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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner :

vs. : Case No. 64,985

GEORGE WICKER, JR., :

Respondent :

_____ :

RESPONDENT'S BRIEF ON MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX

CITATION OF AUTHORITIES

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	:	

STATEMENT OF THE CASE AND FACTS

Respondent, George Wicker, Jr., accepts Petitioner's Statement of the Case and facts as a substantially accurate account of the proceedings below, with such exceptions or additions as set forth in the argument of this brief.

ISSUE I

WHETHER THE LOWER COURT ERRED IN EXAMINING COUNT II OF THE INFORMATION TO DETERMINE THE ADEQUACY OF COUNT I?

The State argues that the Second District Court of Appeals erred in considering the entire information in determining whether or not Mr. Wicker had been convicted and sentenced for two separate offenses when, in actuality, only one offense had been charged. The State then cites several cases for the proposition that separate counts of an information must be separately considered and not by reference to the other. These cases, however, apply to whether or not the State has sufficiently alleged a crime in a count of an information. The courts have held that one must look only to that count to see if it completely charges a crime. The State is not allowed to reach down into another count on the same information to supply missing allegations.

Such an argument has nothing to do with the issues at hand. What the Second District Court of Appeals did in Mr. Wicker's case was to examine Counts 1 and 2 of the information to see if double jeopardy had been violated. Under Bell v. State, 437 So.2d 1057 at 1059 (Fla. 1983), this court noted several methods or tests to see if offenses charged are "the same" and thereby prohibited under double jeopardy from having more than one conviction and sentence:

> Under the required evidence, or statutory elements test, offenses are "the same" if elements constituent in one statute are sufficiently similar to elements of another. This test describes a labeling under different statutory sections of essentially the same crime. Such legislative legerdemain surely cannot be employed to contravene a constitutional right not to be twice placed in jeopardy for the same offense. See Stewart, J. in Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).
>
> Under the alleged evidence test, offenses are "the same" if there is sufficent similarity between allegations of two indictments or informations or even two counts within a single indictment or information. This test necessitates scrutiny of the charging instruments to determine if repetitious charges have been brought.
>
> Finally, under the actual evidence or same evidence test, offenses are "the same" if there is sufficient similarity in the evidence actually presented either at two trials or among two or more counts in a single trial. (Emphasis added.)

The court then stated that "when one statutory offense includes all of the elements of the other, those two offenses are constitutionally 'the same offense' and a person cannot be put in jeopardy as to both such offenses unless the two offenses are based on two separate and distinct factual events." Bell, supra at 1060.

In our case the Second District Court of Appeals examined the charges against Mr. Wicker and found that Count II was a lesser

of Count I. This does not conflict with the First District Court of Appeals, the Florida Supreme Court in Bell, or any of the other cases cited by the State. The rule of law that each count in an information must be considered separately is not stating that a court cannot look at two counts of an information to see if double jeopardy is being violated. In fact, Bell states that double jeopardy can be violated by two counts in an information:

> We hold that once it has been established that an offense, whether charged or not, and whether in single or separate proceedings, is a lesser included offense of a greater offense also charged, then the double jeopardy clause proscribes multiple convictions and sentences for both the greater and lesser included offenses.

Bell, supra at 1061.

Inasmuch as the Second District Court of Appeal's examination of Counts I and II was for purposes of determining whether or not double jeopardy had been violated, such an examination was not prohibited under the cases cited by Petitioner. The Petitioner's allegation that acceptance of the Second District Court of Appeal's reasoning could lead to having main charges dismissed is ludicrous. Informations alleging first-degree burglary via assault and subsequent convictions would not be set aside because a different form of assault was established. As long as some sort of assault was shown - be it simple assault or sexual battery - the burglary assault conviction would stand. A double

jeopardy issue arises, however, when the defendant is convicted and sentenced for both burglary assault and the assault. The Second District Court of Appeals did not err in setting aside the sexual battery conviction in this case.

ISSUE II

DID THE TRIAL COURT ERR IN OVERTURNING THE APPELLANT'S SEXUAL BATTERY CONVICTION?

The State argues that the Second District Court of Appeals improperly expanded Bell because under the Blockburger test burglary and sexual battery are not the same offense due to the fact that each have separate elements of proof. There is no argument with the fact that simple burglary has different elements from sexual battery. However, in this case Mr. Wicker was not charged and convicted for simple burglary. Mr. Wicker was charged and convicted of first-degree burglary assault. It is the assault that increased the sentence and the degree of the crime, and it is the assault that is identical to the sexual battery. In Bell, supra at 1060, this court stated:

> If two statutory offenses have the exact, same essential constituent elements, or when one statutory offense includes all of the elements of the other, those two offenses are constitutionally "the same offense" and a person cannot be put in jeopardy as to both such offenses unless the two offenses are based on two separate and distinct factual events. (Emphasis added.)

In Mr. Wicker's case the sexual battery was a lesser-included offense of the assault part of the burglary. The Second District Court of Appeals followed Bell and threw out the lesser-included conviction.

The State argues that three recent Florida Supreme Court cases applying the Blockberger standard prevail in Mr. Wicker's case and justify separate convictions for burglary assault and sexual battery. The principle behind these casesis whether the statutory elements of each offense require proof of a fact that the elements of the other do not as per Blockburger. In State v. Baker, __So.2d__ (Fla. 1984)(Case No. 63,807, opinion filed June 7, 1984), 9 F.L.W. 209; and State v. Gibson, __So.2d__ (Fla. 1984)(Case No. 61,325, opinion filed June 14, 1984, on motion for rehearing), 9 F.L.W. 234, this court held that armed robbery with a gun and use or display of a gun during the commission of a felony were not the same crime - one not being a lessor of the other - and required separate convictions and sentences. The reason for such decisions was based on the fact that the definition of armed robbery with a gun did not require the display of the gun. The robber could carry a concealed gun and still be guilty of armed robbery. Use or display of a gun during the commission of a felony, however, required that the gun be displayed. Thus, the two crimes were separate in that they each required proof of an element not included in the other's criminal definition. Similarly, in Scott v. State, __So.2d__ (Fla. 1984)(Case No. 63,878, opinion filed June 7, 1984), 9 F.L.W. 209, it was determined that manslaughter and child abuse were two separate crimes because manslaughter required a death of a human being and child abuse did not.

In the case of burglary assault and sexual battery, however, this court's reasoning in Scott, Baker, and Gibson does not apply. Burglary assault requires an assault upon a person and sexual battery is a type of assault upon a person. Such a situation is analogous to first-degree felony murder and the underlying felony. In Faison v. State, 426 So.2d 963 (Fla. 1983), this court agreed with such an analogy, but held that under State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), a conviction for both felony murder and the underlying felony was permissible as long as only one sentence was imposed. The sexual battery conviction, therefore, in Faison was to be reinstated but no sentence imposed. Since Faison, this court has receded from such a position in Bell and held that a person cannot be convicted and/or sentenced for lesser included offenses. Multiple convictions for lesser included offenses are not permissible. See Snowden v. State, 449 So.2d 332 (Fla. 5th DCA 1984). Under Faison and Bell, therefore, Mr. Wicker should not have been either convicted or sentenced for the sexual battery conviction. The Second District Court of Appeals was correct in throwing out Mr. Wicker's conviction and sentence for the underlying sexual battery.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, this Honorable Court should uphold the Second District Court of Appeal's reasoning on the issue of vacating the judgment and sentence for the underlying sexual battery conviction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Robert J. Landry, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 8th day of August, 1984.

Respectfully submitted,

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