IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CLIFFORD WAYNE GORDON,

Respondent.

CASE NO. 66,213

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Mr. Clifford Wayne Gordon (herein after referred to as Respondent) was charged by Information with the offenses of second degree murder (Section 782.04(2), Florida Statutes) and D.W.I. manslaughter (Section 860.01(2), Florida Statutes) and leaving the scene of an accident with injuries (this count was not appealed and is irrelevent to the issues herein).

A sworn motion to dismiss was filed by the defense which alleged that the uncontroverted facts failed to establish the crime of second degree murder (R 30-31). The State filed a motion to quash (R 32) and following a hearing the motions were denied (R 43-63, 52).

The matter proceeded to jury trial. At the conclusion of the State's case, defense moved for a judgment of acquittal and argued that the evidence was insufficient from which the jury could determine that Respondent had the requisite mens rea of ill will hatred, spite or evil intent pursuant to the second degree murder charge (R 150-154). The motion was denied (R 157).

The defense put on witnesses. Following instructions the jury deliberated and returned verdicts of guilty as charged for second degree murder, D.W.I. manslaughter, and leaving the scene of an accident with injuries (R 216-217, 80-82).

On February 7, 1983, Respondent was adjudicated guilty of each offense and sentenced upon the second degree murder conviction to a life term of imprisonment, sentenced

upon the D.W.I. manslaughter conviction to a fifteen (15) year term of imprisonment (concurrent) (R 91-96).

Thereafter, Respondent directly appealed to the Fifth District Court of Appeal. Respondent first argued that the evidence was insuffcient to convict him of second degree murder. The Fifth District in Gordon v. State, ___ So.2d ___ (Fla. 5th DCA 1984) [9 FLW 2062, Case No. 83-328, November 27, 1984] affirmed the judgment and sentence for the second degree murder. Respondent next argued that the trial court erred in allowing him to be convicted and sentenced for the two homicides (the second degree murder and the D.W.I. manslaughter) when there was only one victim. It is the latter issue that the Fifth District agreed with by vacating the conviction and sentence for the D.W.I. manslaugther charge. However, the district court then certified three questions to this Court pursuant to Florida Rule Appellate Procedure 9.030(a)(2)(A)(v). Thereafter, Petitioner filed a notice to invoke discretionary jurisdiction of this Court and the brief on the merits follows herein.

STATEMENT OF THE FACTS

The opinion in Gordon v. State, ___ So.2d ___ (Fla. 5th DCA 1984) [9 FLW 2062, Case No. 83-328, November 27, 1984] summarized the facts very well and Petitioner will quote directly therefrom:

> The record shows that both homicide charges arose out of the same factual occurrence. While intoxicated, (his blood alcohol level later tested at .259) Gordon drove his pick-up truck at 2 P.M. on a multi-lane highway. He caused a chain reaction collision where he rammed into a Datsun automobile in front of his truck. Janet Hexam, the victim, was driving a Corvette in front of the Datsun.
>
> After the Datsun hit her vehicle, Hexam exited her Corvette to assess the damage. Gordon pulled out of the blocked traffic lane into the open one, intending to flee the accident he had caused. Hexam stepped into the open lane and raised her arms as if to flag him down. But Gordon continued to accelerate. He smashed into Hexam and, after throwing her body ahead of the truck, he ran her over again. Hexam died as a result of the injuries she received. Gordon caused several more accidents before his vehicle finally came to rest, one-half mile away from where Hexam was struck.

POINT I

D.W.I. MANSLAUGHTER IS NOT A NECESSARILY LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER.

The first certified question asked if D.W.I. manslaughter (Section 860.01(2), Florida Statutes) is a possibly lesser included offense of second degree murder (Section 782.04(2), Florida Statutes). The Fifth District in Gordon tentatively answered its own question in the negative as evidenced by the following:

> Apparently all we need to do in analyzing double jeopardy in this kind of case is look solely to the statutory elements of each crime. State v. Baker, 456 So.2d 419 (Fla. 1984); Bell v. State, 430 So.2d 1057 (Fla. 1983). If each has a different element not required to prove the other, then there are two separate and distinct crimes for which multiple convictions may be imposed. Apparently it does not matter that both crimes are in fact proved by the same facts (in this case, the death of the same homicide victim), or that one crime is an included (but not necessarily) lesser offense of the other (old category IV, Brown v. State, 206 So.2d 377 (Fla. 1968) or current category II see, Baker).

The Fifth District in Gordon then goes on to analyize the elements of the two crimes. The opinion acknowledges that D.W.I. manslaughter requires proof of driving a vehicle while the driver is intoxicated but that second degree murder does not require that element. Further the opinion explains that second degree murder requires proof the defendant did "an act immenently dangerous to another which evinces a depraved mind." Then the Fifth District explains that D.W.I.

manslaugter does not require proof of this mental element. This analysis is correct and unassailable.

In Scott v. State, 453 So.2d 798 (Fla. 1984) the defendant was convicted of manslaughter and child abuse based upon one criminal transaction. This Court held that since the statutory elements of each offense require proof of a fact that the elements of the other do not then under Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and Borges v. State, 415 So.2d 1265 (Fla. 1982) separate convictions and sentences could be imposed for both offenses. This reasoning applies even if the same act which constituted the homicide of the child also was the child abuse.

Likewise in such an analysis, it is irrelevent whether D.W.I. manslaughter could be a Brown category 4 lesser included offense of second degree murder. In State v. Baker, 456 So.2d 419 (Fla. 1984) (in upholding separate judgment and sentences for premeditated first degree murder and use of a firearm during the commission of a felony in the same criminal transaction) this Court concluded:

> ...we did agree and hold that the statutory language refers only to necessarily lesser included offenses and that the Brown category 4 lesser included offense analysis, while still possibly viable for jury alternatives, has nothing to do with double jeopardy. In determining whether separate convictions may flow from a single event, one looks to the statutory elements of the charged crimes, as opposed to the

> language of the charging documents. If each crime, under the respective statutes, requires an element of proof that the other does not, then one is not an included offense of the other. They are separate offenses. (emphasis not supplied).

Clearly for purposes of Section 775.021(4), Florida Statutes (1981) D.W.I. manslaughter and second degree murder constitute separate criminal offenses and are not lesser included offenses of each other. So the first certified question must be answered in the negative.

POINT II

THE DOUBLE JEOPARDY CLAUSE OF FLORIDA'S OR THE UNITED STATES' CONSTITUTIONS DO NOT BAR CONVICTIONS FOR BOTH OF THESE OFFENSES WHERE THESE OFFENSES AROSE OUT OF A SINGLE CRIMINAL PROSECUTION AND THERE WAS ONLY ONE HOMICIDE VICTIM.

Although the Fifth District in Gordon acknowledged the reasoning in State v. Baker, 456 So.2d at 419, the court announced that the rule in Florida had always been when there is but one death, there can be only one conviction for homicide. The opinion then proceeds to list a long line of cases to stand for the latter proposition.

Many of these cases (Muszynski v. State, 392 So.2d 63 (Fla. 5th DCA 1981) Ubelis v. State, 384 So.2d 1294 (Fla. 2d DCA 1980), Thomas v. State, 380 So.2d 1299 (Fla. 4th DCA 1980), and Strickland v. State, 332 So.2d 119 (Fla. 1st DCA 1976) quote from and base their decisions from the case of Brown v. State, 371 So.2d 161 (Fla. 2d DCA 1979). In Brown it was held that a defendant who was convicted of vehicular homicide and manslaughter could only be sentenced on the manslaughter charge. The Brown decision based its rationale on the case of State v. Young, 357 So.2d 416 (Fla. 2d DCA 1978). (c.f. foot note no. 1 in the Brown case.) In Young a charge of manslaughter was dismissed but the trial court gave leave to the State to file vehicular homicide charges. The State appealed and the Second District held that the trial court was correct because the standard of proof in the vehicular

homicide statute was virtually the same as the manslaughter statute. The analysis in Young was statutory principles; not double jeopardy analysis. Yet this Court in State v. Young, 371 So.2d 1021 (Fla. 1979) reversed the Young case, supra and held that vehicular homicide was a lesser included offense of the manslaughter statute with a lesser standard of proof. Therefore the State could elect which statute to prosecute. The Brown court relied erroneously on the Second District Court decision of Young because this Court had not handed down its decision yet in State v. Young, supra. Yet, Brown still stands as viable law. In any event neither Young decisions deal with the single transaction rule.

One of the earlier cases to deal with the single transaction rule in which many of these cases cited by the Fifth District follow is Phillips v. State, 289 So.2d 769 (Fla. 2d DCA 1974). In Phillips the defendant was convicted of manslaughter as well as D.W.I. manslaughter. Phillips overturned one of the homicide convictions. But in so doing the Second District in Phillips questioned the sufficiency of the evidence presented to establish the manslaughter conviction. The decision is not predicated upon any double jeopardy grounds whatsoever. Of course the Phillips court, as well as many of these decisions cited in the Gordon opinion, did not have the benefit nor consider Section 775.021(4), Florida Statutes (1977).

In State v. Gibson, 452 So.2d 553 (Fla. 1984) separate judgment and sentences for armed robbery

(Section 812.13(1), (2)(a), Florida Statutes (1981) and use or display of a firearm during the commission of a felony (Section 790.07(2), Florida Statutes (1981) during one criminal episode were upheld). This Court held:

> The "single transaction rule", however, has been legislatively eliminated from the law of Florida. § 775.021(4), Fla. Stat. (1977).

Id. at 555. Section 775.021(4), Florida Statutes, (1977) and (1983) (as amended) applies to all offenses. There is no statutory exception for homicide cases. Had the legislature wanted to create such an exception by following the "single transaction rule" homicide cases, it would have so stated explicitely in the statutes. No such exceptions exist and therefore the court should not create any sort of judicial exception and contravene the clear legislative mandate.

POINT III

THE DOUBLE JEOPARDY CLAUSE OF FLORIDA'S OR THE UNITED STATES' CONSTITUTIONS DO NOT BAR IMPOSITIONS OF DIFFERENT SENTENCES FOR THE CONVICTIONS OF D.W.I. MANSLAUGHTER AND SECOND DEGREE MURDER RENDERED IN A SINGLE CRIMINAL EPISODE WHERE THERE WAS ONLY ONE HOMICIDE VICTIM.

The Gordon opinion expressed equivocation on the issue of whether the United States Constitution would allow separate sentences for both the offenses. The question arose from a quote from the case of Ohio v. Johnson, ___ U.S. __ 104 S.Ct. 2536, ___L.Ed.2d___ (1984). This quote was quoted in Gordon at 9 Florida Law Weekly 2062 and is as follows:

> While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the State from prosecuting Respondent for such multiple offenses in single prosecution.

This quote must be viewed from the entire context of the Johnson case. The defendant was indicted for murder, involuntary manslaughter, aggravated robbery, and grand theft. At arraignment the defendant pled guilty (over State objection) to involuntary manslaughter (a lesser included offense of murder in Ohio) and grand theft (a lesser included offense of robbery in Ohio). The other charges were then dismissed on double jeopardy grounds. The Ohio State Supreme Court upheld the trial court's action. But it must be remembered in Ohio that offenses which share common elements (called "allied")

based upon one criminal transaction, will allow only one conviction under Ohio Law.

After explaining the latter, the United States Supreme Court went on to explain that the double jeopardy clause protects against multiple punishments for the same offense. (emphasis supplied). This concept, the Supreme Court explained, was designed to insure that the sentencing discretion of courts is confined to the limits established by the legislature. So the question of whether punishments are multiple or not is one of legislative intent. The United States Supreme Court in Johnson explained:

> We accept, as we must, the Ohio State Court's determination that the Ohio legislatute did not intend cumulative punishments for the two pairs of crimes involved here.

Id at 2541. After this analysis the Supreme Court held that Ohio must try the defendant on the greater offenses even if Ohio State law might prohibit cumulative punishments for each greater offense and its respective lesser included.

But it is most important to remember that the Johnson decision reaffirmed the holding in Missouri v. Hunter, ___ U.S. ___ 103 S.Ct. 673, ___L.Ed.2d___ (1983). The Supreme Court held in Hunter that the double jeopardy clause prohibits a court from sentencing a defendant to a greater punishment than that prescribed by the legislature. The Missouri statute allowed a defendant to be sentenced for use of a deadly weapon during a felony as well as a first degree robbery offense (by use of a deadly weapon) even though both

offenses were based upon the same criminal transaction. The Supreme Court upheld this State legislative sentencing scheme and allowed cumulative punishments for both offenses even though based upon one criminal transaction. The holding in Hunter was reaffirmed in Johnson, supra at 2451, footnote 8.

Indeed there would be no substantive difference for double jeopardy purposes in allowing the Missouri State legislature to impose a greater sentence based upon two separate statutes, as opposed to allowing the legislature to statutorily amend the robbery statute by increasing the punishment; the result is the same and if the legislature desires to impose a greater (or multiple) punishment for the offenses the double jeopardy clause of the United States Constitution does not prohibit such action.

This Court has acknowledged such a principle in State v. Baker, 452 So.2d 927 (Fla. 1984) explaining:

> Where an offense is not a necessarily lesser included offense, based on its statutory elements, the intent of the legislature clearly is to provide separate convictions and punishment for the two offenses. § 775.021(4), Fla. Stat. (1979).

Id at 929. The legislative mandate of Section 775.021(4), Florida Statutes (1983) is unequivocal in that it allows separate convictions and punishments for multiple offenses based upon one criminal episode where some of the statutory elements differ. Likewise, such a statute does not offend the double jeopardy clause of the United States Constitution.

Nor are there any Florida cases which would disallow such a legislative intent pursuant to the double jeopardy clause of the Florida Constitution (Art. I § 9, Fla. Const.). As such the second and third certified questions in the Gordon opinion must be answered in the negative and the D.W.I. manslaugther conviction and sentence reinstated.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on the Merits has been furnished, by delivery, to Larry Henderson, Assistant Public Defender, Counsel for Respondent at 1012 South Ridgewood Avenue, Daytona Beach, Florida 32014-6183 this 12th day of December, 1984.

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