

Supreme Court of Florida

No. 64,368

STATE OF FLORIDA, Petitioner,

v.

JULES BOIVIN, Respondent.

[August 29, 1985]

McDONALD, J.

We have for review yet another case because of conflict over what is and what is not a lesser included offense. We have jurisdiction, article V, section 3(b)(3), Florida Constitution, and we quash Boivin v. State, 436 So.2d 1074 (Fla. 3d DCA 1983).

In this case the district court relied on Bell v. State, 437 So.2d 1057 (Fla. 1983), and reversed Boivin's convictions of and sentences for aggravated battery and possession of a firearm during commission of a felony, finding these two crimes to be lesser included offenses of attempted murder. We recently revisited the subject of lesser included offenses in State v. Baker, 456 So.2d 419 (Fla. 1984), and restricted Bell to necessarily lesser included offenses. Applying Baker to the instant case, we find that the district court reached the wrong result.

The state charged Boivin with attempted first-degree murder (sections 777.04 and 782.04, Florida Statutes (1979)), aggravated battery (section 784.045, Florida Statutes (1979)), and possession of a firearm in commission of a felony (section 790.07, Florida Statutes (1979)). A comparison of the statutory elements of these crimes reveals that each requires proof of at least one fact which the others do not. Baker. In other words,

each can be committed without necessarily committing either or both of the other crimes charged against Boivin. These crimes are, therefore, not necessarily lesser included offenses of attempted first-degree murder. See Baker; Scott v. State, 453 So.2d 798 (Fla. 1984); State v. Baker, 452 So.2d 927 (Fla. 1984); State v. Gibson, 452 So.2d 553 (Fla. 1984).

Not having the benefit of Baker, the district court erroneously analyzed the allegations and proof surrounding this incident rather than the statutory elements of the crimes charged against Boivin. Aggravated battery and possession of a firearm are not necessarily lesser included offenses of attempted first-degree murder. We therefore quash the district court's opinion and direct that Boivin's convictions and sentences be affirmed.

It is so ordered.

BOYD, C.J., ALDERMAN, EHRLICH and SHAW, JJ., Concur
ADKINS and OVERTON, JJ., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court
of Appeal - Direct Conflict of Decisions

Third District - Case No. 81-2668

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