its own charge in Ch. 800 and kept separate from Ch. 794.

Prosecutions of child sexual abusers arise under two felony statutes: section 800.04, Florida Statutes, prohibiting sexual battery or section 794.011, Florida Statutes, prohibiting, inter alia, lewd or lascivious molestation. The sexual battery statute imposes a mandatory sentence of life without parole; punishment under section 794.011 can be a life felony, a second degree felony, or a third degree felony depending upon the age of the offender and the age of the victim. Over time the lines between lewd or lascivious conduct and sexual battery have become blurred.

For many years the lewd or lascivious statute contained language that excluded the commission of a sexual battery as part of its definition. Prior to 1984 the statute read:

> 800.04 Lewd, lascivious or indecent assault or act upon or in presence of child.-Any person who shall handle, fondle or make an assault upon any child under the age of fourteen (14) years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, <u>without the intention to commit involuntary sexual battery</u>, shall be

> guilty of a felony of the second degree[.] (Emphasis added.)

The statute was amended in 1984 to correct some problems such as the victim's lack of chastity or consent as a defense, but the intent to keep lewd and lascivious conduct separate from sexual battery was strengthened:

> 800.04 Lewd, lascivious or indecent assault or act upon or in presence of child.-Any person who shall:
>
> (1) Handle, fondle or make an assault upon any child under the age of 16 years in a lewd, lascivious or indecent manner;
>
> (2) Commit an act defined as sexual battery under s.794.011(1) (f) upon such child; or
>
> (3) Knowingly commit any lewd or lascivious act in the presence of such child, without committing the crime of sexual battery shall be guilty of a felony of the second degree[.] (Emphasis added.)

Ch. 84-86, sec. 5.

The language of "without committing the crime of sexual battery" remained in the statute until 1999 when the legislature added subsections for additional offenses. It was during that major overhaul that the line between sexual battery and lewd or lascivious battery was dissolved. As a result, there has been a great deal of confusion as to whether or not they are the same crime when arising from the same conduct.

In Johnson v. State, 913 So.2d 1291 (Fla. 2d DCA 2005) the defendant was convicted of sexual battery by putting his penis inside the vagina of a nine-year-old victim. The Second District found a double jeopardy violation because the offense of sexual battery and the offense of lewd and lascivious molestation were both perpetrated on the same victim, at the same time and place, during the same criminal episode. See also, Gisi v. State, 909 So.2d 531 (Fla. 2d DCA 2005) (multiple convictions for lewd and lascivious acts when incidents not discrete constituted double jeopardy violation); Tannihill v. State, 848 So.2d 442 (Fla. 4th DCA 2003) (convictions for sexual battery and lewd and lascivious battery based on same act constituted double jeopardy violation).

The following year the Second District decided Robinson v. State, 919 So. 2d 623 (Fla. 2d DCA 2006). Robinson was convicted of both sexual battery and lewd or lascivious molestation based upon a single act of digital penetration under the 1999 version of section 800.04. The court found that convictions for sexual battery and lewd or lascivious molestation violate double jeopardy protection when the offenses are both perpetrated on the same victim, at the same time and place, during the same criminal episode. Robinson at 623.

In 2010 the First District utilized the Blockburger[1] test to reverse dual convictions for sexual battery and lewd or lascivious molestation. Smith v. State, 41 So.3d 1041 (Fla. 1st DCA 2010). The court recognized that the standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal episode is whether the legislature intended to authorize separate punishments for the two crimes and that absent a clear statement of legislative intent to authorize separate punishments for two crimes, courts employ the Blockburger test, codified in section 775.021(4), Florida Statutes, to determine whether separate offenses exist. The court engaged in a three part analysis.

First, the court must determine whether the offenses occurred within the same criminal episode. Second, the court must determine whether there is more than one distinct act upon which the offenses are predicated. Third, the court must engage in the Blockburger same-elements test, i.e., whether each offense has an element the other does not, and if so whether one of the exceptions set forth in section 775.021(4)(b) applies to preclude separate convictions and sentences. If it is determined that the charged offenses occurred in different criminal episodes or constituted different acts, the offenses do not violate double jeopardy and no further analysis is required. Smith at 1042. Utilizing the Blockburger test the

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[1]Blockburger v. United States, 52 S.Ct. 180 (1932).

court concluded that the criminal act under both section 794.011(2)(a) and section 800.04(5) is an intentional touching of the type prohibited by the respective statutes and constitute the same offense. The Court distinguished State v. Meshell, 2 So.3d 132 (Fla. 2009) on the ground that the testimony at trial showed that the proof of the touching to support the lewd or lascivious charge was the same touching which occurred in the sexual battery. Smith at 1043.

The court followed the same reasoning in Berlin v. State, 72 So.3d 284 (Fla. 1st DCA 2011) where the first count of sexual battery was based on union with or penetration of the child's vagina by the defendant's penis and the second count was based on union with or penetration of the child's anus with the defendant's penis. There was no separate act that formed the basis for the lewd or lascivious charge, and the court found a double jeopardy violation.

The Second District has adopted the same analysis. In State v. Drawdy, 98 So.3d 165 (Fla. 2d DCA 2012)[2] the defendant was charged with sexual battery by penetrating the victim's vagina with his penis and with lewd or lascivious molestation by touching the victim's breasts, genitals, genital area, or buttocks. The court held that convictions for both sexual battery and lewd or lascivious molestation violate double jeopardy. The holding was based upon the court's

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[2]SC 12-2021.

determination that the elements of lewd or lascivious molestation are subsumed into the elements of sexual battery. The crux of the issue is explained in Judge Altenbernd's concurring opinion:

> As the cases cited by the court's opinion demonstrate, standard Blockburger analysis is often an unsatisfactory method to resolve double jeopardy in cases of sexual misconduct because our sense of the separateness of these crimes or, alternately, our sense that two or more offenses are inextricably intertwined conduct is not adequately explained by a difference in the English language description of the elements of these offenses. Indeed, even providing a definition of 'single criminal episode' has been extremely difficult in these cases. The courts have repeatedly struggled with the limitations created by double jeopardy – as a constitutional question – because we do not have a statute that would allow the matter to be more simply resolved as a statutory question.

The Second District followed the Blockburger application of Beahr v. State, 992 So.2d 844 (Fla. 1st DCA 2008), abrogated by Roberts v. State, 39 So.3d 372 (Fla. 1st DCA 2010). Beahr held that sexual battery included an element (penetration or union) not included in lewd or lascivious molestation but the converse was not true; rather, the elements of lewd or lascivious molestation [were] subsumed by the elements of the more serious crime of sexual battery. Beahr, 992 So.2d at 847. The court concluded that sexual battery cannot occur without a touching of one of the body parts listed in section 800.04(5). Because sexual battery requires such a

touching, one cannot commit sexual battery without simultaneously committing a lewd or lascivious molestation prohibited in section 800.04(5). Drawdy at 170. See also, Webb v. State, 104 So.3d 1153 (Fla. 4th DCA 2012) (if the offenses occurred in the same criminal episode, the defendant may be convicted of only one offense for each episode).

From the creation of the statute in 1943 until 1999, it contained language prohibiting the finding of lewd and lascivious acts if sexual battery was present. The specific language and the names of the offenses changed over the years as the sexual battery law changed, but the intent to prevent the double charging of the crime remained constant. In 1999 the statute was rewritten to create separate offenses for lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, and lewd or lascivious exhibition. The amendment removed the language "without committing the crime of sexual battery." The summary of the purpose of the act does not mention the removal of the language; however, the Senate Staff Analysis and Economic Impact Statement for the final version states that the statute would be amended to provide definitions, to break down the offenses to clearly indicate the different types of criminal behavior that would be prohibited, and to impose different penalties depending on the age of the

offender.[3] The present definition of sexual activity for the purpose of section 800.04 is virtually identical to the definition of sexual battery for crimes under section 794.011. Both are intended to prohibit the same basic conduct. Issues concerning the 1999 amendments to section 800.04 seem to be arising with some frequency. Williams v. State, 922 So. 2d 418, 420-21 (Fla. 2d DCA 2006) approved, 957 So. 2d 595 (Fla. 2007). This court should adopt the more rational line of reasoning in the decisions of the First, Second, and Fourth District Courts.

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[3]http://archive.flsenate.gov/data/session/1999/Senate/bills/analysis.pdf/SB0170.cj.pdf.

CONCLUSION

Based upon the authorities cited and the argument presented this court should reverse the decision of the Fifth District Court of Appeal and remand for further consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118 and mailed to James Roughton, DOC No. 114753, Gulf CI, 500 Ike Steele Road, Wewahitchka, Florida 32465-0010 this 12 day of June 2013.

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CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14pt.

Edward J. Weiss for

Dee Ball
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

JAMES HOUSTON ROUGHTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC12-1719
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2012

11-329 DB

JAMES ROUGHTON,

Appellant,

v. Case No. 5D11-652

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed July 13, 2012

Appeal from the Circuit Court
for Orange County,
Bob Leblanc, Judge.

James S. Purdy, Public Defender, and Dee Ball, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

ORFINGER, C.J.

James Roughton appeals his convictions for sexual battery on a person under twelve years of age and lewd or lascivious molestation of a victim less than twelve years of age. Mr. Roughton asserts that because his convictions for sexual battery and lewd or lascivious molestation arise from the same criminal act, they violate his constitutional

protections against double jeopardy.[1] The State concedes that the convictions were based on the same act, but argues that the convictions do not violate double jeopardy. We affirm both convictions.[2]

'Determining whether double jeopardy is violated based on undisputed facts is a purely legal determination, so the standard of review is de novo." Binns v. State, 979 So. 2d 439, 441 (Fla. 4th DCA 2008). "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." Valdes v. State, 3 So. 3d 1067, 1070 (Fla. 2009) (quoting M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996)). Absent clear legislative intent to authorize separate punishments, courts employ the Blockburger[3] "same elements" test, i.e., "whether each offense has an element that the other does not," codified at section 775.021(4)(a), Florida Statutes (2008).[4] If each of the offenses has an element that the other does not,

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[1] Both counts of the information allege that Mr. Roughton placed his mouth on the victim's penis.

[2] Although the trial court adjudicated Mr. Roughton guilty of lewd or lascivious molestation, it failed to impose a sentence. Withholding the sentence on one of the two convictions does not cure a double jeopardy violation. See Bolding v. State, 28 So. 3d 956 (Fla. 1st DCA 2010).

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

[4] Section 775.021(4)(a), Florida Statutes (2008), states:

> 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, offenses are separate if

the court must then determine if one of the exceptions set forth in section 775.021(4)(b)[5] applies to preclude separate convictions and sentences. Valdes, 3 So. 3d at 1070.

Florida courts have reached differing conclusions about whether sexual battery and lewd or lascivious molestation have different elements. The Fourth District Court holds that the offenses of lewd or lascivious molestation and sexual battery each contain an element that the other does not. As a result, that court concluded that a conviction of both, arising from the same underlying act, is not a violation of double jeopardy. See, e.g., Darville v. State, 995 So. 2d 1025, 1027 (Fla. 4th DCA 2008) ("We have no difficulty in ascertaining that the lewd and lascivious molestation offense contains an element not found in the sexual battery conviction, and vice versa."). Conversely, the First and Second District Courts both hold that convictions of sexual battery and lewd or lascivious molestation arising from the same criminal act are barred by double jeopardy. See, e.g., Berlin v. State, 72 So. 3d 284, 284-85 (Fla. 1st DCA

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

[5] Section 775.021(4)(b), Florida Statutes (2008), states:

> 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.

2011); Smith v. State, 41 So. 3d 1041, 1043 (Fla. 1st DCA 2010) ("Lewd or lascivious molestation requires proof of an intentional touching of certain body parts, and sexual battery requires proof of penetration or union with those same body parts. The criminal act under both section 794.011(2)(a) and section 800.04(5) is an intentional touching of the type prohibited by the respective statutes. Under the Blockburger test, the two charged offenses arise from a single criminal act and constitute the same offense."); Robinson v. State, 919 So. 2d 623, 623 (Fla. 2d DCA 2006) (holding double jeopardy principles preclude convictions for both sexual battery and lewd or lascivious molestation based on one act); Johnson v. State, 913 So. 2d 1291, 1291 (Fla. 2d DCA 2005).

Here, there is no specific statement of legislative intent to have sexual battery and lewd or lascivious molestation punished separately when the two crimes arise from a single act. However, section 775.021(4)(a) establishes the general legislative intent to punish separate offenses that arise from the same act. Thus, we must utilize the Blockburger "same elements" analysis. Roberts v. State, 39 So. 3d 372, 373 (Fla. 1st DCA 2010). Comparing the lewd or lascivious and sexual battery statutes demonstrates that their elements are different. Lewd or lascivious molestation requires a specific lewd or lascivious intent, which sexual battery does not. Admittedly, lewd or lascivious intent is often associated with sexual battery, however, it is not an element of that crime, and may be committed without the intent for sexual satisfaction.[6] Surace v.

[6] The lewd or lascivious statute was substantially amended in 1999. Under the previous language, the proscribed acts expressly excluded "the crime of sexual battery." Welsh v. State, 850 So. 2d 467, 471 n.5 (Fla. 2003). Hence, cases decided prior to that amendment are not particularly helpful.

State, 378 So. 2d 895 (Fla. 3d DCA 1980) (holding intent to obtain sexual gratification not essential element of sexual battery); see State v. Wiley, 917 A.2d 501, 505 (Vt. 2007) (distinguishing sexual assault from lewd or lascivious conduct for double jeopardy purposes based upon intent).

In addition, the anatomy protected by the statutes is, or may be, different. For example, touching the buttocks of a child in a lewd manner would constitute a lewd or lascivious molestation, but would not constitute a sexual battery. Instead, sexual battery requires either penetration or oral, anal or vaginal union with the sexual organ of another, neither of which are elements of lewd or lascivious molestation. Further, the two offenses are not subject to any of the three exceptions set out in section 775.021(4)(b) in that they do not require identical elements of proof, are not degrees of the same offense as provided by statute, nor is one subsumed by the other. Hence, because they are separate statutory offenses not subject to any of the enumerated exceptions, convictions of lewd or lascivious molestation and sexual battery arising from the same act do not violate the prohibition against double jeopardy.

For these reasons, we affirm Mr. Roughton's convictions. In doing so, we certify direct and express conflict with Berlin v. State, 72 So. 3d 284 (Fla. 1st DCA 2011); Smith v. State, 41 So. 3d 1041 (Fla. 1st DCA 2010); Robinson v. State, 919 So. 2d 623 (Fla. 2d DCA 2006); and Johnson v. State, 913 So. 2d 1291 (Fla. 2d DCA 2005).[7]

AFFIRMED; CONFLICT CERTIFIED.

PALMER and EVANDER, JJ., concur.

[7] We find no merit in Mr. Roughton's Williams rule argument and decline to address it.