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FILED

IN THE SUPREME COURT OF FLORIDA

S'D J. WHITE

APR 15 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

STATE OF FLORIDA,)
)
)
 Petitioner,)
)
 v.)
)
 KEITH HENRIQUEZ,)
)
)
 Respondent.)
 _____)

CASE NO. 66,782

4TH DCA NO. 83-2345

RESPONDENT'S

ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the prosecution in the Circuit Court and Appellee in the District Court of Appeal, Fourth District. Respondent was the defendant in the Circuit Court and Appellant in the Fourth District Court of Appeal. In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

R = Record on Appeal
SR = Supplemental Record on Appeal

STATEMENT OF THE CASE

Respondent agrees with petitioner's statement of the case for the purposes of jurisdiction, in so far as it is not argumentative.

STATEMENT OF THE FACTS

The facts of this case, set forth by the Fourth District Court of Appeal in its opinion below follow:

Appellant contends that his convictions of both battery and resisting arrest with violence violate his double jeopardy rights and that the trial court improperly delegated authority to a probation supervisor to determine the amount of restitution.

In Portee v. State, 447 So.2d 219 (Fla. 1984), our supreme court explained that:

If two statutory offenses have the exact, same essential constituent elements, or when one statutory offense includes all of the elements of the other, those two offenses are constitutionally "the same offense" and a person cannot be put in jeopardy as to both such offenses unless the two offenses are based on two separate and distinct factual events. If it is established that an offense is a lesser included offense of a greater offense also charged, the double jeopardy clause proscribes multiple convictions and sentences for both the greater and lesser included offenses. Bell v. State, 437 So.2d 1057 (Fla. 1983) (holding that sale and possession of controlled substances were lesser included offenses of trafficking in illegal drugs).

Id. at 220.

Our supreme court uses the Blockburger test to identify lesser included offenses:

A less serious offense is included in a more serious one if all of the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter. If each offense requires proof of an element that the other does not, the offenses are separate and discrete and one is not included in the other. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982).

We have compared the statutory elements of assault or battery of a law enforcement officer, Sections 784.011, 784.03 and 784.07, Florida Statutes (1983), with those of resisting an officer with violence to his person, Section 843.01, Florida Statutes (1983). All of the elements contained in Section 843.01 must be proved, along with more, in order to sustain a conviction

under Section 784.07.¹ The information alleges that appellant

¹ 843.01 Resisting officer with violence to his person. -- Whoever knowingly and willfully resists, obstructs, or opposes any sheriff, deputy sheriff, officer of the Florida Highway Patrol, municipal police officer, county or municipal correctional officer, beverage enforcement agent, officer of the Game and Fresh Water Fish Commission, officer of the Department of Natural Resources, member of the Florida Parole and Probation Commission or any administrative aide or supervisor employed by said commission, parole and probation supervisor or parole and probation officer employed by the Department of Corrections, county probation officer, personnel or representative of the Department of Law Enforcement, or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

784.07 Assault or battery of law enforcement officers or firefighters; reclassification of offenses. --

....

(2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties, the offense for which the person is charged shall be reclassified as follows:

(a) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

(b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

784.011 Assault. --

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

(2) Whoever commits an assault shall be guilty of a misdemeanor of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

784.03 Battery. --

(1) A person commits battery if he:

(a) Actually and intentionally touches or strikes another person against the will of the other; or

resisted the law enforcement officer by pushing or striking him, and battered him by touching or striking him. The State relied upon evidence of a single, continuous incident to prove the allegations of both counts. Therefore we hold that the resisting arrest with violence charged herein constituted a lesser included offense of battery of a law enforcement officer".

[Appendix, 2-4]

(b) Intentionally causes bodily harm to an individual.

(2) Whoever commits battery shall be guilty of a misdemeanor of the first degree, punishable as provided in s.775.082, s.775.083, or s.775.084. [Emphasis added.]

SUMMARY OF THE ARGUMENT

Respondent respectfully requests this Court to decline to take jurisdiction in this case. Petitioner has failed to demonstrate that the decision of the Fourth District Court of Appeal expressly and directly conflicts with the decision of this Court in State v. Carpenter, 417 So.2d 986 (Fla. 1982) or in any other case.

POINT INVOLVED

PETITIONER IMPROPERLY INVOKES THE DISCRETIONARY JURISDICTION OF THIS COURT WHERE THE INSTANT DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT

Respondent respectfully requests this Honorable Court to decline to take jurisdiction in this case. Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

This Court may only hear cases pursuant to discretionary review which "expressly and directly conflict" with a decision of another District Court of Appeal or this Honorable Court. Art. V, Section 3(b)(3) Fla.Const. (1980); Rule 9.030(2)(A)(IV), Fla.R.App.P. The opinion of the District Court of Appeal on this issue does not conflict with any other opinion of this Court or any District Court of Appeal.

The District Court of Appeal reversed Respondent's conviction for resisting arrest with violence as violative of Respondent's double jeopardy rights (Appendix I at 2). Petitioner maintains that this somehow conflicts with State v. Carpenter, 417 So.2d 986 (Fla. 1982).²

² Parenthetically, Respondent notes that the Fourth District Court could not have "overlooked" the holding of Carpenter as Petitioner claims since Petitioner presented the case to the District Court of Appeal in its Notice of Supplemental Authority [Appendix II]. Likewise, Petitioner presented the same argument raised herein in its Motion for Rehearing before the District Court of Appeal [Appendix II]. Respondent maintains that Petitioner misstates the holding of the Fourth District Court of Appeal. The Fourth District Court of Appeal held that Respondent's conviction for battery on a law enforcement officer and resisting arrest with violence violate his double jeopardy rights. The District Court of Appeal applied the Blockburger test in analyzing the statutory elements of each offense to determine if resisting arrest with violence was a lesser included offense of battery on a law enforcement officer [Appendix I, pp

Petitioner misapprehends this Court's holding in State v. Carpenter, supra. In Carpenter, this Court considered the double jeopardy issue, noting that "[i]t remains the court's function ... to determine if the crimes are the same. If they are, double jeopardy would prohibit the imposition of multiple punishments. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)." Id. at 987. This Court further stated:

"While resisting arrest with violence and battery on a law enforcement officer are similar offenses, and while they usually happening conjunction with one another, one does not necessarily involve another."

Id. at 988. Also pertinent to this Court's decision in Carpenter, of course, is its consideration of the single transaction rule. Section 775.021(4) Florida Statutes (1979). Id. at 787. The present cause, in contrast, involves the issue of double jeopardy. [Appendix I at 2]. The District Court of Appeal analysed the statutes involved³ pursuant to Blockburger, supra, [Appendix I, p.p 2-4, fn 1]. The District Court of Appeal concluded that the resisting arrest with violence as charged constituted a lesser included offense of battery of a law enforcement officer [Appendix I, p. 4].⁴ Therefore, the District Court of Appeal correctly held that multiple convictions for the greater and lesser included offenses were proscribed by the double jeopardy clause.

2-4]. Clearly, the District Court of Appeal utilized the correct analysis in the present cause. Petitioner, on the other hand, attempts to obfuscate a straightforward opinion by misconstruing the crux of the ruling below.

³ Sections 784.07 and 843.01, Florida Statutes (1983).

⁴ In contrast, Carpenter involved two convictions which were not lesser-included offenses of the other. State v. Carpenter, supra.

The bottom line is that Petitioner has not and cannot demonstrate that the holding of the Fourth District Court of Appeal expressly and directly conflicts with State v. Carpenter, supra or any other decision. Thus, this issue forms no basis for the invocation of jurisdiction herein.

CONCLUSION

Respondent respectfully requests this Honorable Court to decline to review the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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BY *Ellen Morris*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to Lee Rosenthal, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401, this 12th day of April, 1985.

Ellen Morris
Of Counsel