IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 64,985

GEORGE WICKER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

JIM SMITH
ATTORNEY GENERAL

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

COUNSEL FOR PETITIONER

/jaf

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STATEMENT OF THE CASE AND FACTS

George Wicker was charged and convicted of burglary, sexual battery and robbery. The trial judge imposed consecutive sentences of seventy-five, thirty and ten years respectively. The burglary and sexual battery counts of the information recited that Wicker, on November 15, 1981:

I.

> ". . . 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 II.

> 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 the 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 siad 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.
>
> (App. B)

In its opinion of November 4, 1983, the lower court relies upon an earlier decision, McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980) and reasoned:

> "Finally, in McRae, this 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 battery 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 burglary and the sexual battery which also formed the basis of the burglary charge." (Slip Op., p. 5)

The State sought rehearing and rehearing en banc, noting that McRae was no longer the law even in the Second District (App. C). On February 8, 1984 the Second District amended its opinion, explaining in footnote 1 that McRae was revitalized by this Court's opinion in Bell v. State, 437 So.2d 1057 (Fla. 1983). (App. A)

The State now seeks discretionary review.

ISSUE I.

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN WICKER v. STATE, ___ So.2d ___ CREATES CONFLICT EXPRESSLY AND DIRECTLY WITH DAVIS V. STATE, 371 So.2d 721 (Fla. 1st DCA 1981), JONES v. STATE, 385 So.2d 1042 (Fla. 1st DCA 1980) AND BELL v. STATE, 437 So.2d 1057 (Fla. 1983).

ARGUMENT

The Second District Court of Appeal held in this case that "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 (Slip opinion, p. 5). According to the lower court, one may look to a separate count to find the elements of an offense in another count.

In Davis v. State, 371 So.2d 721 (Fla. 1st DCA 1979), the court held that allegations in separate counts of an information must be separately considered and not by reference to the other. The First District reiterated this holding in Jones v. State, 385 So.2d 1042 (Fla. 1st DCA 1980) wherein it held that the omission in failing to recite the felony facilitated in a kidnapping count could not be cured by a court's reading and applying a different count (sexual battery) to the challenged count:

> "Each count of the charging document must stand alone and cannot be determined by reference to another count."
>
> (385 So.2d at 1044)

The Second District previously had recognized this well-established principle. See Goins v. State, 406 So.2d 1199 (Fla. 2d DCA 1981). But in the instant case, the lower court did not apply this well-established doctrine. 1/

The lower court's decision also conflicts with Bell v. State, 437 So.2d 1057 (Fla. 1983). The Second District apparently feels it appropriate to read counts 1 and 2 of an information together as if they were a single charge whereas Bell recites that:

> ". . . each count must be considered as if it were a separate indictment or information. Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982)"
>
> (Text at 1040)

1/ In fairness to the Second District, perhaps the oversight was due to the fact that the issue reversal was not raised or briefed by the respective parties; this was a sua sponte contribution to Florida jurisprudence.

ISSUE II.

THE LOWER COURT'S DECISION CONFLICTS WITH FAISON v. STATE, 426 So.2d 963 (Fla. 1983); MONARCA 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); AND BELL v. STATE, 437 So.2d 1057 (Fla. 1983).

ARGUMENT

Quite apart from the District Court's unique judicial incorporation of multiple counts of an information, the instant case conflicts with a number of decisions in the double jeopardy analysis of McRae, supra, which was readopted below. [2/] Florida courts have consistently held that a defendant may be convicted of both burglary (during which an assault is made) and sexual battery. Faison v. State, 426 So.2d 963 (Fla. 1983); Monarca 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).

As this Court is undoubtedly aware, the Bell decision has spawned much confusion among the lower appellate courts as to the proper meaning and application of the Double Jeopardy Clause. [3/]

2/ In footnote 1 of the slip opinion, the lower court declared that McRae v. State had been put to rest in Speed v. State, 410 So.2d 980 (Fla. 2d DCA 1982) but became revitalized after Bell v. State, 437 So.2d 1057 (Fla. 1983).

3/ See, e.g., Garcia v. State, ____So.2d____, 8 F.L.W. 2873 (5th DCA 1983), Giddings v. State, 442 So.2d 336 (Fla. 5th DCA 1983) (J. Cowart concurring); Rodriguez v. State, ____So.2d ____, 8 F.L.W. 2905 (Fla. 5th DCA 1983).

The Court should reiterate its commitment to the Blockburger test previously recognized by the Court. See State v. Carpenter, 417 So.2d 986 (Fla. 1982); Borges v. State, 415 So.2d 1265 (Fla. 1982); State v. Gibson, ____So.2d____, 8 F.L.W. 76 (Fla. 1983); State v. Getz, 435 So.2d 789 (Fla. 1983).

Applying the Blockburger test sub judice, i.e., examining the statutory elements of the offense, clearly multiple judgments and sentences are appropriate in the instant case since the offense of burglary (Florida Statute 810.02) does not require as an element a sexual battery and the offense of sexual battery (Florida Statute 794.011) does not require as an element the entry of a dwelling. It is incumbent upon this Court, at last, to reject the notion examination of the accusatory pleading or the evidence adduced at trial has anything to do with double jeopardy.

Finally, this Court should accept review of the instant case because it also conflicts with Bell, supra. Bell holds 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."
>
> (437 So.2d at 1061)

In the instant case, the sexual battery count (Count II) is not a lesser included offense to burglary with an assault (Count I). The lower court thus erroneously expanded Bell;

its decision should be quashed.

This Court should accept discretionary review and order the reinstatement of all judgments and sentences.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

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

COUNSEL FOR APPELLEE/PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Regular Mail to: Allyn Giambalvo, Assistant Public Defender, 5100 - 144th Avenue North, Criminal Courts Complex, Clearwater, Florida 33520 this 12th day of March, 1984.

Of Counsel for Appellee/Petitioner