

Third District Court of Appeal
State of Florida, July Term, A.D. 2009

Opinion filed July 22, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-1513
Lower Tribunal No. 04-25891

Chentee Maurice Key,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Rosa I. Rodriguez, Judge.

Chentee Maurice Key, in proper person.

Bill McCollum, Attorney General, for appellee.

Before RAMIREZ, C.J., and COPE and WELLS, JJ.

PER CURIAM.

This is an appeal of an order summarily denying a motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a). Because the motion was filed within two years after the issuance of the mandate in Key v. State, 990 So. 2d 529 (Fla. 3d DCA 2008), it could also be viewed as a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850.

In the motion, defendant-appellant Key contends that the charging document and verdict form do not support a conviction under subsection 794.011(3), Florida Statutes (1995), for armed sexual battery. For counts one, two, and three, the jury checked a box on the verdict form finding the defendant “GUILTY of Sexual Battery while armed with a deadly weapon **or** in the process used physical force likely to cause serious injury[.]” The jury did not check a box stating that “the deadly weapon used was a firearm[.]”

The defendant argues that on counts one through three he was charged with possessing a firearm or destructive device during the sexual battery. He points out that the charging document did not contain an allegation that he used “actual physical force likely to cause serious personal injury” § 794.011(3), Fla. Stat. (2005). He maintains that his offense must be reduced to the lesser included offense of sexual battery under subsection 794.011(5), Florida Statutes (2005).

We have taken judicial notice of the defendant’s file in his direct appeal. The identical issue was raised in the defendant’s initial brief and the motion for

rehearing. We did not address the issue in the panel opinion, but we denied the motion for rehearing by unpublished order, stating, “The motion for rehearing is denied on the merits on authority of the controlling and indistinguishable case of DuBoise v. State, 520 So. 2d 260, 264-65 (Fla. 1988).” As the issue has already been decided, we affirm the order now before us.

Affirmed.