W00A

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 64,985

GEORGE WICKER, JR.

Respondent.

BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner, the STATE OF FLORIDA was the plaintiff in the trial court and the appellee in the Second District Court of Appeal. Respondent, GEORGE WICKER, JR. was the defendant in the trial court and the appellant in the Second District Court of Appeal. The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent, George Wicker, was charged and found guilty of burglary, sexual battery and robberty (R.38) The trial judge inposed consecutive sentences of seventy-five (75) years for the burglary, thirty (30) years for the sexual battery, and ten (10) years for the robbery (R.40-42). On appeal, the District Court of Appeal, Second District, set aside the sexual battery conviction, citing McRae v. State, 338 So.2d 389 (Fla. 2d DCA 1980). Wicker v. State, 445 So.2d 581 (Fla. 2d DCA 1984).

The pertinent counts in the information, Counts I (Burglary) and II (Sexual Battery) recited that Wicker on November 15, 1981:

COUNT ONE

> ". . .unlawfully and without invitation or license did stealthily enter that certain structure, the dwelling of Elouise Rubin, located at 1672 13th Avenue South, Apt. B, in the City of St. Petersburg, in the County and State aforesaid, the property of Elouise Rubin, with the intent to commit an offense therein, to-wit: theft and/or involuntary sexual battery and/or robbery, and in the course of committing the said burglary the said GEORGE WICKER, JR. did make an assault upon Elouise Rubin, the said structure not at the time open to the public, contrary to Chapter 810.02(2), Florida Statutes, and against the peace and dignity of the State of Florida.

COUNT TWO

> And the State Attorney aforesaid, under oath as aforesaid, further information makes that GEORGE WICKER, JR., of the County of Pinellas, State of Florida, on the 15th day of November, in the year of our Lord, one thousand, nine hundred eighty-one, in the County and State aforesaid, did commit a

> sexual battery upon Elouise Rubin, to-wit: by inserting the penis of said GEORGE WICKER, JR. into the vagina of the said Elouise Rubin, without the consent of Elouise Rubin, while coercing the said Elouise Rubin to submit to said sexual battery by threatening to use force or violence on the said Elouise Rubin likely to cause serious personal injury, and the said Elouise Rubin reasonably believed that GEORGE WICKER, JR. had the present ability to execute said threats, contrary to Chapter 794.011(4)(b), Florida Statutes and against the peace and dignity of the State of Florida . . ."
>
> (R.28)

The Second District Court of Appeal reversed on the sexual battery count explaining in a footnote the reason for revitalizing the McRae decision.

> 1. The court properly receded from the authority of McRae for the cited principle on the authority of State v. Hegstrom, 401 So.2d 1143 (Fla. 1981). However, Bell v. State, 437 So.2d 1057 (Fla. 1983) has now explained or receded from Hegstrom to the extent that Hegstrom was interposed to permit multiple convictions for lesser included offenses in single trial settings. 437 So.2d at 1060. As a result, the then correct act of this court in Speed v. State, 410 So.2d 980 (Fla. 2d DCA 1982), in receding from McRae is invalidated, and McRae is therefore reinstated. See also State v. Harris, 439 So.2d 265 (Fla. 2d DCA 1983)
> 445 So.2d at 582.

In the text the court explained why the earlier McRae ruling required reversal:

> [5] Finally, in McRae, the court held that appellant could not be convicted of both an enhanced first degree burglary and the sexual battery which formed the basis of the enhanced burglary charge. The reason being

> that the sexual batter was necessary to sustain a conviction for enhanced first degree burglary. In the case at bar, while appellant was charged only with "assault" as the enhancing offense, it is clear from the entire information that the assault relied upon was the sexual battery as charged in Count II of the information.
>
> Accordingly, we must set aside appellant's sexual battery conviction. The finding that appellant committed a sexual battery was necessary to a conviction for first degree felony burglary. Therefore, appellant could not be convicted of both the first degree burglary and the sexual battery which also formed the basis of the burglary charge.
>
> (Text at 583)

The State timely sought discretionary review and on July 9, 1984, this Honorable Court entered an order granting review.

ARGUMENT

POINT I

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

In deciding that the sexual battery conviction could not stand, the lower court reasoned that:

> ". . .while appellant was charged only with assault in the enhancing offense, it is clear from the entire information that the assault relied upon was the sexual batery as charged in Count II of the information . . ."
>
> (445 So.2d at 583)

In other words, the appellate court would look to Count II to determine what might have been alleged or what might be proved at trial on the charge of Count I.

The courts have consistently held that each count must be considered as if it were a separate indictment or information. See Dunn v. United States, 284 U.S. 390, 76 L.Ed. 356 (1932); Bell v. State, 437 So.2d 1057 at 1060 (Fla. 1983); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982); Davis v. State, 371 So.2d 721 at 722 (Fla. 1st DCA 1979).

Since separate counts of an information are separate offenses, chargeable as if in separate indictments, the District Court of Appeal erred, in effect, by consolidating the two counts.

Acceptance of the lower court's premise would lead to all manner of mischief. For example, if at trial it were established that no sexual batery had occurred but that a simple assault had taken place, must an appellate court (following the lower court's consolidation theory) set aside any resulting burglary conviction?

No persuasive reason appears supporting the lower court's analysis and since it contributed to the lower court's faulty double jeopardy conclusion, as explained in Point II, infra, reversal is required.

POINT II

THE LOWER COURT ERRED IN OVERTURNING APPELLANT'S SEXUAL BATTERY CONVICTION.

A chronology of some of the decisions may be appropriate here. In 1980, the lower court decided McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980). It held that separate judgments and sentences for burglary and sexual battery was improper where the burglary count alleged that during the burglary the accused made an assault, to-wit: sexual battery. The court reasoned that the sexual batery was an indispensable element of the burglary, relying on State v. Pinder, 375 So.2d 836 (Fla. 1979). McRae, supra at 293.

Subsequently, this court receded from Pinder in State v. Hegstrom, 401 So.2d 343 (Fla. 1981). After Hegstrom the Second District Court of Appeal receded from McRae in Speed v. State,

410 So.2d 589 (Fla. 2d DCA 1982), holding that a defendant could receive separate judgments but not separate sentences for burglary and sexual battery when the sexual battery was alleged to be the assault element in the burglary count. However, in White v. State, 412 So.2d 28 (Fla. 2d DCA 1982), the court held that separate judgments and sentences were appropriate where (as in the instant case) the first count alleged a burglary with the commission of an assault, with no sexual battery alleged, and the second count alleged a sexual battery. Judge Grimes, in White, correctly analyzed that sexual battery was not a necessary lesser included offense to burglary. Thereafter, this court decided Bell v. State, 437 So.2d 1057 (Fla. 1983) and the lower court in its footnote 1 of the Wicker opinion interpreted Bell to mean that Hegstrom was no longer the law.

In the instant case the lower court not only revitalized the moribund McRae v. State decision, but expanded its scope. McRae prohibited judgments for sexual battery where the accompanying burglary count specifically alleged that "appellant made an assault, to-wit: sexual battery upon the victim." 383 So.2d 289. The McRae court reasoned that to convict of burglary the state had to prove as indispensable what was alleged, sexual battery. The lower court expanded on that doctrine and concluded that even though the burglary count did not allege a sexual battery, another count in the information did and so the two counts should be counted together.

This court has recently put the entire affair in order in Linda Scott v. State, ____ So.2d ____, 9 FLW 209 (Case No. 63, 878, opinion filed June 7, 1984). This Court upheld separate judgments and sentences for manslaughter and child abuse. The court reasoned that applying the Brown v. State, 206 So.2d 377 "category four" analysis was erroneous:

> "The proper test, however, is whether the statutory elements of each offense require proof of a fact that the elements of the other do not under Blockberger v. United States, 284 U.S. 299 (1932). Missouri v. Hunter, 459 U.S. 359 (1983); Albernaz v. United States, 450 U.S. 333 (1981); State v. Carpenter, 417 So.2d 986 (Fla. 1982); Borges v. State. If so, the two offenses are separate. The district court erroneously analyzed the allegations and proof rather than the statutory elements."
>
> (9 FLW 209)

This Court then applying the test of Blockberger v. United States, found that a killing was not required for child abuse and that it was unnecessary to prove a child was killed for manslaughter. Therefore, manslaughter and child abuse are separate offenses.

In State v. Baker, ___ So.2d ___, 9 FLW 209, decided the same day as Scott, supra, this Court reiterated that the courts are to look to the statutory elements not the allegations in the information or the proof adduced at trial.

> "For double jeopardy purposes this court is bound to consider only the statutory elements of the offenses, not the allegations or proof in a particular case. Bell. Where an offense is not a necessarily lesser included

> offense, based on its statutory elements, the intent of the legislature clearly is to provide for separate convictions and punishments for the two offenses. §775.021(4), Fla. Stat. (1979).
>
> (9 FLW 209-210)

Consequently, it was deemed proper to have separate judgments and sentences for both aggravated assault with a deadly weapon and armed robbery.

Even more recently, the Court decided State v. Gibson, ___ So.2d ___, 9 FLW 234 (Fla. Case No. 61,325, opinion filed June 14, 1984), permitting separate judgments and sentences for robbery while armed and use or display of a firearm during the commission of a felony. The district court had relied on State v. Pinder, supra, and held that separate judgments and sentences were improper.

This Court again reiterated the Borges holding adopting the Blockberger standard that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Applying Scott, Baker and Gibson to the instant case, the result is clear that the District Court of Appeal must be reversed. For the offense of burglary (Count I) Florida Statute §810.02 does not require the conviction of a sexual battery, For enhancement to life imprisonment under Florida Statute 810.02(2) there need be only either an assault upon a person (not necessarily a sexual batery) or that the burglar be armed or arm

himself within the structure with explosives or a dangerous weapon. For the offense of sexual battery (Count II) there need be no nonconsensual entry into a structure or conveyance as required for a burglary. Thus, burglary and sexual bettery are separate offenses for which separate judgments and sentences may be imposed. Accord Faison v. State, 426 So.2d 963 (Fla. 1983);[1/] Manarca v. State, 412 So.2d 443 (Fla. 5th DCA 1982); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982); Moore v. State, 414 So.2d 261 (Fla. 1st DCA 1982). The lower court's analysis attempting to look at the allegations in the accusatory pleading was erroneous, the decision must be reversed, and the trial judge's sentences must be reinstated.

The lower court's decision is no longer viable after Scott, supra and Baker, supra. The decision must be quashed and the trial court's imposition of the judgment and sentence for sexual battery be reinstated.

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i/In Faison, the trial judge sentenced the defendant only on the burglary count, not on the sexual battery count. This Court held that the District Court erred in reversing the conviction for sexual batery. Had the trial judge opted to sentence for both offenses he could have done so.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, the decision of the lower court should be quashed and the trial court's judgment and sentence for sexual battery should be reinstated.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Deborah E. Brueckheimer, Assistant Public Defender, 5100 144th Avenue, North, Clearwater, Florida 33520 on this 27th day of July, 1984.

Of Counsel for Petitioner