IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CLIFFORD WAYNE GORDON,

Respondent.

CASE NO. 66,213

CLIFFORD WAYNE GORDON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,273

PETITIONER'S REPLY BRIEF ON THE MERITS

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TOPICAL INDEX

AUTHORITIES CITED

OTHER AUTHORITIES

STATEMENT OF THE CASE

The State of Florida invoked discretionary jurisdiction of this Court pursuant to certified questions propounded by the Fifth District Court of Appeal in the case at bar (case no. 66,213).

Subsequently, Clifford Wayne Gordon, also filed to invoke this Court's discretionary jurisdiction in the same case (case no. 66,273). This Court accepted jurisdiction pursuant to both causes.

By order of this Court, on December 21, 1984, both of these causes were consolidated.

The State of Florida herein, will consolidate a reply brief in case no. 66,213 with an answer brief in case no. 66,273.

Respondent's answer brief in case no. 66,213 on behalf of Clifford Wayne Gordon, will be referred to in the record as RAB. Clifford Wayne Gordon's initial brief (filed as petitioner's brief on the merits in case no. 66,273 and 66,213) will be referred to in the record as PBM.

The state's initial brief, filed in case no. 66,213 (filed as petitioner's brief on the merits) will be referred to in the record as SPBM.

SUMMARY OF ARGUMENT

POINT I:

DWI manslaughter and second degree murder do have mutually exclusive elements, thus cannot be deemed the "same offense."

POINTS II & III:

Ohio v. Johnson, _____ U.S. _____, 104 S.Ct. 2536, _____ L.Ed.2d _____ (1984), does not preclude the State of Florida from enacting and enforcing section 775.021(4), Florida Statutes (1981), and thus separate convictions and punishments may be imposed for one criminal transaction where such transaction violates two (2) or more criminal statutes, excluding lesser included offenses.

POINT I

DWI MANSLAUGHTER HAS DIFFERING STATUTORY ELEMENTS FROM SECOND DEGREE MURDER, AND THUS DWI MANSLAUGHTER CANNOT BE A LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER.

ARGUMENT

Initially, Mr. Gordon argued that DWI manslaughter and second degree murder contained mutually exclusive elements (PBM 1, 7-9). This analysis, although arguing that only one conviction could result from one (1) homicide victim, implicitly agreed with the analysis given by the Fifth District Court of Appeal in the case at bar. The fifth district analyzed the statutory elements for both offenses, and held that each offense requires proof of an element that the other does not.

However, in Mr. Gordon's answer brief on the merits, he now argues that the offense in the case at bar "are not only necessarily lesser included in each other, they are the same offenses except for penalty" (RAB 5) (emphasis not supplied). Perusal of the Court's decision in Baker v. State, 377 So.2d 17 (Fla. 1979), would belie this latter contention. This Court held that a conviction for DWI manslaughter (now § 316.193, Fla. Stat. 1983) does not require a causal connection between the intoxication and the resulting death. The elements are: (1) a death occurred; (2) the death resulted from the operation of a vehicle by the defendant; (3) the defendant was intoxicated at the time he operated the vehicle. But this Court went on to explain that neither specific intent nor causal connection between the act and the death is an element of the crime. There is no burden upon the state to show that at the time of the incident the defendant was negligent. This Court explained:

> That element is established if it be shown that he was not, at the time, in possession of his faculties due to the voluntary use of intoxicants.

> In view of what was written by the Court in Cannon v. State, 91 Fla. 214 107 So.360, the negligence occurred at the time the driver, drunken to the extent named in the statute, entered the vehicle and proceeded to operate it and that negligence attached at the time the collision occurred, resulting in the death for which the defendant was placed on trial. It was not necessary to show that there was additional negligence when the collission occurred . . .

Id. at 18. This Court went on to explain that the defendant was correct when he argued that proximate causation is an element of proof for a manslaughter conviction based upon culpable negligence pursuant to section 782.07 Florida Statutes (1977), Id. at 19. Under this analysis, it is clear in the case at bar, that DWI manslaughter certainly does not require the state to prove that the defendant committed an act eminently dangerous to another and evincing a depraved mind regardless of human life. Since manslaughter is a necessarily lesser included offense of second degree murder, and by the wording of the second degree murder statute [§ 782.04(2) Fla. Stat. (1981)] it is clear that proximate causation is an element for second degree murder.

Mr. Gordon should take no comfort from the case of State v. Young, 371 So.2d 1029 (Fla. 1979). Mr. Gordon correctly points out that the conclusion reached by this Court is that vehicular homicide was a lesser included offense of manslaughter resulting from the operation of a motor vehicle [but not DWI manslaughter (RAB 9)]. Mr. Gordon then argues that this decision essentially stands for the proposition that since these offenses contain one major constituant element (i.e., the killing of one human being), that the implied holding of this case is that only one murder conviction can be obtained for one criminal transaction (RAB 9-10). This argument goes well beyond what State v. Young, supra held. This decision never construed the effect of section 775.021(4), Florida Statutes (1979),

and indeed it was not necessary to reach the issue in the case at bar; the state was not seeking to impose multiple convictions and sentences.

Mr. Gordon, in arguing that DWI manslaughter and second degree murder are the same "offenses" where there is only one murder victim, has not and cannot rationalize such an argument in lieu of this Court's holding in Scott v. State, 453 So.2d 798 (Fla. 1984) (SPBM 5). Under Scott the defendant's convictions and sentences for manslaughter and child abuse were upheld even though one criminal transaction occurred (i.e., the events that comprised the child abuse also resulted in the manslaughter).

Mr. Gordon relies on and quotes from Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) (RAB 5-6). In Bifulco, the Supreme Court held that it would not interpret a statute so as to increase the penalty when the interpretation could be based on no more than a guess as to what congress had intended. In the case at bar, reading section 775.021(4), Florida Statutes (1981), it is clear that this Court need not guess as to what the Florida Legislature had intended. Indeed, this statute has all ready been interpreted against Mr. Gordon's position in State v. Baker, 452 So.2d 927 (Fla. 1984), and State v. Baker, 456 So.2d 419 (Fla. 1984).

As explained by the state in its initial brief, (SPBM 10-11) the holding in Ohio v. Johnson, ____ U.S. ____ 104 S.Ct. 2536 ____ L.Ed.2d ____ (1984), reaffirms the Supreme Court's decision in Missouri v. Hunter, ____ U.S. ____ 103 S.Ct. 673, ____ L.Ed.2d ____ (1983). In Hunter, the Supreme Court held that the double jeopardy clause merely prohibits a court from sentencing a defendant to a greater punishment than that prescribed by the legislature. In escence this decision allows such statutes as 775.021(4), Florida Statutes (1981),[1] to stand.

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1 Section 775.021(4) Florida Statutes (1983) was subsequently amended by the legislature but the interpretation of the statute by this Court has not been affected by such amendment. See, State v. Baker, 452 So.2d 927 (Fla. 1984), and State v. Baker, 456 So.2d 419 (Fla. 1984).

Mr. Gordon argues that the State could have also charged and obtained convictions and sentences for the additional offenses for vehicular homicide [§ 782.071, Fla. Stat. (1981)], third degree murder [§ 782.04(4), Fla. Stat. (1981)], and manslaughter [§ 782.07, Fla. Stat. (1981)]. But manslaughter is a necessarily lesser included offense of second degree murder and under the schedule of lesser included offenses vehicular homicide is a lesser included offense of DWI manslaughter. See, Florida Standard Jury Instructions (Criminal), section 782.04(2), Florida Statutes (1983), and section 316.1931(2), Florida (1983), respectively. But in any event, if one criminal transaction does result in the violation of a number of criminal statutes (RAB 10), then the state may obtain multiple convictions and sentences pursuant to the mandate of 775.021(4), Florida Statutes (1981).

POINTS II & III

THE DOUBLE JEOPARDY CLAUSE OF FLORIDA'S AND THE UNITED STATE'S CONSTITUTIONS DO NOT BAR SEPARATE CONVICTIONS NOR SENTENCES FOR MULTIPLE CRIMINAL STATUTES BASED UPON ONE CRIMINAL TRANSACTION.

Ohio v. Johnson, supra explained that the Supreme Court would give deference to the Ohio Legislature regarding multiple sentences based upon Ohio's statutory scheme regarding imposing multiple sentences. As explained in this opinion, Ohio law prohibits multiple sentences for "allied offenses." The Florida Legislature in enacting section 775.021(4), Florida Statutes (1983), has no such limitation and such a scheme was reaffirmed and recognized in Ohio v. Johnson, by citing the case of Missouri v. Hunter, supra (SPBM 9-10).

Mr. Gordon attempts to find support in his position from the dissent of Judge Cowart in Akins v. State, ____ So.2d ____ (Fla. 5th DCA 1984) [9 F.L.W. 2541, December 6, 1984]. Judge Cowart explained that the aggravated assault charge was the basis which formed the attempt to committ armed robbery. So the attempt included all the elements of the completed facilitating offense (i.e., the aggravated assault). Judge Cowart did acknowledge that double jeopardy principles did not prohibit separate judgements and sentences on a completed armed robbery and a completed aggravated assault. Judge Cowart did acknowledge that his analysis entailed a two step process. He explained that the first step was to abstractly compare the elements of the two offenses. It is clear from the opinion in the case at bar that this first step can be completed because DWI manslaughter and second degree murder have distinct statutory elements. But in Akens Judge Cowart explained that he could not make any such comparison for an attempt because an attempt contained vague

elements which could constitute any overt act. So as a practical matter, step one could not be completed because an attempt could not be compared for the same or differing elements of another offense. Thus, Judge Cowart had to go to the second step, that is compare factual bases for the two offenses. In the case at bar it is not necessary to go to the second step to compare factual bases because the first step can easily be attained, i.e., each statute containes differing elements that the other does not. In any event, this Court in State v. Baker, 452 So.2d 927, supra, based its reasoning in a large part on the dissent of Judge Cowart in Baker v. State, 431 So.2d 263 (Fla. 5th DCA 1983). The analysis in the dissent in the latter case would apply equally to the case at bar.

Mr. Gordon relies upon Muszynski v. State, 392 So.2d 63 (Fla. 1981) to support his position. He should find no solace in this case as evidenced by the following quote and holding in that case:

> In summary, we affirm appellant's convictions of first degree murder and theft of a motor vehicle. We vacate the convictions of second degree murder, robbery, and aggravated battery because they are necessarily included in the felony murder conviction.

Id. at 65 (emphasis applied). Inasmuch as Muszynski, is limited to necessarily lesser included offenses, this case cannot possibly help Mr. Gordon's cause.

What Mr. Gordon seeks in essence would be to engraft a judicial acception on to section 775.021(4), Florida Statutes (1981). There is no reason not to apply the same analysis for homicide cases that is applied to other criminal statutes when examining the issue of multiple convictions and sentences for one criminal transaction. To make such an acception as Mr. Gordon proposes, would not only in part vitiate section 775.021(4), Florida

Statutes (1981), but would further add to the confusion and ambiguity in the issue of double jeopardy.

CONCLUSION

Based on the arguemnts 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 copy of the above and foregoing Brief on the Merits has been furnished, by mail , to Larry B. Henderson, Assistant Public Defender, at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 21st day of January, 1985.

W. BRIAN BAYLY
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