IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA)
)
Petitioner,)
)
v.)
)
TOM O'HARA)
)
Respondent.)

Case No. 65,116
5th DCA No. 82-1248

PETITIONER'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl 32014
(904) 252-2005

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

Tom O'Hara and Oscar Thrash, posing as law enforcement officers, threatened to imprison an elderly couple for a crime they did not commit unless they paid them a certain sum of money. O'Hara was charged, tried and convicted of extortion, grand theft and impersonating a police officer. (R-182,188-89, 212-214)

O'Hara appealed his convictions for grand theft (section 812.014, Fla.Stat.) and extortion (section 836.05, Fla.Stat.), claiming his right not to be placed in jeopardy twice for one crime had been violated.

The Fifth District, citing the result in Bell v. State, 437 So.2d 1057 (Fla. 1983), but utilizing a single transaction test, agreed, stating:

> "But for the extortion there would have been no money taken - that was the method by which it was taken. Only one conviction should have resulted." O'Hara v. State, ___ So.2d ___, (Fla. 5th DCA 1984) [9 F.W 508].

and

> "One cannot be convictied of two crimes for the taking of one sum of money, be it through an extortion method as here, or a robbery method as in Rodriguez v. State, 443 So.2d 236 (Fla. 5th DCA 1983).[1]

[1]The case of Rodriguez v. State has been submitted for discretionary review as well. See State v Rodriguez, Case No. 63,775.

The use of a single transaction analysis, in violation of the substantive analysis required by Bell, prompts this request for discretionary review.

POINT ON APPEAL

IT IS SUGGESTED THAT THIS HONORABLE COURT HAS JURISDICTION TO REVIEW A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL THAT IS TO EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THIS COURT.

ARGUMENT

In Neilson v. Sarasota, 117 So.2d 731 (Fla. 1960), this Honorable Court held that it would utilize its powers of discretionary review whenever a district court of appeal announced a rule of law ehich conflicted with a rule previously announced by this Court. This decision, coupled with the supremacy doctrine of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), from the basis of this argument.

Two decisions of this Court; Borges v. State, 415 So.2d 1265 (Fla. 1982) and Bell v. State, 437 So.2d 1057 (Fla 1983), provide for review of double deopardy claims by the use of a "substantive analysis" test. Under that test, the elements of the statutory offenses and the facts of each case must be analyzed to determine whether separate and distinct crimes have been proven, or merely a greater and lesser included offense have been proven.

Borges and Bell expressly reject the "single transaction rule."

The case at bar was not decided on the basis of any substantive analysis. It was, openly and directly, decided on the strength of a single transaction determination. The

majority opined:

> "But for the extortion there would have been no money taken - that was the method by which it was taken. Only one conviction should have resulted."

and

> "One cannot be convicted of two crimes for the taking of one sum of money, be it through the extortion method as here, or a robbery method as in Rodriquez v. State."[1] O'Hara v. State, So.2d (Fla. 5th DCA 1984) [9 FLW 508].

In a heated dissent, the Honorable Judge Cowart declared that the Fifth District is citing Bell and Borges for thier conclusions, but is not utilizing the required substantive analysis. This, in turn, was creating direct and substantial inter and intra-district conflict.[2] Judge Cowart's dissent is appendixed with the majority opinion and speaks for itself regarding the disagreement over which test the district court wishes to use.

Had the district court complied with the procedures of this Court, the double jeopardy analysis of extortion and grand

---

[1]The Rodriguez case is currently before this Court on petition for review, Case No. 63,775.

[2]Conflict certiorari, of course, does not permit resolution of intra-district conflicts. Relief is sought due to conflict with the declared rules of this Court set forth in Bell and Borges.

theft would have shown:

> (1) The elements of extortion are (a) a communication, (b) a threat (c) with malice (d) with intent to compel action or non-action by the victim.
>
> (2) The elements of grand theft are (a) obtaining or using of (2) the property of another, of (3) a certain value (4) with intent to deprive.

The elements of extortion and grand theft are separate and distinct, with proof of one not constituting proof of another. O'Hara was not convicted of "two crimes for the taking of one sum of money." Only grand theft involved any "taking." The criminal act of extortion is in the making of a threat.

This analysis would be in accord with Borges v. State, 415 So.2d 1265 (Fla. 1982), which eliminated the single transaction rule while affirming convictions for burglary with a dangerous weapon, possession of burglary tools, possession of a firearm by a felon and carrying a concealed firearm despite the existence of one incident and one gun.

The substantive analysis approach was used by the Second District in Gaither v. State, 436 So.2d 289 (Fla. 2nd DCA 1983). The Fifth District, however, seems to persist in the "single transaction" approach. For this reason, this Honorable Court is asked to utilize its power of discretionary review to establish the supremacy of its announced rules. Hoffman v. Jones, surpa.

CONCLUSION

This discretionary review powers of this Court are invoked to provide relief from the District Court's failure to abide by the substantive analysis standard of review declared by this Court to be the standard for reviewing double jeopardy claims.

Respectfully submitted,

Jim Smith
Attorney General

Mark C. Menser
Assistant Attorney General
125 N. Ridgewood Avenue, 4th Fl
Daytona Beach, Florida 32014
(904) 252-1067

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to David A. Henson, Esquire, Assistant Public Defender, this 6th day of April, 1984.

Of Counsel for Appellee
Mark C. Menser