

IN THE SUPREME COURT OF FLORIDA

FILED

JOHN WHITE

JAN 9 1985

CLERK SUPREME COURT

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Chief Deputy Clerk

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 66,212

WILLIAM FOREMAN,
Respondent.

BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The STATE OF FLORIDA will be referred to as the "Petitioner" in this brief. WILLIAM FOREMAN will be referred to as the "Respondent". References to the Record on Appeal will be made by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On July 29, 1983, the State filed a two-count information charging the Respondent with sexual battery and burglary.* The Court specifying sexual battery charged that Foreman threatened to use force or violence likely to cause serious personal injury. The burglary count charged that the Respondent entered or remained in a structure with the intent to commit an offense therein. It went on to specify the offense as assault and gave supporting facts. (R. 8). Later, the State filed an amended information in the case. (R. 18) It did not change the allegations regarding the sexual battery count. It did, however, change the burglary charge. It changed the specified offense from assault to "assault or battery", deleted the specific facts found in the first information specifying instead that the Respondent made an assault on the victim. (R. 18).

A jury returned a verdict finding the Respondent to be guilty as charged on both counts of the amended information. (R. 31, 32). The circuit court adjudicated the Respondent guilty of both charges and imposed sentence on both. (R. 44 - 48).

*

It filed an amended information.

The district court determined that under its decision in Wicker v. State, 445 So.2d 581 (Fla. 2DCA 1983), review granted and cases implementing the sentencing guidelines that only sexual battery convictions could stand since it was the primary offense at the time of sentencing. It then vacated both sentences on account of error in using the guidelines and the first-degree burglary conviction. The Court concluded that first-degree burglary conviction could not stand. It reasoned:

But since the only error in these multiple convictions derived from using the enhancing factor of sexual battery to convert second degree burglary to first degree burglary and without that enhancing factor the crime of second degree burglary continues to exist, defendant should be sentenced for sexual battery and second degree burglary.

The Court then certified the following question for this Court's consideration:

MAY A DEFENDANT BE CONVICTED AND SENTENCED FOR BOTH SEXUAL BATTERY AND FIRST DEGREE BURGLARY PUNISHABLE BY LIFE (WHICH IS ENHANCED FROM BURGLARY TO FIRST DEGREE BURGLARY PUNISHABLE BY LIFE BY REASON OF THE COMMISSION OF ASSAULT OR BATTERY IN THE COURSE OF THE BURGLARY) WHEN THE SEXUAL BATTERY IS THE SAME CONDUCT ON THE BASIS OF WHICH THE BURGLARY CHARGE IS SO ENHANCED?

SUMMARY OF THE ARGUMENT

The Court must answer the certified question in the affirmative. For double jeopardy purposes, the Court must examine only the statutory elements of the crimes charged to determine whether there is only one crime or two. The elements of the two charged crimes are separate and distinct. Each contains elements the other does not. The fact that they arguably contain a common element, an assault on the victim is not controlling. Settled authority from this Court, Scott v. State, 453 So.2d 799 (Fla. 1984) and State v. Gibson, 452 So.2d 553 (Fla. 1984) compel a reversal of the district court's decision. The district court's reliance on its decision in Wicker v. State, 445 So.2d 581 (Fla. 2DCA 1983) review granted is misplaced. Wicker failed to understand the continuing validity of Borges v. State, 415 So.2d 1265 (Fla. 1982) as articulated by this Court in State v. Gibson, 452 So.2d 553 (Fla. 1984).

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED TO THE PREJUDICE OF THE STATE IN VACATING FIRST DEGREE CONVICTION OCCASIONED BY THE RESPONDENT'S ASSAULT OR BATTERY ON THE VICTIM BECAUSE IT OCCURRED DURING THE SAME CRIMINAL EPISODE AS AN INVOLUNTARY SEXUAL BATTERY INVOLVING THE THREATENED USE OF FORCE LIKELY TO CAUSE SERIOUS PERSONAL INJURY?

Based on this Court's most recently articulated understanding of both double jeopardy and lesser included offenses it is clear that this Court must answer the question certified by the district court in the affirmative and find that it erred in vacating the Respondent's conviction for first-degree burglary and the sentence imposed as a result of it.

Neither the constitutional prohibitions against double jeopardy nor the lesser included offense provision of Fla. Stat. § 775.021(4) (1983) requires the result reached by the district court. As this Court taught in State v. Baker, 452 So.2d 927 (Fla. 1984):

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).

In the case under review, the statutory elements of the sexual battery charge are:

- (a) the victim was over the age of eleven;
- (b) defendant inserted his penis in the victim's vagina;
- (c) defendant coerced the victim to submit by threatening to use force or violence likely to cause serious personal injury and the victim reasonably believed the defendant had the present ability to execute those threats; and
- (d) the act was committed without the consent of the victim.

The statutory elements of the burglary charge in this case are:

- (a) defendant entered or remained in a structure in the possession of the victim;
- (b) without permission or consent of either the victim or anyone authorized to act for her;
- (c) at the time of the entering or remaining, the defendant had a fully formed conscious intent to commit an offense, to wit: assault or battery; and
- (d) assaulted the victim during the course of the burglary.

Accordingly, it is abundantly clear that neither the burglary charge nor the sexual battery charge are lesser included offenses to each other. At best, they can be said to

contain a common element, the assault. The burglary charge was no more a lesser included offense to the sexual battery than the child abuse was to the manslaughter in Scott v. State, 453 So.2d 799 (Fla. 1984). See also State v. Gibson, 452 So.2d 553 (Fla. 1984) (robbery while armed and use or display of firearm during the commission of a felony justified separate convictions and punishments even though arising out of the same factual event). Just as in Gibson, the legislature meant to punish each offense separately.

The district court erred in relying on its Wicker decision as it had erroneously concluded that Borges v. State, 415 So.2d 1265 was no longer good law. Since that time, this Court has relied on Borges as controlling authority. State v. Gibson, 452 So.2d at 556. There the court said:

[3-5] In Borges v. State, we adopted the test announced in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), for determining whether two statutory offenses, when ostensibly violated by a single act of the accused, are intended to be separately prosecuted and punished. There it was said that the "applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, 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."
284 U.S. at 304, 52 S.Ct. at 182.

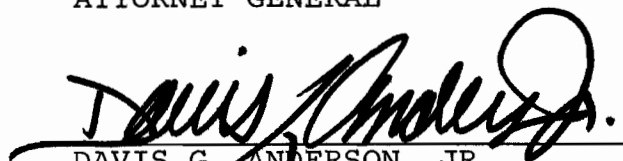
Applying that to this case yields the conclusion that the district court erred in its analysis of the double jeopardy-included offense issue. Footnote 7 of the opinion goes on to show the fallacy of the reasoning that led to the result below. In short, settled precedent in this Court mandates a reversal of the district court's ruling upsetting Foreman's enhanced burglary conviction and the sentence imposed for it.

CONCLUSION

Based on the above stated facts, arguments and authorities, the Petitioner would pray this Honorable Court reverse the decision of the district court and instruct it to reinstate the Respondent's conviction and sentence for aggravated burglary.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

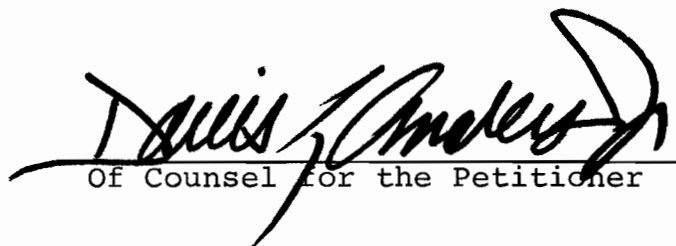


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Regular Mail to Deborah K. Brueckheimer, Assistant Public Defender, Criminal Courts Complex, 5100 - 144th, Clearwater, Florida on this 7th day of January, 1985.



Of Counsel for the Petitioner