W.O.O.A. 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,368

THE STATE OF FLORIDA,

Petitioner,

vs.

JULES BOIVIN,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

CALIANNE P. LANTZ
Assistant Attorney General
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(continued)

OTHER AUTHORITIES

Carpenter, supra; State v. Gibson,[1] ___So.2d___ (Fla. 1983(Case No. 61,325; Opinion filed February 17, 1983)[8 F.L.W. 76]; and Strickland v. State, 437 So.2d 150 (Fla. 1983), clearly indicate that the Court should not look to the allegations contained in the charging document or the evidence adduced at trial. It is the discrete elements of the statutes involved which must be examined.

A common thread between this Court's inconsistent decisions as to the propriety of multiple convictions and sentences for offenses occurring during a single criminal transaction or episode is the acknowledgement that where two distinct offenses have been committed under the analysis followed in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1962), separate convictions and sentences are proper. Under the Blockburger test, if each offense requires proof of an element that the other does not, the offenses are discrete and one is not included in the other. A less serious offense is included in a more serious one if all the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter.

[1]Although the proper test for determining whether multiple convictions and sentences may lie for offenses resulting from a single episode was enumerated in State v. Gibson, Petitioner submits that this Court's ultimate result was erroneous as the "test" was misapplied.

PRELIMINARY STATEMENT

Respondent, Jules Boivin, was the defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida and the appellant in the District Court of Appeal of Florida, Third District. Petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the district court. In this brief, the parties will be referred to as they appear before this Court.

The symbol "R" followed by a page number will constitute a page reference to the record on appeal. The symbol "T" will be used to designate the transcipt of the proceedings. The appendix to this brief will be referred to as "App." all emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

A three-count information was filed in Case No. 80-2244-CF in the Circuit Court in and for the Sixteenth Judicial Circuit of Florida, Monroe County on January 8, 1981, charging Respondent with the attempted first degree murder of Stephen (Steven) Koch (Count I), aggravated battery (Count II), and possession of a firearm in the commission of a felony (Count III) on December 27, 1980. (R.4-7). A jury trial commenced before the Honorable Bill G. Chappell, Circuit Judge on September 21, 1981. (T.1-269).

Testimony of Jacob Koch at Respondent's trial indicated that on the morning of the date in question, December 27, 1980, his son, victim Steven Koch, went to his house and told him that he had bumped into Respondent's boat trailer. (T.86). Mr. Koch accompanied his son next door (twelve to fifteen feet away) to Respondent's trailer. He stated that after the victim knocked on Respondent's door and identified himself, he told Respondent that he bumped into his trailer and that he wanted him to look at it. (T.87-88). Respondent came to the door, opened the door, subsequently swinging the door wide open and reaching for his rifle. (T.88-91).

Mr. Koch went on to testify that he warned his son

about Respondent's possession of a gun and then slammed the trailer door shut on the gun. (T.91). Respondent regained control of the gun. (T.92). The victim pushed his father out of the way as Respondent fired the gun, ripping Steven Koch's arm off. (T.92). Respondent subsequently turned the gun on Jacob Koch, and grinned. (T.92).

The victim, Steven Koch, testified as to the same events. (T.145-146). He stated that when he approached the respondent's door, he had nothing in his hands except a wedding ring worn on his left hand. (T.148). He indicated that he tried to apologize to Respondent for bumping into his boat-trailer. (T.143-145). Respondent stuck his head out and then grabbed a gun. (T.46). The victim felt a bullet pierce his arm which was "just blown to pieces." The victim grabbed his father and ran for his safety until he was assisted by a neighbor, George Owens. (T.147).

Pursuant to guilty verdicts of guilty as charged, Respondent was convicted of attempted first degree murder, aggravated battery and possession of a firearm in the commission of a felony. (R.33-35; T.266). Respondent was sentenced to serve concurrent sentences of fifteen (15) years in prison as to each of the three counts, with a three-year minimum mandatory term as to Counts I and II. (R.48-50).

Respondent appealed from the entry of the convictions and sentences to the District Court of Appeal of Florida, Third District. In an opinion filed on September 6, 1983 (A.1, 2), the majority of the panel determined that under the circumstances, the aggravated battery predicated upon the shooting with a rifle is a lesser included offense of the attempted murder, which was also based upon the shooting with a rifle; and that possession of a firearm during the commission of any felony also predicated upon the shooting with a rifle is a lesser included offense of the aggravated battery. The Third District vacated the convictions and sentences for aggravated battery and possession of a firearm during the commission of a felony and affirmed the conviction and sentence for aggravated murder. (A.1, 2). Boivin v. State, 436 So.2d 1074 (Fla. 3d DCA 1983).

Judge Nesbitt dissented from the majority opinion on the grounds that this Court's Hawkins v. State, ___So.2d___ (Fla. 1983)[8 F.L.W. 245] dictated affirmance of all the convictions.

On July 15, 1983, Petitioner filed a Notice Invoking the Discretionary Jurisdiction of this Court. Both parties subsequently filed briefs on jurisdiction and this Court granted discretionary review on March 30, 1984. This brief is being filed and served pursuant to said Order Accepting

Jurisdiction and Dispensing with Oral Argument. Petitioner respectfully reserves the right to argue additional pertinent facts in the argument portion of this brief.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN VACATING RESPONDENT'S CONVICTIONS AND SENTENCES FOR AGGRAVATED BATTERY AND POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY PURSUANT TO THE AFFIRMANCE OF RESPONDENT'S CONVICTION AND SENTENCE FOR ATTEMPTED FIRST DEGREE MURDER WHERE IT IS STATUTORILY POSSIBLE TO COMMIT EACH OFFENSE WITHOUT COMMITTING EITHER OF THE OTHER TWO, THEREBY REMOVING EACH OFFENSE IN QUESTION FROM THE CATEGORY PROSCRIBING SENTENCING "LESSER INCLUDED OFFENSES" UNDER SECTION 775.021(4), FLORIDA STATUTES?

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN VACATING RESPONDENT'S CONVICTIONS AND SENTENCES FOR AGGRAVATED BATTERY AND POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY PURSUANT TO THE AFFIRMANCE OF RESPONDENT'S CONVICTION AND SENTENCE FOR ATTEMPTED FIRST DEGREE MURDER WHERE IT IS STATUTORILY POSSIBLE TO COMMIT EACH OFFENSE WITHOUT COMMITTING EITHER OF THE OTHER TWO, THEREBY REMOVING EACH OFFENSE IN QUESTION FROM THE CATEGORY PROSCRIBING SENTENCING FOR "LESSER INCLUDED OFFENSES" UNDER SECTION 775.021(4), FLORIDA STATUTES.

Petitioner submits that the District Court of Appeal of Florida, Third District erred in its decision in the instant cause by vacating Respondent's convictions and sentences for aggravated battery and possession of a firearm during the commission of a felony pursuant to the affirmance of Respondent's conviction and sentence for the attempted first degree murder of victim Steven Koch. The district court of appeal incorrectly analyzed the three separate offenses in question which were appropriately charged pursuant to three separate counts in the information. (R.4-7). The proper analysis to be followed is an examination of the <u>discrete elements</u> of each crime, as enumerated in the respective statutes. In this case, the district court mistakenly treated the offenses whose convictions and sentences were vacated as lesser included offenses merely because of an

overlap in the evidence. This type of analysis has been rejected by this Court in State v. Carpenter, 417 So.2d 986 (Fla. 1982).

The Third District's reliance on Brown v. State, 206 So.2d 377 (Fla. 1968) and the Florida Standard Jury Instructions; In re Standard Jury Instructions, 431 So.2d 594 (Fla. 1981) as bases for its conclusion that convictions and sentences for the offenses of aggravated battery and possession of a firearm during the commission of a felony are precluded by the provisions in §775.021(4), Florida Statutes excluding lesser offenses is clearly misplaced. Analysis of "lesser included offenses" under Brown, supra, requires an examination of the allegata [charge] and the probata [evidence introduced]. If one looks to the charge and proof of charges consolidated for a single trial, the proof will always overlap. This is because Rule 3.150(a), Florida Rules of Criminal Procedure provides that separate charges may not be joined in a single information unless they arise from the same criminal episode or transaction.

The only application which Brown, supra may have to a sentencing analysis is for guidance in determining necessarily lesser included offenses. Even though this Court has been somewhat inconsistent in its opinions involving similar issues, several of its decisions, notably State v.

Carpenter, supra; State v. Gibson,[1] ___So.2d___ (Fla. 1983(Case No. 61,325; Opinion filed February 17, 1983)[8 F.L.W. 76]; and Strickland v. State, 437 So.2d 150 (Fla. 1983), clearly indicate that the Court should not look to the allegations contained in the charging document or the evidence adduced at trial. It is the discrete elements of the statutes involved which must be examined.

A common thread between this Court's inconsistent decisions as to the propriety of multiple convictions and sentences for offenses occurring during a single criminal transaction or episode is the acknowledgement that where two distinct offenses have been committed under the analysis followed in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1962), separate convictions and sentences are proper under the Blockburger test, if each offense requires proof of an element that the other does not, the offenses are discrete and one is not included in the other. A less serious offense is included in a more serious one if all the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter.

[1]Although the proper test for determining whether multiple convictions and sentences may lie for offenses resulting from a single episode was enumerated in State v. Gibson, Petitioner submits that this Court's ultimate result was erroneous as the "test" was misapplied.

In Borges v. State, 415 So.2d 1265 (Fla. 1982), this Court affirmed separate convictions and separate sentences imposed pursuant to convictions for burglary while armed with a dangerous weapon, possession of tools with intent to use them to commit burglary or trespass, possession of a firearm by a person convicted of a felony and carrying a concealed firearm. In that case, the Court rejected the petitioner's argument that under the facts of his case, he was subjected to improper multiple convictions and sentences based upon the provision in §775.021(4), Florida Statutes which excludes separate sentences for lesser included offenses. This Court followed the Blockburger test and held that separate convictions and sentences were proper in light of the elements of the offenses involved.

In State v. Carpenter, supra at 417 So.2d 988, this Court noted that in applying the Blockburger test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts alleged in a particular information. See: Whalen v. United States, 445 U.S. 684, 685 n.8, 100 S.Ct. 1432, 1439 n.8, 63 L.Ed.2d 715 (1980); See also: Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). See: State v. Getz, 435 So.2d 789 (Fla. 1983); State v. Cantrell, 417 So.2d 260 (Fla. 1982). See also: Strickland v. State, 437 So.2d 150 (Fla. 1983).

In the cause sub judice, it is obviously "statutorily possible" to violate each of the statutes in question without violating either of the other two. Thus, a proper application of the Blockburger test to the statutory elements of the offenses involved in the cause sub judice should result in a determination that imposition of separate sentences pursuant to each conviction is entirely appropriate.

The statutory elements of attempted first degree murder are codified in §§782.04(1)(a) and 777.04, Florida Statutes which read as follows:

> 782.04 Murder.--
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation or opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the use, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s.775.082.
>
> 777.04 Attempts, solicitation, conspiracy, generally.--
> (1) Whoever attempts to commit an offense prohibited by law and in such attempt does any act toward

the commission of such an offense, but fails in the perpetration or is intercepted or prevented in the execution of the same, commits the offense of criminal attempt and shall, when no express provision is made by law for the punishment of such attempt, be punished as provided in subsection (4).

Aggravated battery is defined as follows in §784.045, Florida Statutes:

> 784.045 Aggravated battery.--
> (1) A person commits aggravated battery who, in committing battery:
> (a) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
> (b) Uses a deadly weapon.
> (2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

The elements of battery as referred to in §784.045, are enumerated in §784.03, Fla.Stat.:

> 784.03 Battery.--
> (1) A person commits battery if he:
> (a) Actually and intentionally touches or strikes another person against the will of the other; or
> (b) Intentionally causes bodily harm to an individual.
>
> (2) Whoever commits battery shall be guilty of a misdemeanor of the first degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

The statutory elements applicable to the conviction for possession of a firearm in the commission of a felony are enumerated as follows in §790.03, Fla.Stat.:

> 790.07 Persons engaged in criminal offense, having weapons.--
> (1) Whoever, 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 is guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084.
> (2) Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s.775.082, s.775.083, and s.775.084.

Attempted first degree murder requires proof of a premeditated design to effect death of the victim where there has been an interception or failure in perpetration. Neither aggravated battery nor possession of a firearm in the commission of a felony, as provided for in the appropriate statutes, require such proof.

Aggravated battery, as enumerated in the statute, requires proof of a touching and either proof of use of a deadly weapon or the intentional or knowing causing of bodily harm, permanent disfigurement or permanent disability

of the victim. Specific intent is not required. Attempted first degree murder does not require proof of any of the above-noted elements. "Possession" of a firearm in the commission of a felony can be proved by display, threat or attempt to use a firearm; actual use is not required if one of the other three elements is met. A projectile need never by fired nor is a touching or severe injury to the victim required. The firearm charge requires a firearm. Under the statutory scheme, aggravated battery and attempted first degree murder do not necessarily have that requirement.

The elements of each crime involved are obviously discrete. See, Borges v. State, supra; Strickland v. State, supra; State v. Getz, supra; Smith v. State, 430 So.2d 448 (Fla. 1983); See also: Baker v. State,[2] 425 So.2d 36, 62-64 (Fla. 5th DCA 1983)(Cowart, J., dissenting).

Furthermore, in this case, imposition of separate sentences for each offense will not result in violation of the Double Jeopardy Clause. The United States Supreme Court has noted the following in Missouri v. Hunter, ___U.S.___, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983):

[2]This Court is currently reviewing the Fifth District's decision in Baker v. State, supra, in Baker v. State, Florida Supreme Court Case Nos. 63,135 and 63,269.

> Our analysis and reasoning in Whalen and Albernaz led inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent.

For the reasons noted above, it is clear that the convictions and sentences for aggravated battery and possession of a firearm during the commission of a felony imposed by the trial court were proper. Thus, the portion of the Third District's opinion vacating said convictions and sentences should clearly be reversed.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully submits that this Court should reverse the portion of the district court's opinion that vacates the trial court's imposition of convictions and sentences for aggravated battery and possession of a firearm during the commission of a felony.

Respectfully submitted,

JIM SMITH
Attorney General

Calianne P. Lantz

CALIANNE P. LANTZ
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing BRIEF OF THE PETITIONER ON THE MERITS was furnished by mail to BRUCE A. ROSENTHAL, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 and to JULES BOIVIN, #081217, P.O. Box 158, Lowell, Florida 32663, on this 26th day of April, 1984.

Calianne P. Lantz

CALIANNE P. LANTZ
Assistant Attorney General

/vbm