

IN THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

CASE NO.: CF16-007839-XX

CHESTER KWITOWSHI, JR.,
Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS – FLORIDA RULES OF
CRIMINAL PROCEDURE 3.190(C)(4)**

THIS MATTER came before the Court upon *Defendant's Motion to Dismiss – Florida Rules of Criminal Procedure 3.190(c)(4)*. After review of the Motion, applicable law, and being otherwise informed, the Court finds as follows:

In his Motion, the Defendant seeks to dismiss Counts 1, 2, and 3 of the information in this case. Counts 1, 2, and 3 charge the Defendant with a violation of Section 837.02(2), Florida Statutes, perjury in an official proceeding that relates to the prosecution of a capital felony. The information, in Counts 1, 2, and 3, alleges that the Defendant committed perjury in a case in which the defendant in that case was charged with sexual battery on a child under 12 years of age in violation of Section 794.011(2)(a), Florida Statutes. Section 794.011(2)(a) provides that sexual battery on a child under 12 years of age by a defendant 18 years of age or older is a capital felony. In his Motion, the Defendant argues that the Defendant could not be guilty of and punished for a violation of Section 837.02(2) as the case he testified in was not a case that involved a capital felony. The Court agrees.

Mills v. Moore, 786 So. 2d 532, 538 (Fla. 2001) states that a "capital felony" is by definition one punishable by death:

"The plain language of section 775.082 (1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082 (1) is read in pari materia with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death. Both sections 775.082 and 921.141 clearly refer to a "capital felony." Black's Law Dictionary defines "capital" as "punishable by execution; involving the death penalty." Black's Law Dictionary 200 (7th ed. 1999). Merriam-Webster's Collegiate Dictionary defines "capital" as "punishable by death . . . involving execution." Merriam-Webster's Collegiate Dictionary 169 (10th ed. 1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death." [See also Heuring v. State, 513 So. 2d 122, 123 (Fla. 1987) ("A capital felony is one that is punishable by death. Rusaw v. State, 451 So.2d 469 (Fla. 1984). Sexual battery is not punishable by death."]

Section 837.02 describes two degrees of perjury in an official proceeding. Subsection 1 involves perjury in a non-capital proceeding and is a third degree felony and subsection 2 involves perjury in a capital proceeding and is a second degree felony. Subsection 2 of Section 837.02 was added in 1997 well after the courts of this state had decided that first degree murder was the only remaining offense that could be described as a capital felony. Although Section 794.011(2)(a) still describes sexual battery on a child under 12 years of age by a defendant 18 years of age or older as a capital felony, sexual battery is no longer punishable by death and, therefore, could no longer be described as a capital offense. The Section 794.011(2)(a) description of sexual battery on a child under 12 years of age as a capital felony predates Buford v. State, 403 So. 2d 943 (Fla. 1981) which held it unconstitutional to extend the death penalty to the state's sexual battery laws.

This Court feels compelled to find that, in 1997, the legislature must be imputed with knowledge of the state of the law at that time. The legislature could have worded Section 837.02(2) to include non-capital felonies such as life felonies if they had so chosen. Additionally, as the Defendant suggests in his Motion, Section 837.02(2) was added as a reaction to Roberts v. State, 678 So. 2d 1232, 1236-37 (Fla. 1996), a first-degree murder capital felony case. The plain language of Section 837.02(2) indicates that it applies only to a capital felony and the only capital felony in this state at the time subsection 2 was added was one involving the death penalty. The Court also finds that any ambiguity that exists regarding the statutory language in this matter must be resolved in favor of the Defendant. [See State v. Weeks, 202 So. 3d 1 (Fla. 2016) and Section 775.021(1), Florida Statutes]

Based on the above, the Court finds that, if the Defendant were to be found guilty of committing perjury, he could not be found guilty of committing perjury in a capital proceeding.

It is, therefore, **ORDERED AND ADJUDGED** that Defendant's *Defendant's Motion to Dismiss – Florida Rules of Criminal Procedure 3.190(c)(4)* is **GRANTED**. Counts 1, 2, and 3 of the information filed in this case are dismissed.

DONE AND ORDERED in Bartow, Polk County, Florida, this 8th day of February, 2017.



JAMES A. YANCEY, Circuit Judge

cc:

-- James E. Felman, Esq., P.O. Box 3396, Tampa, FL 33601-3396
-- A.S.A. Bradford Copley, Esq.