IN THE SUPREME COURT OF THE STATE OF FLORIDA

EDWIN MURPHY,

Petitioner,

v.

CASE NO. SC12-27
5DCA CASE NO. 5D09-3771

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

Respondent rejects Murphy's statement of the case and facts. As this court held in *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986), "[t]he only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict." Murphy's statement of the case and facts contains facts not contained within the decision he seeks review of and is improper.

In affirming Murphy's convictions and sentences, the Fifth District Court of Appeal set forth the following:

> Edwin Murphy (defendant) appeals his judgment and sentence on the charge of attempted sexual battery. Determining that the trial court committed fundamental error by sentencing the defendant without appointing him counsel for his sentencing hearing, we reverse and remand for resentencing.
>
> A jury convicted the defendant of committing the crimes of attempted sexual battery and lewd or lascivious molestation. The defendant was sentenced to 30 years' incarceration for lewd or lascivious molestation, including a 25-year mandatory minimum sentence. The court did not enter an order adjudicating the defendant guilty or sentence the defendant on his attempted sexual battery conviction because of the potential for a double jeopardy violation.
>
> On direct appeal, this court reversed and remanded the defendant's case, ruling:

> In this [*Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)] appeal, Edwin Murphy's pro se brief raises one meritorious issue. Following a trial, Murphy was convicted of attempted sexual battery and lewd or lascivious molestation. At his sentencing hearing, Murphy sought dismissal of one of the two convictions on double jeopardy grounds. The trial judge, while conceding that a double jeopardy issue might exist, declined to rule on Murphy's motion. Instead, the court adjudicated Murphy guilty of lewd or lascivious molestation and sentenced him to prison, while taking no action on the attempted sexual battery charge. The State concedes this was error.
>
> A trial court must adjudicate and sentence a defendant convicted of a crime, or in an appropriate case, adjudicate the defendant not guilty due to a lack of sufficient evidence to convict, double jeopardy, or any other legally sufficient reason. The trial court may not simply refuse to act. Accordingly, we remand this matter to the trial court for the purpose of rendering an order with regard to the attempted sexual battery charge. If it is appropriate to adjudicate Murphy not guilty of that charge, it may do so. If not, it must adjudicate and sentence him for that crime.

Murphy v. State, 16 So. 3d 269 (Fla. 5th DCA 2009) (citations and footnote omitted). Judge Griffin concurred specially with the following opinion:

> The trial court appeared to be uncertain

> about the double jeopardy issue in this case, which was understandable given the uncertain state of the law. Since this case was decided, however, the Florida Supreme Court issued its decision in *State v. Meshell*, 2 So.3d 132 (Fla. 2009), which may inform the trial court's decision on remand.
>
> In this case, count one charged capital sexual battery, alleging that defendant's penis had union with the victim's vagina. Defendant was found guilty of attempted sexual battery, which means that defendant did some act in furtherance of the charged offense but failed to complete it. *See* § 777.04(1), Fla. Stat. (2008). Count three, which charged lewd or lascivious molestation of the same victim, alleged that defendant intentionally touched her genitals or the clothing covering her genitals. Unlike count one, count three did not allege that defendant used his penis, but alleged a lewd touching.

Murphy, 16 So.3d at 269-70.

On remand, the trial court conducted a sentencing hearing on the defendant's sexual battery conviction. The defendant was not appointed counsel for the hearing. The trial court adjudicated the defendant guilty and sentenced him to 15 years' incarceration to run concurrent with his 30-year sentence for lewd and lascivious molestation.

The defendant argues that the trial court committed reversible error by not appointing him counsel for his sentencing hearing, citing to case law holding that where the sentencing error is due to judicial error the defendant

is entitled to representation. *See Nickerson v, State*, 927 So. 2d 114, 117 (Fla. 4th DCA 2006). The State concedes that a defendant is generally entitled to counsel at sentencing or resentencing. . . .

* * *

The defendant also argues that his convictions for both attempted sexual battery and lewd and lascivious molestation violate his right against double jeopardy because both convictions arose from a single, continuous episode without a spatial or temporal break between each act to enable the defendant to form a new criminal intent for each separate act. We disagree.

The differences in the character and type of crime proven are as important as the spatial and temporal aspects when considering whether multiple punishments are appropriate. An analysis of those differences, as noted by Judge Griffin in her concurring opinion in the defendant's initial appeal, leads to the conclusion that the defendant's convictions for attempted sexual battery and lewd and lascivious molestation did not violate his double jeopardy rights. *See also State v. Meshell*, 2 So.3d 132, 135 (Fla. 2009) (holding that acts of oral, anal, and vaginal penetration, as prescribed by statute defining lewd and lascivious battery, are distinct criminal acts, such that separate punishments for those acts do not violate double jeopardy, despite the fact that they occurred in the same criminal episode).

Accordingly, the defendant's sentence for attempted sexual battery is reversed and this matter is remanded for a resentencing hearing at which the defendant shall be appointed counsel.

REVERSED and REMANDED.

Murphy v. State, 49 So. 3d 295 (Fla. 5th DCA 2010).

This court granted Murphy belated discretionary review.

SUMMARY OF ARGUMENT

This court lacks jurisdiction to review this case. The Fifth District's opinion does not expressly and directly conflict with a decision of this court or another district court. This court must decline to accept jurisdiction.

ARGUMENT

THIS COURT LACKS JURISDICTION TO REVIEW THIS CASE, AS THE FIFTH DISTRICT'S OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR ANOTHER DISTRICT COURT.

Murphy claims that the opinion of the Fifth District in Murphy, *supra*, is in express and direct conflict with decisions of this court and another district court. Contrary to his claim, there is no express and direct conflict. Murphy was charged with capital sexual battery based on the union of his penis with the victim's vagina, but he was found guilty of the lesser included offense of attempted sexual battery. *Murphy*, at 297. Murphy was also found guilty of one count of lewd or lascivious molestation based upon his intentional touching of the

victim's genitals or the clothing covering her genitals. *Id.* There was no allegation that Murphy used his penis to commit the lewd or lascivious molestation. *Id.* Murphy is under the mistaken belief that because his crimes were committed during one criminal episode he could only be convicted of one crime. Such is not the case. Capital sexual battery and lewd or lascivious molestation are charged under separate statutes. Also, each offense requires proof of an element the other does not. As found by the Fifth District, there was no double jeopardy violation in this case. *See McKinney v. State*, 66 So. 3d 852 (Fla. 2011); *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009).

Because there was no double jeopardy violation, there is no express and direct conflict between this court's decision in *State v. Meshell*, 2 So. 3d 132 (Fla. 2009), and *State v. Paul*, 934 So. 2d 1167 (Fla. 2006), *receded from*, *Valdes, supra*, and the decision from the Second District in *Brown v. State*, 25 So. 3d 78 (Fla. 2nd DCA 2009). In *Meshell*, this court specifically held "that sexual acts of a separate character and type requiring different elements of proof, such as those proscribed in the sexual battery statute, are distinct criminal acts that the Florida Legislature has decided warrant multiple punishments." *Meshell*, at 137. Murphy was convicted of separate crimes, the crimes charged concerned separate acts, the crimes charged were in violation of separate statutes, and each crime

required proof of an element the other did not. Thus, the decision in *Murphy* does not expressly and directly conflict with the decision of this court in *Meshell*.

Murphy also argues that the decision of the Fifth District expressly and directly conflicts with this court's decision in *Paul*, *supra*. However, in *Valdes* this court receded from its decision in *Paul* and adopted the reasoning of Justice Cantero's special concurrence in *Paul*. *Valdes*, at 1068. Again, Murphy was convicted of separate crimes, the crimes charged concerned separate acts, the crimes charged were in violation of separate statutes, and each crime required proof of an element the other did not. Even had this court not receded from *Paul*, there would be no conflict.

Murphy further argues that the Fifth District's decision conflicts with the decision of the Second District in *Brown*, *supra*. There is no conflict. The decision in *Brown* issued from a petition alleging ineffective assistance of appellate counsel. The Second District did not find a double jeopardy violation occurred. Rather, they awarded Brown a new direct appeal in order to address the double jeopardy issue. *Brown*, at 80. Brown's convictions and sentences were later *per curiam* affirmed. *See Brown v. State*, 69 So. 3d 283 (Fla. 2nd DCA 2010).

Finally, the decisions in *Meshell*, *Paul* and *Brown* do not, and cannot,

conflict because they involve different factual situations. Thus, this is not a case where the same factual situation has resulted in different outcomes. *Contra McKean v. Warburton*, 919 So. 2d 341, 346 (Fla. 2005) ("A contrary result creates an apparent conflict because the same factual situation has resulted in different outcomes. See art. V, § 3(b)(3), Fla. Const."). As such, there is no express and direct conflict between the decision in *Murphy* and the decisions in *Meshell*, *Paul* and *Brown*. *See Gillis v. State*, 959 So. 2d 194 (Fla. 2007) (review initially accepted based on express and direct conflict; review dismissed because cases were factually distinguishable); *Horn v. Sheldon Greene & Associates, Inc.*, 502 So. 2d 421 (Fla. 1987) (review granted on basis of express and direct conflict; "Upon further examination of the record and reconsideration of the holdings of these two cases, we find they are factually distinguishable. We therefore dismiss the petition for review."); *Kaylor v. Kaylor*, 500 So, 530 (Fla. 1987) (same). This court lacks jurisdiction to review this case pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and Art. V, section 3(b)(3), Fla. Const.

CONCLUSION

Based on the arguments and authorities presented herein, respondent asserts that there is no express and direct conflict and this court must decline to accept

jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished to Edwin Murphy, #X62569, Jackson Correctional Institution, 5563 10th Street, Malone, Florida 32445, this ____ day of February, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is 14-point, Times New Roman.

_____

Bonnie Jean Parrish
Of Counsel