IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
CLIFFORD WAYNE GORDON,
Respondent.

CASE NO. 66,213

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Respondent accepts the Statement of the Case contained in the Petitioner's Brief on the Merits.

STATEMENT OF THE FACTS

[Respondent accepts the Statement of the Facts contained in the Petitioner's Initial Brief on the Merits subject to the following additional facts:]

July 6th was a typically nice summer day in Florida, with the usual afternoon thundershowers that turned the busy highway in Ocala slick with rain (R18,27,30,62). Around two o'clock p.m., several automobiles stopped for a red traffic light on highway 200 just past the Burger King and tragedy struck (R18-19,29-30).

A Chevrolet pick-up truck being driven by Mr. Gordon caused a chain reaction collision when, without braking, it crashed into the rear of a Datsun automobile (R18-19,117). Ms. Janet Kint Hexham was the driver of the vehicle immediately in front of the Datsun, and she quickly emerged from her Corvette after it was struck by the Datsun (R46-48,51,59,63,75,102). She stepped into the middle of the road as if to assess the damage that had occurred to her sports car and, upon becoming aware of the truck approaching truck, raised her hands, and was struck almost instantly by the truck as it accelerated away from the scene of the accident (R46-48,51,59,63,80,102-104,111-112,139). Ms. Hexham died soon thereafter as a result of being run over by the right-side tires of the truck (R131,148-149).

There followed several more traffic accidents as Mr. Gordon's truck changed lanes, until the vehicle finally came to a rest about a half-mile away from where Ms. Hexham was struck

(SR13-14)[1/]. Mr. Gordon was at once arrested, and a chemical test run upon a sample of his blood disclosed a blood alcohol content of .259% (SR169).

The arresting officer testified that Mr. Gordon appeared to be intoxicated at the time of his arrest; that he was "staggering, swaying about on his feet, having trouble standing. [Mr. Gordon had] a very strong smell about his breath, what appeared to be an alcoholic beverage, and his eyes were bloodshot". (R100). The expert chemist testifying for the State established that a .259% blood alcohol percentage would indicate that the person was intoxicated. The witnesses near enough to observe Mr. Gordon's demeanor consistently testified that he was "expressionless" and in a stuporous-type state (R120,129,138,SR14-15,58-59, 88,96,100).

1/ (SR) refers to the Supplemental Record on Appeal filed in this cause on September 2, 1983.

SUMMARY OF ARGUMENT

POINT I

D.W.I. Manslaughter is not a "possibly " lesser included offense of Second Degree Murder. It is necessarily the same offense a s second degree murder because operation of a motor vehicle while intoxicated is, as a matter of law, synonymous with any act imminently dangerous to another and an act evincing a depraved mine.

POINTS II AND III

The double jeopardy clauses of the Florida and United States Constitutions bar multiple convictions and sentences for D.W.I. manslaughter and Second Degree Murder where there is only one victim because the crimes have a sufficiently similar element so that only one offense [the unlawful killing of a human being by another] in the constitutional sense has occurred

The Blockburger approach to double jeopardy is wrong because it fails to recognize that two "offenses", as defined by the legislature, can and may, and often do contain meaning-less distinctions insofar as legal elements of the "crimes", yet the "crimes" are proved by the same basic, substantive facts. One unlawful killing, however wrongful, does not two punishable homicides make.

Because Blockburger has proved unsound, this Court should pass upon the double jeopardy provision contained in the Florida Constitution and enunciate definative guidelines.

POINT I

IS D.W.I. MANSLAUGHTER A POSSIBLY LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER?

The state has framed its point to state that "D.W.I Manslaughter is not a necessarily lesser included offense of Second Degree Murder." (P.B. at 4). Mr. Gordon respectfully disagrees and points out that if the term "unlawful killing of a human being when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life"[2/] was intended by the legislature to be synonymous with "death of any human being...caused by the operation of a motor vehicle by any person while intoxicated"[3/], the offenses are not only necessarily lesser included in each other, they are the same offenses except for penalty. Based upon the patent ambiguity and applying the statutory rule of lenity, it is evident that the District Court vacated the wrong conviction, and instead should have vacated the sentence for second degree murder. See Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980).

> In past cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of substantive ambit of criminal prohibitions, but also to the penalties they impose. (citations omitted). The Court's opinion in Ladner v. United States, 358 U.S. 169, 178, 3 L.Ed.2d 199, 79 S.Ct. 209 (1958), states the rule:"this policy of lenity means that the Court will not interpret a Federal criminal statute so as to increase the penalty that it places on an

2/ §782.04(2), Fla. Stat. (1981)
3/ §860.01(2), Fla. Stat. (1981)

> individual when such an interpretation can be based on no more than a guess as to what Congress intended." See Whalen v. United States, 445 U.S. 684, 692, n 10, 63 L.Ed.2d 715, 100 S.Ct. 1432 (1980); Simpson v. United States, 435 U.S., at 15, 55 L.Ed.2d 70, 98 S.Ct. 909.

Bifulco, supra at 387, 65 L.Ed.2d at 211.

The language of "unlawful killing... by ANY act" language contained in the second degree murder statute is anologous to the "any overt act" language contained in the attempt statute.[4/] In Akins v. State, 9 F.L.W. 2541 (Fla. 5th DCA December 6, 1984) Judge Cowart, in a dissenting opinion[5/] stressed that when a statute uses terms such as "any act", the elements of the offense become too imprecise for the Blockburger analysis.[6/]

> The analysis of two statutory offenses for substantive sameness or difference for double jeapardy and due process purposes is properly a two step test; the first step is to abstractly compare the elements of the two offenses and the second step compares the factual bases for the two prosecutions. However, the vague "any overt act" element of the offense of an attempt cannot, as a practical matter, be precisely compared for sameness or difference with elements of another offense. Therefore, when one offense is an attempt, meaningful analysis of the elements of the two offenses is thwarted and all that can be done is to go on to the second or factual test and determine if the facts that are being used to prove "the overt act" element in the attempt offense are the same facts that are used to prove the second offense. If both the attempt offense and the other

4/ §777.04(1), Fla. Stat. (1983)

5/ See also Baker V. State, 425 So.2d 36,69 (Fla. 5th DCA 1983) Cowart, J. dissenting, quashed State v. Baker, 9 F.L.W. 282 (Fla. July 13, 1984).

6/ Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)

> offense are based on the same factual event, the two are, in substance, "the same offense" within the constitutional prohibitions; otherwise, they are not.

Akins, supra at 2541 (footnotes omitted).

In the instant case, "the unlawful killing of a human being when perpetrated by any act" element of second degree murder just so happened to factually and legally be same act of D.W.I. Manslaughter. Because the same unlawful act has been alternatively alleged by the state and resulted in duplicituous convictions [but with differing results], the least severe sanction should be imposed.

Accordingly, this Court is respectfully asked to answer the first certified question in the negative [because in fact the two offenses in light of the facts of this case are necessarily the same offense], and further asked to re-instate the conviction/sentence for D.W.I. manslaughter and to vacate the conviction and sentence for second degree murder.

POINTS II AND III

THE DOUBLE JEOPARDY CLAUSE OF FLORIDA'S AND THE UNITED STATE'S CONSTITUTIONS BARS CONVICTIONS [CERTIFIED QUESTION #II] AND SENTENCES [CERTIFIED QUESTION # III] FOR TWO HOMICIDE CONVICTIONS FOR A SINGLE HOMICIDE VICTIM.

In Bell v. State, 437 So.2d 1057 (Fla. 1983), this Court held "that once it has been established that an offense, whether charged or not, and whether in a 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." id. at 1061.

Bell also notes that, "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." id at 1059. (emphasis added).

This Court in Bell recognized that a mere recitation of the Blockburger rule for determining when offenses are distinct or the same cannot alone give guidance to the courts. Common sense and a desire for consistency and fairness also play an important role in applying a constitutional premise.

Florida courts have consistently held that where there is but one victim, there can be but one homicide conviction and sentence, and for good reason. The gravamen of the crime[or offense] of homicide is the killing of one human being by another.

It is the killing of another that is the crime and the primary constitutent element that renders multiple convictions and sentences for but one act of killing another impermissibly cumulative.

The State has misapprehended the holding of Ohio v. Johnson, __U.S.__, 104 S.Ct. 2536, __L.Ed.2d__(1984). Clearly in Johnson the Court was holding that the double jeopardy clause cannot be used by a defendant as a sword to prevent further prosecution for a more serious offense by at the onset pleading guilty over State objection to a lesser included offense. Implicit in that holding, and as unquestionably established by is the fact that, if a conviction is subsequently obtained for the more serious offense, the prior conviction and sentence for the lesser included offense must be vacated due to double jeopardy proscriptions. The Court in Johnson simply acknowledged that a prosecution could go forward. It bears noting that jeopardy as to the more serious offense in Johnson never attached, and that Johnson did NOT concern inconsistant crimes.

This Court's attention is respectfully called to State v. Young, 371 So.2d 1029 (Fla. 1979), wherein this Court held that the State may elect to charge a defendant with either vehicular homicide [violation of §782.07, Fla. Stat.(1975] or manslaughter [violation of §782.07 Fla. Stat. (1975)]. The court "conclude[d] that vehicular homicide is a lesser included offense of manslaughter resulting from the operation of a motor vehicle, with a lower standard of proof." Young, supra at 1030 (emphasis added).

The above conclusion obtained not withstanding

that the offenses do not contain identical elements. Again, the major constitutent element is the killing of one human being by another.

It is apparent that constitutional double jeopardy proscriptions pertain to multiple felonious homicide convictions (and sentences) because the one identical element necessarily contained in every homicide statute (the killing of a human being by another) is of such historical import that the killing itself is the offense. Stated somewhat differently, murder is the epitome of a malum in se crime...it is the unlawful killing of a human being by another that constitutes the crime (the offense). Even if the killing is unlawful because it violates umpteen different statutes, it is still the unlawful killing that society is interested and justified in punishing. The act of killing, however, may constitutionally only be punished once.

In the instant case, Mr. Gordon was convicted of Second Degree Murder and D.W.I. manslaughter. The State could as easily have additionally charged and received convictions on vehicular homicide [violation of §782.071 Fla. Stat. (1981)], third degree murder [7/] [violation of §782.04(4) Fla. Stat.(1981)]. and/or manslaughter [violation of §782.07 Fla. Stat. (1981)]. See Austin v. State, 40 So.2d 896 (Fla. 1949).

Thus, for one death, applying solely the Blockburger rationale, five separate felonious homicide convictions and sentences could obtain for the death of one person. That is an absurd result. It is none-the-less an application of the argument advanced by the State sub judice.

4/ The possible underlying non enumerated felony would be leaving the scene of an accident with injuries [violation of §316.027 (1) Fla. Stat.(1981)] for which a conviction was in fact obtained.

Respondent respectfully submits that the second and third certified questions must be answered affirmatively. Moreover, pursuant to the argument advanced by Mr. Gordon in Mr. Gordon's initial brief on the Merits in Supreme Court case no. 66,273, it is respectfully submitted that both convictions must be vacated due to the fundamental inconsistency that exists between second degree murder and manslaughter.

Moreover, with all due deference to the United States Supreme Court, it is respectfully pointed out that the double jeopardy ship has steered an errant and erratic course with the federal courts at the helm. As noted by Justice Rehnquist,"[w]hile the [double jeopardy clause] itself simply states that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator". Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275, 284 (1981).

The rule espoused in Blockburger provides too much importance to the intent of the law making body. Congress or the state legislature may fully intend to make it one crime to negligently kill a human being and a different crime to kill someone by an automobile while intoxicated. Such statute may indeed be independently valid, but cumulatively sanctioned they violate basic double jeopardy tenets.

Stated simply, regardless of congressional intent, mere statutes, however defined or intended cannot take precedence over the constitution. This Court has already recognized the foregoing in Bell, where the following was stated.

> In a pure sense of the definition two offenses are "the same" if they are identical in law and fact. That is, that one statute has been violated once. Of course merely labeling statutes does not, and cannot, make offenses distinct when in fact they are identical. U.S. Const. amend. V; art 1, §9, Fla. Const.

Bell v. State, 437 So.2d 1057, 1058-59 (Fla. 1983)

A state court is perfectly capable of construing the provisions of its own state's constitution in order to achieve fair and consistent results, so long as the construction provides as much protection as is afforded by the United States constitution.

The progeny of Blockburger clearly demonstrate that blind application of the Blockburger rule cannot be the answer to double jeopardy considerations. The results obtained are neither fair nor consistent.

It is respectfully submitted that the time has come for this Court to navigate entirely its own course through the turbulent waters of double jeopardy. This case, with its compelling facts, forms the proper vehicle for this Court to commence its journey, bearing in mind that the Fifth District Court of Appeal, in vacating the D.W.I. conviction and sentence, based its holding solely on Art. 1, §9 of the Florida Constitution.

The second and third certified questions should be answered in the affirmative.

CONCLUSION

Based upon the argument and authority contained herein this Court is respectfully asked to answer the first certified question in the negative, to vacate the conviction and sentence for second degree murder and to reinstate the conviction and sentence for D.W.I. manslaughter and, further asked to answer the second and thrid certified questions affirmatively.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General at 125 N. Ridgewood Avenue, Fourth floor, Daytona Beach, Florida and to Clifford Wayne Gordon, Inmate no. 088124 Marion Correctional Institute, P.O. Box 158 Lowell, Fla. 32663 this 2nd day of January 1985.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER