IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

WILLIAM D. JOHNSON,

Respondent.

CASE NO. 66,371

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent, William D. Johnson, was charged by Information in the circuit court, Orange County, with one felony and three misdemeanors committed on May 8, 1977, to-wit:

COUNT I: Aggravated battery
COUNT II: Reckless or negligent operation of a vessel
COUNT III: Operating vessel under influence of intoxicating liquor
COUNT IV: Failure to render assistance after collision or accident.

(R 59). November 1, 1977, respondent offered to plead no contest to the charges as follows:

COUNT I: "The lesser included offense of culpable negligence with injury,"
COUNT II: as charged;
COUNT III: as charged;
COUNT IV: to be nol prossed by state, at sentencing.

(R 62-63). The pleas were accepted by the court, as was an "agreement" of a 90 day jail cap. Respondent was adjudicated guilty and a pre-sentence investigation ordered, with sentencing postponed.(R 62-86).

Upon reviewing the PSI, the court determined it could not acquiesce in the plea agreement because of a prior conviction and a dishonorable military discharge, and, on February 10, 1978, issued an order stating, "...This court is of the opinion that these unknown matters constitute good cause for this court to allow said pleas to be withdrawn...," and set aside the no contest pleas (R 93-94). Respondent apparently then went to trial on all four counts (See R 5). Judgments and sentences issued for aggravated battery and the three misdemeanors on August 1, 1980 (R 95,96,97,98). No trial transcript was provided by respondent

in this record. At some point after conviction (either before or after sentencing) respondent jumped bond, (R 5); in any event, no direct appeal was ever filed from these convictions (R 100).

In September, 1982, respondent filed a motion pursuant to Florida Rule of Criminal Procedure 3.850, claiming his trial, conviction and sentence for aggravated battery violated his double jeopardy rights (R 99-101). Relief was denied, appeal taken, and, in an en banc opinion, the Fifth District Court of Appeal reversed respondent's convictions (Opinion attached hereto as Exhibit "A"). The Fifth District certified the questions presented in this petition for discretionary review.

SUMMARY OF ARGUMENT

QUESTION (1)

There is no fundamental error in the trial proceedings, nor in the resulting conviction when a defendant goes to trial after a plea agreement is set aside, and the defendant does not assert a double jeopardy defense at trial. The double jeopardy claim presented here is technical at best (if it exists at all), and is, like search and seizure violations, a right which must be affirmatively raised or it is waived.

QUESTION (2)

(a) Proceeding in the face of a valid double jeopardy defense may or may not be harmful and reversible per se. However, proceeding to trial where a technically valid double jeopardy claim has not been raised although it exists constitutes reversible error only in the most exceptional circumstances, if at all.

(b) The constitutional immunity from double jeopardy is a personal right which, unless affirmatively pleaded, will be waived.

(c) The constitutional immunity from double jeopardy is a personal right which, unless affirmatively pleaded, will be waived. Assuming a defense of double jeopardy can be raised for the first time post-conviction, such belated assertion of the defense should be limited to direct appeal, and not permitted by Rule 3.850; any further double jeopardy attacks should be allowed only in the context of ineffective assistance of counsel.

ARGUMENT

QUESTION CERTIFIED: (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 FUNDAMENTAL ERROR IN THE TRIAL PROCEEDINGS?

The question certified here, as a practical matter, is identical to the questions certified in question number 2, in that "fundamental error" by definition is that error "which can be considered on appeal without objection in the lower court." Clark v. State, 363 So.2d 331, 333 (Fla. 1978). Even constitutional errors, "other than those constituting fundamental error" are waived unless timely raised in the trial court. Id., citing Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). Consequently, if double jeopardy can be waived by failing to raise the defense, it is not "fundamental," conversely, if it is "fundamental" in the sense that it cannot be waived, the defense could be asserted for the first time on appeal. Petitioner would suggest that the instant question, as a general theoretical proposition, should be answered in the negative.

Unlike rights considered "fundamental", double jeopardy does not affect the integrity of the fact finding process or the reliability of a conviction. Like search and seizure, double jeopardy is a personal right of individuals to be free from

government harassment.[1] The invasion of either double jeopardy or search and seizure rights do not adversely affect the reliability of a trial proceeding or create an unacceptable risk of error in the conviction; rather, both are limitations on the exercise of government power in pursuit of that conviction. Consequently, the failure of a defendant to assert a double jeopardy defense, like the failure to contest a search and seizure violation, does not create any fundamental error in either the trial proceedings or the resulting conviction.

Assuming, arguendo, that a reprosecution for the same offense should, in some circumstances, be considered fundamental, such is not the case here. "The doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." Ray v. State, 403 So.2d 956,960 (Fla. 1981). In the instant case, far from being a "fundamental error," it is highly questionable whether respondent was actually twice in jeopardy for the "same offense," as far as the aggravated battery is concerned. The plea that was set aside was for culpable negligence, while the trial proceeded on aggravated battery. Clearly, there is no double jeopardy problem on

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[1] Double jeopardy is usually analyzed in terms of three rights; "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense." Brown v. Ohio, 432 U.S. 161,165; 97 S.Ct. 2221,2225; 53 L.Ed.2d 187 (1977). Of these two possibilities -multiple prosecution or multiple punishment- the issue in the case at hand would seem to be possible multiple prosecution.

the face of the two charges.[2] Indeed, from the face of the prior plea, there would be no double jeopardy problem in filing a new, subsequent information for aggravated battery. Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), "If the prosecution is based on a different statutory offense from, but the same factual event as, that resolved in a prior, or another prosecution, double jeopardy does not bar the proposed prosecution or punishment." Bell v. State, 437 So.2d 1057, 1060 (Fla. 1983), accord, Bowden v. State, 18 So.2d 478 (Fla. 1944); State v. Giesy, 243 So.2d 635 (Fla. 4th DCA 1971). Thus, while jeopardy may have attached at the earlier plea, it is incumbent upon the defendant to demonstrate that a subsequent prosecution is for the "same offense." If the state could prove aggravated battery using different facts than those plead to for culpable negligence, the second charge does not constitute double jeopardy. Illinois v. Vitale, supra. The point here is not to argue whether or not "double jeopardy" actually took place,[3] but rather to emphasize the factual nature of the determination in this case. If double jeopardy is to be recognized as creating a fundamental error, the error

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[2] culpable negligence is not a lesser included offense of aggravated battery. See In the Matter of Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981).

[3] The state does not discount the possibility of estoppel or some other reason why the offenses might be deemed identical. However, these possibilities do not deny that "double jeopardy" does not exist on the face of the two pleas.

would need to be limited to the face of the record. This may be analagous to the treatment given an unconstitutional statute:

> The facial validity of a statute, including an assertion that the statute is infirm because of overbreath, can be raised for the first time on appeal even though prudence dictates that it be presented at the trial court level to assure that it will not be waived. The constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level.

Trushin v. State, 425 So.2d 1126, (Fla. 1982).

Petitioner would further point out that the events in this case differ very little from the normal situation where a plea agreement is not accepted by a judge, at least insofar as their impact on the defendant. Had the court "tentatively" accepted the plea pending receipt of the PSI, respondent could have ended up with the same sentence without going to trial. Likewise, had a plea been accepted on the aggravated battery charge with an understanding of a 90 day jail cap, the court would not have been bound to the jail cap when the PSI revealed respondent's record. The problem arises here because the plea restricted the possible sentence to one year, even though the plea agreement could be set aside. Far from a fundamental deprivation of rights, it is technical quirk in the proceedings that distinguishes respondent's case from hundreds of others. Plea agreements are set aside daily on the basis of the PSI, and it is only a fortuitous technical mistake on the part of the trial judge that has allowed respondent to get this far.

In sum, double jeopardy, like search and seizure, involves a personal right to be free from overzealous government prosecution. The right to be free of multiple prosecutions may be "fundamental" in that, like the right to be free from unreasonable searches, it is ingrained in our system of jurisprudence. The right is "fundamental" enough that, had respondent raised the defense at trial, he could have "gotten off on a technicality" if double jeopardy in fact was threatened. However, like search and seizure, there is no need to allow the defense to be raised for the first time post-conviction, since double jeopardy does not create any fundamental unreliability in the proceedings or conviction.

QUESTION CERTIFIED: (2)(a) IS THE FUNDAMENTAL ERROR PER SE HARMFUL AND REVERSIBLE WITHOUT A SPECIFIC SHOWING OF PREJUDICE? (b) TO BE EFFECTIVE MUST A WAIVER OF THE CONSTITUTIONAL RIGHT, OR OF THE FUNDAMENTAL ERROR RESULTING FROM ITS VIOLATION, BE MADE KNOWINGLY, INTENTIONALLY AND INTELLIGENTLY AND NOT MERELY IMPLIED FROM SILENCE OR INACTION OF THE DEFENDANT OR HIS COUNSEL? (c) IS THE FUNDAMENTAL ERROR SUBJECT TO CORRECTION WHEN RAISED FOR THE FIRST TIME ON DIRECT APPEAL OR IN POST-CONVICTION PROCEEDINGS (FLORIDA RULE OF CRIMINAL PROCEDURE 3.850), NOTWITHSTANDING CONTEMPORANEOUS OBJECTION RULES AND HARMLESS ERROR STATUTES?

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

A constitutional error is not per se reversible without need of objection in the lower court unless the error is fundamental. Clark v. State, supra. Petitioner is uncertain how one would apply the harmless error statutes in all double jeopardy cases, assuming a proper defense had been raised. In the present case, the nolo plea to Counts II and III followed by a guilty verdict to Counts II and III appears to be harmless error (assuming error was present and preserved); it would seem unnecessary to overturn the conviction pursuant to the verdict, only to send the case back to re-instate the conviction pursuant to the plea. Consequently, petitioner would suggest a double jeopardy error is not harmful or reversible per se, without a showing of prejudice.

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

Florida Rule of Criminal Procedure 3.190(b) requires that all defenses, including double jeopardy, be raised by motion to dismiss the indictment or information. Such motion must be made either before or at arraignment, except that a motion to dismiss the information on double jeopardy grounds can be made at any time, Rule 3.190(c), Florida Rule of Criminal Procedure, presumably because the facts necessary to determine if double jeopardy is actually occurring will appear during the course of the trial. However, being a "pre-trial motion," a motion to dismiss on double jeopardy grounds must occur prior to conviction, or it is untimely. Drakes v. State, 400 So.2d 498 (Fla. 5th DCA 1981)[4]; Chapman v. State, 389 So.2d 1065 (Fla. 5th DCA 1980)[5]; Bell v. State, 262 So.2d 244 (Fla. 4th DCA 1972), cert. denied, 265 So.2d 50 (Fla. 1972); Suiero v. State, 248 So.2d 219 (Fla. 4th DCA 1971); Robinson v. Wainwright, 240 So.2d 65 (Fla. 2d DCA 1970); Robinson v. State, 239 So.2d 282 (Fla. 2d DCA 1970). The federal courts have a similar procedural rule. See, Fed. R. Crim. Proc. 12(b). All federal circuits

[4] The Fifth District in the instant case is receding from earlier cases on the issue of whether double jeopardy is fundamental and can be waived; this case and earlier cases still hold a 3.190 motion must be brought pre-conviction.

[5] See Note 4, supra.

considering the question have consistently held that a double jeopardy defense must be raised prior to trial, or it is waived. U.S. v. Bascoro, 742 F.2d 1334 (11th Cir. 1984); Paul v. Henderson, 698 F.2d 589 (2d Cir. 1983), cert. denied, 104 S.Ct. 120; U.S. v. Herzog, 644 F.2d 713 (8th Cir. 1981), cert. denied, 451 U.S. 1018, 101 S.Ct. 3008, 69 L.Ed.2d 390 (1981); U.S. v. Perez, 565 F.2d 1227 (2d Cir. 1977); U.S. v. Buonomo, 441 F.2d 992 (5th Cir. 1967), cert. denied, 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 81 (1971); Grogan v. U.S., 394 F.2d 287 (5th Cir. 1967), cert. denied, 393 U.S. 830, 89 S.Ct. 97, 21 L.Ed.2d 100 (1968); Haddad v. U.S., 349 F.2d 511 (9th Cir.), cert. denied, 382 U.S. 896, 86 S.Ct. 193, 15 L.Ed.2d 153 (1965); Barker v. Ohio, 328 F.2d 582 (6th Cir. 1964). The federal courts recognize that "the constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded at the trial, will be waived." U.S. v. Perez, at 1232. In refusing to set aside a subsequent felony-murder conviction after a prior attempted robbery trial, the second circuit in Paul v. Henderson, stated:

> Here it was within the petitioner's power to assert his right not to be prosecuted twice for the same offense at a time when the courts could have protected that right. Instead of presenting his claim to the trial court, the petitioner elected to rest on his rights and allowed himself to be subjected to a second trial. Consequently, he cannot be heard to complain now that this right has been abridged. By proceeding through the second trial without raising the defense, the petitioner waived his right to claim double jeopardy.

698 F.2d at 592.

The vast majority of jurisdictions throughout the United States adhere to the view that double jeopardy "is a personal right which, unless affirmatively pleaded, will be waived." Wesley v. U.S., 449 A.2d 282,283 (D.C. App. 1982). See e.g. Hancock v. State, 368 So.2d 581 (Ala. App. 1979), cert. denied, 368 So.2d 587 (Ala. 1979); State v. Morales, 363 P.2d 606 (Ariz. 1961); State v. Adamson, 680 P.2d 1259 (Ariz. App. 1984); People v. Norwood, 316 P.2d 1010 (Cal. 1957); Holmes v. State, 170 S.E.2d 312 (Ga. App. 1969); Lutes v. State, 401 N.E. 671 (Ind. 1980); State v. Birkestrand, 239 N.W. 2d 353 (Iowa 1976)(Stating Rule); People v. Johnson, 233 N.W. 2d 246 (Mich. App. 1975); State v. Carter, 288 N.W. 2d 35 (Neb. 1980); State v. McKenzie, 232 N.E. 2d 424 (N.C. 1977); Carboneau v. Warden of Nev. State Prison, 634 P.2d 1197 (Nev. 1981); Smith v. State, 573 P.2d 1215 (Okla. Cr. App. 1978), cert. denied, 436 U.S. 908; Com. v. Peters, 373 A.2d 1055 (Pa. 1977); State v. Sharbuno, 390 A.2d 915 (RI 1978). Pennsylvania and Rhode Island will allow double jeopardy to be raised post-conviction upon a showing of extraordinary circumstances, such as where a defendant acting pro se is subjected to a second trial after being acquitted. See, Borough of West Chester v. Lal, 426 A.2d 603 (Pa 1981). The only two states found by petitioner which allow a double jeopardy defense to be raised for the first time post-conviction are Texas and New York. New York traditionally followed the "established body of case law holding that the constitutional immunity from double jeopardy is a personal right which if not timely interposed at trial may be waived"

People v. LaRuffa, 332 N.E.2d 312 (N.Y. 1975). However, the New York Court of Appeals was reversed by the U.S. Supreme Court on a double jeopardy issue in Menna v. N.Y., 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), wherein the Supreme Court held that a guilty plea does not waive a properly raised defense of double jeopardy. The New York Court, apparently stung by the reversal, incorrectly read Menna to mean a double jeopardy defense can never be waived, reasoning "since the failure to raise a particular defense is a much more equivocal indication of intent than is a decision to plead guilty, it would appear to follow that the failure to timely raise a double jeopardy claim cannot alone serve as a waiver of that claim." People v. Michael, 394 N.E.2d 1134,1135 N.1 (N.Y. 1979). This view of Menna has not been followed, and has, in fact, been specifically rejected by federal couts. U.S. v. Herzog, supra; U.S. v. Pratt, 657 F.2d 218 (8th Cir. 1981).

Contrary to the holding of the Fifth District, it has long been established that the double jeopardy clause of the Florida Constitution does not prevent waiver upon the failure of a defendant to plead the defense. In 1939, the Florida Supreme Court held:

> As there was no plea of former jeopardy interposed in bar of the prosecution, we can not say upon the record before us that the provision of section 12 of the Declaration of Rights of the Constitution of the State of Florida was violated.

Whitefield v. State, 188 So. 361,363 (Fla. 1939). Thus, Florida has taken a view of waiver under the state constitution consistent

with the requirement of an affirmative pleading to assert federal rights. This view is reasonable, and is in furtherance of several practical considerations.

First is the recognition that the plea of double jeopardy "consists partly of a matter of record and partly of a matter of fact." Strobhar v. State, 47 So.5 (Fla. 1908). The matter of record is the prior information and the conviction or acquittal thereon. The matter of fact is the identity of person and the identity of offenses charged. Id. Where, as here, the subsequent charge may or may not rely on the conduct involved in a prior conviction of an allegedly lesser included offense, the court must look to the actual facts used to prove the greater offense. Illinois v. Vitale, supra. In Vitale, the court explained:

> The mere possibility that the state will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.
>
> * * *
>
> [I]t may be that to sustain its manslaughter case the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; ...In that case, [Vitale's] ... claim of double jeopardy would be substantial...
>
> * * *
>
> [B]ecause the reckless act or acts the state will rely on to prove manslaughter are still unknown, we...remand...for further proceedings....

100 S.Ct. at 2266-2268. Thus, it is necessary that a double

jeopardy claim be presented in the trial court since a factual determination is necessary.

A second, related, consideration supporting early assertion of the defense is to allow the state to support a conviction based facts other than those asserted to involve double jeopardy. As in Vitale, the state here could well have proved aggravated battery without using the identical (Blockburger) facts proving culpable negligence. By not raising a double jeopardy claim prior to trial, the state has no reason to avoid presenting certain facts, while the defendant lies in ambush waiting for a post-conviction claim.

While in the concurring opinion of the instant case Judge Orfinger doubts any strategic reason to avoid timely assertion of the defense, this case presents a very obvious set of circumstances. Rather than encourage timely defenses, a defendant who pleads double jeopardy early under these circumstances would be foolish indeed. Here, had respondent claimed double jeopardy prior to the trial, he would have been required to serve up to the maximum sentences for the misdemeanors.[6] However, by not raising the claim, respondent was afforded the opportunity to be acquitted of all charges.[7] Under the decision of the Fifth District, respondent, upon guilty verdicts, now

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[6] The court could have set aside the plea agreement after receiving the PSI, if not the plea.

[7] This was not an inconsequential possibility, since the highly contested facts induced major consessions in the plea agreement by the state (R 78-79).

wishes to return to the prior plea, limiting his possible sentences once again. This type of tactic (or possibility) was decried it the case of a claim of unconstitutionality of a statute, Davis v. State, 383 So.2d 620 (Fla. 1980), and in making Witherspoon objections to jury selection, Maggard v. State, 399 So.2d 973 (Fla. 1981). Such "sandbagging" should not be permitted in the area of double jeopardy, either.

> 2(c) IS THE FUNDAMENTAL ERROR SUBJECT TO CORRECTION WHEN RAISED FOR THE FIRST TIME ON DIRECT APPEAL [OR] IN POST CONVICTION PROCEEDINGS (FLORIDA RULE OF CRIMINAL PROCEDURE 3.850), NOTWITHSTANDING CONTEMPORANEOUS OBJECTION RULES[8] AND HARMLESS ERROR STATUTES?

The issue of direct appeal is discussed above. If a distinction is made for collateral attack, petitioner would suggest that, since the new amendment to Rule 3.850[9] is intended to limit the availability of relief to two years, a procedure requiring double jeopardy to be brought pursuant to an ineffective assistance of counsel claim would avoid the first loophole in the rule. Additionally, considering the fluctuation in double jeopardy principles, allowing collateral attack (as "fundamental error") permits defendants to bring their petitions

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[8] The question is re-worded since raising a double jeopardy claim for the first time "on appeal in post conviction proceedings" would provide no record, even of the prior conviction. In the instant case the claim was raised 3.850, then the denial was appealed.

[9] 9 F.L.W. 501 (Fla. November 30, 1984)

during periods when the law is more favorable to them. Better jurisprudence encourages finality in the appellate process.

Lastly, in the instant case it should be noted that no appeal was taken, apparently because respondent fled the jurisdiction of the court. He should not now be able to circumvent the procedural consequences of his escape by collateral attack. A technical double jeopardy claim should be addressed on direct appeal or not at all.

CONCLUSION

Virtually every jurisdiction adheres to the view that the defense of double jeopardy is personal to the defendant, and, unless affirmatively pleaded, is waived. The decision of the Fifth District, by relying on the Florida Constitution, does not succeed in avoiding this weight of authority, since Florida has viewed its constitutional prevision in the same manner. Although cases of double jeopardy may at some time arise which present fundamental due process problems, the "violation" here is not such a case, and may not even be a true double jeopardy case at all. Petitioner respectfully urges this court to reaffirm Florida's position recognizing waiver of the defense, consistent with the view throughout the United States, and quash the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief on the Merits has been furnished, by mail, to Robert S. Hobbs, Esquire, at 725 E. Kennedy Boulevard, Tampa, Florida 33602, this 30th day of January, 1985.

Ellen D. Phillips

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