IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	*	
Petitioner,	*	
-vs-	*	Case No. 66,371
WILLIAM D. JOHNSON,	*	
Respondent	*	

RESPONDENT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

AUTHORITIES CITED (cont'd)

CASES

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

Respondent, William D. Johnson would abide by the statement of the case and facts as given by the Petitioner with the following additions:

Following Respondent's jury trial and conviction, he actually served close to four and one-half (4 1/2) years at Union Correctional Institute. Only upon the issuing of the mandate from the Fifth District Court of Appeal and the resentencing hearing in the Circuit Court was Respondent released.

During the hearing of Respondent's 3.850 Motion by the trial court, no motion or objection was made by the Assistant State Attorney that the Respondent had somehow waived his double jeopardy rights. Nor did the State file any motion or response attacking Respondent's 3.850 motion on the grounds of waiver or failure to make contemporaneous objections. (R 1-57) Only in the Petitioner's brief to the Fifth District Court of Appeal did the State assert the concept of waiver. Additionally, the record is entirely devoid of any evidence of a knowing, voluntary and intelligent waiver on the part of the Defendant. However, the record is replete with evidence that the original presiding trial judge and the State Attorney did not understand William Johnson's double jeopardy rights.

SUMMARY OF ARGUMENT

Certified Question (1)

It is fundamental error to set aside a previously accepted plea to a stipulated lessor included offense without legal cause and then try the Defendant on the greater original charge.

Certified Question (2)

(a) Under the above facts, it is not possible for the state to show that no prejudice occurred, since the Defendant was, in fact, convicted of the higher offense which could have been barred.

(b) To be effective, the waiver of the Defendant's double jeopardy rights, can only be made knowingly, intentionally and intelligently. Absent such a showing on the face of the record, and not by mere inaction or implication, it must be conclusively presumed that there was no effective waiver.

(c) The violation of a Defendant's fundamental constitution rights, which include double jeopardy are cognizable at any time, notwithstanding contemporaneous objections rules and harmless error statutes.

ARGUMENT

Certified Question:

(1) DOES A CRIMINAL CONVICTION, BASED UPON THE DEFENDANT BEING TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE IN VIOLATION OF ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA, CONSTITUTE A FUNDAMENTAL ERROR IN THE TRIAL PROCEEDINGS?

Respondent, William Johnson would agree with the State in its general proposition that questions one and two are similar in nature. The law in Florida generally divides a criminal Defendant's constitutional rights into two categories. The first category of constitution rights are those which Florida Courts have held are subject to the contemporaneous objection rule and the harmless error rule. Other rights are of such a dimension that they are deemed fundamental and therefore not subject to implied waiver and are conclusively presumed prejudicial when violated. Respondent respectfully submits that the violation of his double jeopardy constitution guarantee was fundamental error in this case.

There is no question the procedure employed by the trial court violated William Johnson's double jeopardy rights. When the nolo contendere plea was accepted to the stipulated lessor included offense, jeopardy attached. Without legal cause, the plea could not be set aside and the original charges reinstated. No legal cause existed. See State ex rel. Wilhoit v. Wells, 356 So.2d 817 (Fla. 1st D.C.A. 1978), cert. denied, 359 So.2d 1222 (Fla. 1978). See also Reyes v. Kelly, 224 So.2d 303 (Fla. 1969), cert. denied, 397 U.S.

958, 90 S.Ct. 961, 25 Ed.2d 142 (1970). Davis v. State, 308 So.2d 27, (Fla. 1975).

The State now contends that the Defendant waived his double jeopardy rights by not objecting to the trial court's actions until the filing of his 3.850 motion. The certified questions are in effect; is a defendant's double jeopardy right fundament and not subject to waiver, and if not fundamental, did such a waiver, in fact, occur.

In Chapman v. State, 389 So.2d 1065 (Fla. 5th D.C.A 1980) the Fifth District Court held that the violation of a Defendant's double jeopardy rights did not constitute fundamental error based upon the holdings of two other District Courts of Appeal. See Bell v. State, 262 So.2d 244 (Fla. 4th D.C.A. 1972), cert. denied, 263 So.2d 50 (Fla. 1972), Suiero v. State, 248 So.2d 219 (Fla. 4th D.C.A. 1971); Robinson v. Wainwright, 240 So.2d 65 (Fla. 2nd D.C.A. 1970); Robinson v. State, 239 So.2d 282 (Fla. 2nd D.C.A. 1970). On his first presentation to the District Court Chapman appealled from the denial of his 3.850 motion seeking relief from the violation of his double jeopardy rights. That appeal was denied based upon a theory of implied waiver. Subsequently, Chapman returned on an appeal from a denial of his second 3.850 motion based on ineffective assistance of counsel. Chapman v. State, 442 So.2d 1024 (Fla. 5th D.C.A. 1983). The second time the Fifth District court agreed with Mr. Chapman and held he had not received effective assistance of counsel due to his trial attorney not recognizing his double jeopardy rights. Following the rendition of the second Chapman opinion, this instant case was argued to the Fifth District Court and the en banc decision was

rendered in which the Court receded from its previous position concerning double jeopardy and waiver.

Fundamental error, among other things, is error which goes to the foundation of the case. Clark v. State, 363 So.2d 331 (Fla. 1978). Fundamental error is not subject to the contemporaneous objection and harmless error rules. Ray v. State, 403 So.2d 956 (Fla. 1981) Fundamental error can be committed in many situations. In the case at bar, the Respondent submits that it is fundamental error for the trial judge and/or the Assistant State Attorney to violate a Defendant's double jeopardy rights. Such a violation can only occurr in two contexts. Such a violation would either be knowing and intentional or unknowing and unintentional. It is hard to concieve of a situation where a knowing violation would occur. Both the judge and the prosecutor are officers of the Court and are sworn to uphold the constitution. If either officer of the Court knowingly participated in violating a Defendant's double jeopardy rights, how could the Defendant's inaction be construed to relieve the State of its wrong doing? Double jeopardy is one of the most basic constitution rights. If, as is more likely, the judge and prosecutor are unaware that violation of double jeopardy is occurring, how can the sole burden to protect such a basic right be placed upon the Defendant and his attorney.

It must be remembered that in the content of this factual situation, it is a judicial act which is required to violate the Defendant's constitutional rights. The case law of Reyes, Davis, and Wilhoit, supra, establishes a standard, constitutional procedure for a trial judge to follow when a plea agreement is unacceptable to the

Court. The Judge should provide the Defendant with two options once jeopardy has attached. The Defendant can either abide by his previously entered plea and receive up to the maximum possible sentence on the lesser charge, or he can voluntarily withdraw his plea and proceed to trial on the greater charge. The option is the Defendant's. Any other course of action, whether it be taken by the Judge or the prosecution, is a violation of Defendant's fundamental constitutional rights.

In his dissent in Clark v. State, supra at 335, Justice Adkins pointed out that:

> "Technicalities in the law should be avoided, not fostered. Our fundamental responsibility is to protect the constitutional rights of individuals, so that justice is rendered without regard to the ability of attorneys to recognize reversible error when it springs forth in the heat of trial."

The per curium opinion of the Fifth District Court in the instant case echoed Justice Adkins reasonings. In candidly explaining the rationale for its decision, the Court state the following:

> "Our decision in this case is not based on the precedential authority of, or argument in, the cases cited, but on our appreciation of the value and fundamental nature of the basic constitutional rights involved; our perception of the quality and magnitude of the legal error involved in its violation and of our belief that an adequate legal remedy must be provided for a violation of that right. Rule 3.850 specifically provides a remedy for a prisoner "claiming the right to be released upon the grounds that the judgment was entered or the sentence imposed, in violation of the Constitution or Laws of the United States or of the State of Florida..." Johnson v. State, 400 So.2d 954 at 958, (Fla. 5th D.C.A. 1984).

The double jeopardy rights of an individual are guaranteed by Article I, Section 9 of the Constitution of the State of Florida and by Fifth Amendment to the Constitution of the United States. Such rights are basic to the concept of American justice. To allow the

Court system to violate those rights by overt action and then to require immediate recognition and objection, defeats the basic fundamental fairness that our system is supposed to extend to individuals.

The Fifth District Court of Appeals realized by hearing both Chapman appeals just how fundamental double jeopardy rights are. In the first Chapman decision, the Court readily acknowledged that Chapman had been wronged but felt powerless to correct the error due to the "unfundamental" nature of double jeopardy. On the next Chapman appeal, the Fifth District recognized that the failure of the trial attorney (and arguably the Judge and prosecutor) to realize and assert the Defendant's double jeopardy rights was, in fact, fundamental error due to ineffective assistance of counsel. According to the second Chapman decision, it appears that failure to recognize a double jeopardy defense would always constitute ineffective assistance of counsel. Thus, the Fifth District Court of Appeal was lead to the inescapable conclusion that double jeopardy itself must be a fundamental right.

The first certified question should be answered affirmatively.

Certified Question

(2)(a) IS THE FUNDAMENTAL ERROR, PER SE, HARMFUL AND REVERSIBLE WITHOUT A SPECIFIC SHOWING OF PREJUDICE?

As Petitioner pointed out, fundamental errors, by definition,

don't require a specific showing of prejudice. That is because fundamental errors are so grave they must be prejudicial.

In the case at hand and similar cases, a violation of double jeopardy rights simply would have to be prejudicial. Either the Defendant would be convicted of an offense greater than he had once been acquittted for, or of an offense greater than one he had previously plead to. See Muszynski v. State, 392 So.2d 63 (Fla. 5th D.C.A. 1981); McGee v. State, 438 So.2d 127 (Fla. 1st D.C.A. 1983). As a result of the violation of his double jeopardy rights, William Johnson served four and one-half years for an act that had his double jeopardy rights been protected, he would have served an absolute maximum of a year and sixty (60) days.

If double jeopardy is fundamental error, it is harmful error per se and reversible without a specific showing of prejudice. If double jeopardy is held not to be a fundamental constitutional right, then upon a showing of an actual prejudice, the error ought to subject to correction without requiring contemporaneous objection for the reasons stated by Judge Upchurch in his concurring opinion in Chapman v. State, 389 So.2d 1005 (Fla. 5th D.C.A. 1980) and by the District Court in the instant case, Johnson v. State, 400 So.2d 954 (Fla. 5th D.C.A. 1984). These reasons are more fully discussed below.

Certified Question

> (2)(b) TO BE EFFECTIVE, MUST A WAIVER OF THE CONSTITUTIONAL RIGHT, OR THE FUNDAMENTAL ERROR RESULTING FROM ITS VIOLATION, BE MADE KNOWINGLY, INTENTIONALLY AND INTELLIGENTLY AND NOT MORELY IMPLIED FROM SILENCE OR INACTION OF THE DEFENDANT OR HIS COUNSEL?

Again by definition, if the error committed in this case is held to be fundamental, an implied waiver by failing to contemporaneously object, does not arise. However, the contemporaneous objection rule has been applied to double jeopardy claims in Florida. In the event this Court holds double jeopardy not to be a fundamental right, the application of the contemporaneous objection rule should be modified. A knowing, intentional and intelligent waiver must be ascertained from the facts in the record and should not be based on mere silence or inaction of Defendant or his counsel.

Double jeopardy is not soley an evidentiary rule or a mere technicality. It is a concept that is fundament and basic to our "fair play" system of justice. Double jeopardy is also a complex right that is difficult for an attorney, let alone a criminal Defendant to understand. In Wilson v. Eastmore, 419 So.2d 673 (Fla. 5th D.C.A. 1982), the Fifth District Court noted the confusion that a Federal District Judge had with the concept of double jeopardy. Wilson arose from a writ of prohibition that the Defendant sought. Apparently, in a previous habeus corpus proceeding, the Federal District Judge had been convinced that the Defendant's rights had been violated and such violation had not been effectively waived. Wilson v. Pellicer, Case No. 81-119 (M.D. Fla. March 24, 1982). The Defendant's case was reversed and remanded for trial. However, he had been previously tried and acquitted of the charge that Federal Court had ordered to be retried. Such act was recognized by the State Appellate Court hearing the ensuing writ of prohibition, to be

clear violation of double jeopardy. Again, this is another example of a judicial action resulting in a violation of double jeopardy rights.

An intentional and knowing waiver of double jeopardy rights should be required in all situations. If such a rule is not acceptable to this Court, then in situations similar to this case at bar, where an established Court procedure is disregarded, neglected, or ignored, no waiver should be implied from mere silence and inaction. In these cases the argument of Petitioner that "double jeopardy consists of partly a matter of record and partly of a matter of fact", does not apply. (Petitioner's brief at 14.) The matter of fact that the Petitioner contends must be present to the trial court is the identity of the Defendant and the identity of the offenses charged. Such facts will be readily apparent from the record in cases similar to the one at hand.

Next, Petitioner argues that an early assertion of the defense allows the State to support a conviction based upon facts other than those claimed to involve double jeopardy. Again, such argument is not well taken in the case at bar. Here, as would be true in all similar fact situations, the Defendant committed but one battery. He plead to a stipulated lessor offense. It would always be in violation of double jeopardy to then convict him of a greater offense for the same crime. See Vela v. State, 450 So.2d 305 (Fla. 5th D.C.A. 1984); Goss v. State, 398 So.2d 998 (Fla. 5th D.C.A. 1981), Ubelis v. State, 384 So.2d 1294 (Fla. 2nd D.C.A. 1980). It should be noted that the double jeopardy error in Goss, supra was discovered and corrected sua sponte. Obviously, the Court found it so

aggregiously wrong, it had to remedied.

The Petitioner's last stated reason why waiver by implication should be the law is the "sandbagging" argument. Many Courts have expressed concern that a Defendant may "sandbag" his way into freedom. First it must be said that by definition any "sandbag" situation requires that an individual's right of constitutional magnitude be violated and that such violation not be raised immediately. The "sandbag" game only works when we are dealing with mere constitutional rights as opposed to fundamental constitutional rights, since the latter by definition, can be raised at any time. Lastly, the "sandbag" concept requires an understanding of all of the above by the Defendant with an appreciation of the risk involved, i.e. the potential for actual time served and the intent to later present the "sandbagged error". Respondent respectfully submits that Judge Orfingers doubts about any strategic reason for "sandbagging" are well reasoned and logical.

In the instant case, as with many authorities cited herein, the assertion of Respondent constitutional rights came on a 3.850 motion. Rule 3.850 provides that judgments entered in violation of the Constitution can be attacked. To "sandbag" his way into a successful 3.850 appeal, Respondent had to spend four and one-half years in jail as opposed to ninety days. Even the trial judge that heard the 3.850 motion at the Circuit level recognized that "sandbagging" was just not a valid concern.

Petitioner states that all Federal circuits have held that double jeopardy can be waived. It is correct that double jeopardy

rights have been subject to a knowing and intelligent waiver. In U.S. v. Pratt, 657 F.2d 218 (8th Cir. 1981) the question of waiver was addressed as follows:

> "Waiver of constitutional rights is not to be lightly presumed, and the double jeopardy clause must be maintained in full vigor. The rights and immunities it embodies are fundamental." Id. at 221 (Emphasis added.)

Even the most fundamental constitutional rights are subject to a knowing, voluntary and intelligent waiver, but such a waiver is not supported by the record in the instant case.

Certified Question

> (2)(c) IS THE FUNDAMENTAL ERROR SUBJECT TO CORRECTION WHEN RAISED FOR THE FIRST TIME ON DIRECT APPEAL, IN POST CONVITION PROCEEDINGS (FLORIDA RULE OF CRIMINAL PROCEDURE 3.850), NOTWITHSTANDING CONTEMPORANEOUS OBJECTION RULES AND HARMLESS ERROR STATUTES?

In Menna v. N.Y., 423 U.S. 61, 96 S.C.T. 241, 46 L.Ed.2d 195 (1975) a criminal Defendant asserted a double jeopardy claim after a plea of guilty to the offense. Admittedly, the double jeopardy defense had been raised prior to trial, but the Supreme Court held that the guilty plea did not constitute a subsequent waiver. The guilty plea was a counseled plea. The Court's opinon notes the unique nature of double jeopardy by stating that "Where the State is precluded by the United States Contitution from hauling Defendant into Court on a charge, Federal law requires that a conviction be set aside even if the conviction was entered pursuant to a counseled plea of guilty." Id. at 242.

The Supreme Court has examined questions similar to the one

presented here from a different prespective. In Robinson v. Neil, 409 U.S. 505, 93 SCt.876, 35 L.Ed.2d 29 (U.S. 1973) and in Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 C.Ed.2d 628 (U.S. 1974) the Court was presented with laws involving double jeopardy questions. The Court applied a mixed analysis consisting partially of double jeopardy and partially of due process and held that in some situations double jeopardy goes to the fundamental power of the State to bring the Defendant into Court. Both Blackledge and Robinson, supra, noted that this particular constitutional infirmity is marketedly different. Once the Defendant had plead to a less included offense, the State was simply precluded by the due process cause from the calling upon the Defendant to Answer to more serious charges. William Johnson was denied such due process and such fundamental error is cognizable at any time.

As Petitioner noted there are several states which, in well reasoned opinions, have refused to apply the implied waiver doctrine to double jeopardy and allow it to be raised later. In People v. Michael, 394 N.E.2d 1134, (N.Y. 1979), it ws held that the failure to raise a double jeopardy claim cannot alone serve as waiver and the claim can be raised on appeal. The New York Court founded its decision upon the fact that the State's legitimate interests are not seriously touched by allowing double jeopardy to be raised on appeal, since:

> "... such a claim, even if successful, will not result in repeated proceedings, as it is the very essence of a successful double jeopardy defense that there are no further proceedings. Similarly, there will be no need for any additional factual findings in such cases, as such defense is made out of the record of prior proceedings and entails no factual inquiry. Finally, double jeopardy

does not constitute the type of error which can be remedied so as to allow the trial to proceed in accordance with law if it is timely raised, for such a defense, if valid, is not correctable." Id. at 1137.

The Respondent raised his double jeopary claim by a post conviction relief motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The purpose of Rule 3.850 is to provide individuals with a vehicle to correct wrongs of a fundamental constitution magnitude. Valid defenses of double jeopardy are absolute bar to prosecution and for such reason should be considered whenever raised, be it on appeal or on past conviction motion. Double jeopardy is not a mere technical right but a fundamental constitution concept.

CONCLUSION

Respondent contends that double jeopardy is a fundamental right and as such is cognizable at any time without regard to the contemporaneous obejction rule or harmless error rule. To allow a trial judge to set aside a previously accepted plea of guilty to a lessor included offense and reinstate on the greater charge violates both double jeopardy and basic due process. Such error should be correctable whenever found.

If double jeopardy is held not to be a fundamental right, the contemporaneous objection rule should not be applied due to the complexity of the concept and to the fact that the prosecutor and the Judge were also unaware of the error. By the same token, waiver should not be implied for silence and inaction. Requiring that the record contain a knowing voluntary and intelligent record will insure that all participants are aware of the rights involved and the correct procedure to follow.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Ellen D. Phillips, Esquire, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 on this 20th day of February, 1985.

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