IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,368

THE STATE OF FLORIDA,

Petitioner,

vs.

JULES BOIVIN,

Respondent.

FILED
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JUN 11 1984
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ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, Jules Boivin, was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The Petitioner, the State, was the prosecution in the trial court and the Appellee in the District Court of Appeal. The parties will be referred to as they stood before the trial court. The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the separately bound transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

The State's statement of the case and facts is incomplete; therefore, additional pertinent circumstances will be presented in the argument portion of this brief.

ARGUMENT

PURSUANT TO THIS COURT'S DECISION IN BELL V. STATE, 437 SO.2D 1057 (FLA. 1983), THE DISTRICT COURT OF APPEAL PROPERLY VACATED THE DEFENDANT'S CONVICTIONS AND SENTENCES ON TWO LESSER INCLUDED OFFENSES OF THE MAIN OFFENSE FOR WHICH HE WAS ALSO CONVICTED AND SENTENCED.

The information in this case charged that on December 27, 1980, the defendant:

> Count I
>
> In the vicinity of Burgandy Drive, Tavernier, Florida, did then and there unlawfully attempt to kill a human being, to-wit: Stephen Koch, with a rifle, and said killing was perpetrated by said Jules Michael Boivin from, or with premeditated design or intent to effect the death of said Stephen Koch, contrary to Section 782.04, F.S.;
>
> Count II
>
> Did then and there unlawfully commit a battery by touching or striking another person, to-wit: Stephen Koch, by intentionally touching or striking the said Stephen Koch, and did thereby cause great bodily harm, from permanent disability or permanent disfigurement upon Stephen Koch, by shooting him with a rifle, contrary to Section 784.045, F.S.; and
>
> Count III
>
> Did then and there while committing or attempting to commit any felony or while under indictment, displays, uses, threatens or attempts to use any weapon or electric weapon or device or carries a concealed weapon, to-wit: shooting Stephen Koch with a rifle, contrary to Section 790.07, Florida Statutes (sic).

[R. 4-6].

The evidence showed that the defendant fired a single shot which struck and injured the victim, Stephen Koch (T. 92, 146).

In Borges v. State, 415 So.2d 1265 (Fla. 1982), this Court

noted that: "The explicit exclusion of lesser included offenses in Section 775.021(4) makes clear that the legislature does not intend separate convictions and punishments for two or more statutorily defined offenses when in fact only one crime has been committed." Id. at 1267.

Relatedly, in State v. Carpenter, 417 So.2d 986 (Fla. 1982), this Court recognized that even where separate sentencing did not violate Section 775.021(4) because two crimes carried the same penalty, double jeopardy would nevertheless bar multiple punishments if the crimes were the same. Id. at 987.

Finally, and controlling in this case, in Bell v. State, 437 So.2d 1057 (Fla. 1983), after carefully considering its prior pertinent decisions as well as the history of the double jeopardy clause, this Court articulately reaffirmed the principle that the permissibility of multiple convictions or punishments could not hinge on the mere happenstance of a prosecutor's charging decision. As stated in Bell:

> The fact that a single indictment or information charges both the greater and lesser included offenses should not change the result regarding the propriety of multiple convictions. To hold otherwise would allow prosecutors to obtain multiple convictions based on a charging decision, an unjust result which we decline to legitimize.

Id. at 1061.

Bell recognized that because at the time the double jeopardy clause was framed joinder of causes was impermissible, multiple punishment questions necessarily entailed multiple convictions, and there was thus no reason for the early case law to separately address the question of permissibility of multiple convictions.

Based on this important historical circumstance, Bell further recognized that, despite the short-sightedness of more recent case law, where double jeopardy barred separate punishment for lesser included offenses separate convictions for those offenses were thereby also barred. Id. at 1059. Thus, because the defendant in Bell had been convicted and sentenced for the offense of trafficking in narcotics, separate convictions and sentences for the lesser offenses of sale and possession were disallowed. Id. at 1058, 1061.

In this case, the State maintains that this Court should not look to the charging document. This precisely underscores the pernicious effect of allowing prosecutors to obtain multiple convictions based on a charging decision, an evil which this Court squarely and properly declined to legitimize in Bell. Id. at 1061. Indeed, Petitioner's brief glaringly omits any discussion whatsoever of, or even reference to, this Court's decision in Bell. The State's position further overlooks that in Portee v. State, 447 So.2d 219 (Fla. 1984), this Court, consistent with Bell, looked to the charging document to determine the propriety of multiple convictions and sentences for sale and possession, thereby recognizing that the charges could have (although were not in that case) been brought duplicitously in violation of double jeopardy principles as well as legislative intent.

Unwaveringly, the State advocates a pure statutory analysis, relying on Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). What this argument overlooks, however,

is that Blockburger is not an absolute rule of construction. As observed by the Supreme Court in Missouri v. Hunter, ___ U.S. ___, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), it is simply a tool in ascertaining legislative intent, and the assumption underlying the rule is that the legislature ordinarily does not intend to doubly punish the same offense. "Where two statutes proscribe the 'same offense', they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." Id., 103 S.Ct. at 678, quoting from Whalen v. United States, 445 U.S. 684, 691-692, 100 S.Ct. 1432, 1437-1438, 63 L.Ed.2d 715 (1980).

For instance, as held in Rodriquez v. State, 443 So.2d 236 (Fla. 5th DCA 1984):

> In the instant case it is readily apparent that the Florida Legislature did not contemplate cumulative punishments in its enactment of the robbery and theft statutes under which Rodriquez was charged, where there is only one taking of money by force. The crime here is singular - and it is robbery. Id. at 238.

Similarly, the defendant in this case committed only a single act and a single crime. As this Court observed in Bell:

> The mere existence of two statutory offenses does not establish that the legislature intended each to be independently convictable and punishable when both are committed in a single course of conduct.

Id. at 1060.

In Re Nielsen, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889) is a good example of an instance where the Court declined to apply a strict Blockburger-type analysis to permit conviction and sentence for both the crime of adultery and the crime of

cohabitation, where, although each technically included an element the other did not, to do so would circumvent congressional intent as well as the double jeopardy clause. See Spencer v. State, 438 So.2d 864, 867 (Fla. 1st DCA 1983).

Even the most articulate Florida proponent of a pure Blockburger analysis, Judge Cowart, recognizes that its validity dissipates fully when applied to attempts and to degree crimes. See Baker v. State, 425 So.2d 36, 60 (Fla. 5th DCA 1983) (Cowart, J., dissenting), rev. granted. In those situations Blockburger simply provides no guidance whatsoever. The exceptions are precisely applicable to the instant case, where the "highest" crime charged was an attempt (attempted murder with a firearm), and a conviction was also returned on lesser degree offenses (aggravated battery with a firearm and possession of a firearm in the commission of a felony). It defies logic, legislative intent, and, most importantly, the fundamental historic policy underlying the double jeopardy clause to, in such a case as this, forsake any consideration whatsoever of pleading or proof in determining what is and is not permissible either under that clause or as a matter of legislative intent. Bell properly rejects such a blind, mechanistic approach and has in turn so been properly construed by the District Courts of this State.

See, e.g., Gaither v. State, 436 So.2d 289 (Fla. 2d DCA 1983) (where one count charged carrying a concealed firearm, and another count charged carrying the same concealed firearm by a convicted felon, former count a category two offense of latter count and therefore under Bell double jeopardy bars dual

convictions and sentences); Wicker v. State, 445 So.2d 581 (Fla. 2d DCA 1984) (hereinafter Wicker I) (where clear from entire information that "assault" alleged as enhancing offense in Count I, burglary, was the sexual battery alleged in Count II, defendant could not be convicted of both -- conviction on Count II set aside); Wicker v. State, 445 So.2d 583 (Fla. 2d DCA 1984) (distinguishing Wicker I, where charging document alleged both assault and arming within as enhancing factors for burglary, and jury's verdict indicated both factors were established, no double jeopardy bar to convictions and sentences for enhanced burglary and sexual battery); Alvarez v. State, 445 So.2d 677 (Fla. 4th DCA 1984) (defendant could not be convicted for both attempted murder and for possession of a firearm in the commission of a felony); Bogard v. State, ___ So.2d ___, No. 83-95 (Fla. 4th DCA February 15, 1984) 9 F.L.W. 386 (looking to charging document and proofs, possession of firearm in commission of felony a lesser included offense of aggravated battery and dual convictions and sentences therefore barred); Downs v. State, 438 So.2d 1057 (Fla. 4th DCA 1983), Jackson v. State, 436 So.2d 1101 (Fla. 4th DCA 1983), Spencer v. State, supra (all holding that defendant could not be convicted and sentenced for both armed robbery and possessing a firearm in the commission of a felony).

The defendant in this case committed only a single act, shooting the victim one time, and was charged three times over for that act in the information. It seems clear enough that if the victim had died from the act, the defendant could be convicted only of a single offense, murder. He could not be

convicted at once of murder and all its category one or category two lesser offenses. There is no basis in precedent, reason or policy to treat a conviction for attempted murder any differently. The District Court of Appeal's holding in this case, both as a matter of constitutional law and legislative intent, is sound and should be approved.

CONCLUSION

BASED on the foregoing argument and authorities cited, the Respondent respectfully requests this Court to approve the decision below.

Respectfully submitted,

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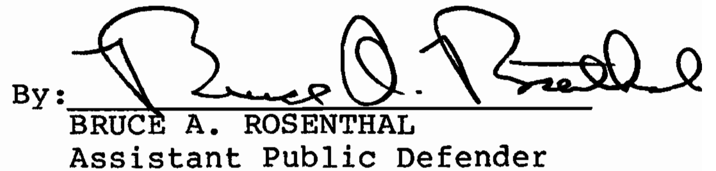

By: ______________________
BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 8th day of June, 1984.

BRUCE A. ROSENTHAL
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