

OA 1-7-86

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

KEITH HENRIQUEZ,

Respondent.

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)
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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. 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

Appendix = Opinion of the Fourth District
Court of Appeal

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts in so far as it is accurate and not argumentative. Respondent includes the following additions, corrections, and clarifications:

Count I of the Information charged Respondent with battery on law enforcement officer Laurence Slane and Count II of the Information charged Respondent with resisting, obstructing, or opposing Officer Slane in the lawful execution of his duty (R362). Count I of the Information charged, in part, that Respondent "did actually and intentionally touch or strike" the officer. Count II of the Information charged, in part, that Respondent resisted, obstructed or opposed the officer by "pushing or striking" him (R362). Prior to trial, Respondent moved to dismiss Count I of the Information citing, in part, double jeopardy (R363-364, 374-377).

The Fourth District Court of Appeal struck that portion of the lower court's Order of probation which improperly delegated to Respondent's probation officer the determination of restitution (R388, SR16-17). Frensneda v. State, 347 So.2d 1021 (Fla. 1977); Cada v. State, 382 So.2d 405 (Fla. 4th DCA 1980).

The incident giving rise to the case-at-bar involves the circumstances surrounding the arrest of Appellant Keith Joseph Henriquez at his Miramar residence in the early morning hours of August 26, 1982.

The prosecutor relied on the testimony of three City of Miramar police officers for its case-in-chief. The initial witness, Officer Loren E. Slane, stated that he and Officer David

M. Sells responded to a 1:00 a.m. call to the Henriquez house. The call which apparently reported women's screams, was interpreted by the police as a "possible rape in progress" (R27, 68, 91, 134). All three officers alluded to a prior call for reckless driving which allegedly occurred in the Henriquez neighborhood. Officers Slane and Sells did not see any vehicle in the area, however (R28, 134). Officer Slane testified that when they responded to the second call, he knocked on the front door, got no answer and called Sergeant Harper for back-up and further instructions (R29). Officer Slane then heard a car "revving" down the street, travelling at a high rate of speed --about 35-50 m.p.h. The vehicle swerved from side to side and appeared to the officer to be out of control "or nearly." The headlights went off and Officer Slane tried to wave the car down. The car stopped in the Henriquez driveway (R31-32, 34-35, 43-44, 46, 82-83). The officer asked the driver, identified in court as Mr. Henriquez, for his license. Mr. Henriquez stated that it was in the house; he started to walk towards the house but the officer directed him to stay put (R33). Mr. Henriquez denied driving "other than normal." Then he suddenly bolted "pushed the officer out of the way with his arm and ran to the house (R35-36, 51-54). The officer fell sideways, hitting the car (R52). Officer Slane caught Mr. Henriquez, pushed him against a wall, and held him with his hand on his chest. The two got into a "slight pushing match." Then Mr. Henriquez kicked the officer across his knee and punched him. As Mr. Henriquez ran over him, the officer grabbed his belt and Mr. Henriquez pulled him up (R36-37, 55-62).

Inside the house, Mr. Henriquez yelled for his brother Alex and the struggle continued. The officer allowed that he used his flashlight "to help control him" (R37-38). The first time was at the front door; the next time was inside the house. Officer Slane said he believed the flashlight "connect[ed]" with Mr. Henriquez (R38). The officer said his (Slane's) thumb was dislocated and his knee was injured (R38, 78, 87).

On cross-examination, Officer Slane testified that he carried a gun in the left side of his uniform; his flashlight was under his arm (R41-42). The lights were on in the Henriquez residence (R45). Officer Slane denied he and Officer Sells had a discussion -- before the suspect vehicle stopped -- regarding who would write the traffic ticket (R46). According to Officer Slane, both he and Officer Sells came around the front of the vehicle when Mr. Henriquez got out of the car. Mr. Henriquez was not boisterous and did not run out of the car (R53).

Officer Slane allowed that he hit Mr. Henriquez twice with his flashlight inside the house, and once with his flashlight outside the house. All blows landed on the side of Mr. Henriquez's head and involved "wild swings." Mr. Henriquez had blood on him (R66-67, 73, 76). Officer Slane had "no idea" how Mr. Henriquez suffered a four-inch gash on the back of his head, nor did he knew how Mr. Henriquez got a crushed left thumb (R76-77). The officer stated he saw no blood in the house but observed blood outside (R77-78). Officer Slane never called out for Officer Sells to help him, although he didn't feel he had the situation under control, because he didn't want to take his eyes off Mr. Henriquez (R67-68).

Officer Sells was talking to the woman in the car. Officer Slane never heard her cry "rape" but said she was "hysterical" and screaming (R68-69). Officer Slane questioned Mr. Henriquez about his driving and not a rape, although he admitted that the latter was more important than a traffic stop (R71-72).

Officer Slane stated that he knew Mr. Henriquez by sight and by his last name; he had been called to the house before (R49-50, 101). Mr. Henriquez and the officer were involved in a previous traffic incident. During the prior encounter, Mr. Henriquez entered his house against the officer's request. Mr. Henriquez's mother refused entry to the officer. A ticket was never issued (R50, 74-75). Other calls to the house involved domestic fights (R75).

Officer Slane further stated that when he made the stop, Mr. Henriquez was not under arrest for anything but he was told he could not leave. He was detained for investigation of the traffic matter and the "possible rape" (R71-72, 85).

Officer David M. Sells stated that the vehicle Mr. Henriquez drove was travelling at a "high rate of speed" and fishtailing from side to side (R92-93). When the car stopped, the female passenger said "thank God you're here, I need help." She also allegedly said that Mr. Henriquez beat her up (R95-96, 98, 109). The woman was "hysterical" (R95, 98, 109, 128, 131).

Officer Sells heard the exchange between Officer Slane and Mr. Henriquez pertaining to the driver's license (R95). He did not hear a body hit the car (R113). He next observed them at the front door. He saw Mr. Henriquez punch Officer Slane in the chest, and knock him into the house. Then Mr. Henriquez followed

the officer into the house. When Officer Sells got to the front door, Officer Slane was against the wall and Mr. Henriquez was against the wall. Officer Sells pulled Mr. Henriquez's head to his (Sell's) knees, pulled him outside and placed him under arrest (R96-97). The witness said Mr. Henriquez did not hit him. He saw Mr. Henriquez punch Officer Slane once outside but did not observe him hit him inside (R97).

On cross-examination, Officer Sells first denied that he and Officer Slane decided to charge Mr. Henriquez with a traffic violation prior to the stop (R105-106). However, Officer Sells did testify during a deposition that they had decided to do so (R106). Officer Sells then stated at trial that they did in fact decide before Mr. Henriquez got out of the car, that Officer Slane would write a ticket (R114, 130). Officer Sells said that Mr. Henriquez was under investigation for possible rape and a traffic violation and agreed that the rape took precedence over the traffic violation (R111). However Officer Slane never questioned Mr. Henriquez about a rape (R110).

Officer Sells stated that Officer Slane blocked Mr. Henriquez from entering the house. Then Mr. Henriquez punched the other officer (R115). In the house, Officer Sells saw Officer Slane pushing Mr. Henriquez against the wall (R116-117, 119). At one point, he heard Mr. Henriquez say "help, I need help" (R122). Officer Sells said he noticed blood and hair on his hands after he grabbed Mr. Henriquez's head (R120, 123). Officer Sells transported Mr. Henriquez to the hospital (R123). Officer Sells had a previous street encounter with Mr. Henriquez, who was purportedly "a little boisterous" (R146).

On re-direct, Officer Sells stated that at the hospital, Mr. Henriquez's driver's license was found in his wallet (R130).

The final state witness, Sergeant George Harper, testified that he saw Officer Slane talking to Mr. Henriquez when he arrived at the scene (R134-135). Then Officer Slane chased Mr. Henriquez to the front of the house. A woman in the car was crying and "hysterical" (R137). Sergeant Harper first saw Mr. Henriquez with his back to the wall, then he saw Officer Slane fall back and then into the house. Mr. Henriquez stood over him (R138-139, 145). Sergeant Harper said the woman told him Mr. Henriquez hit her behind the car but that she wanted no medical aid nor did she wish to bring charges against him (R141, 152). Both Mr. Henriquez and Officer Slane were injured (R142).

On cross-examination, Sergeant Harper admitted he "probably" told Mr. Henriquez's mother he was sorry for what happened and wished he could have gotten there sooner. He said maybe he could have controlled the area or could have done something to keep someone from getting hurt (R149-150). The sergeant stated that the Henriquez family was known by the City of Miramar Police Department (R151). On re-direct, the sergeant elaborated that the family was involved in ten to fifteen police calls over the past six or seven years (R153).

Respondent Keith Joseph Henriquez testified that he and his girlfriend Jeannie Spain arrived at his home at about 11:30 p.m. An argument ensued when they were inside. It lasted ten to fifteen minutes, then the couple decided to go for a ride in her

car. Mr. Henriquez drove because Ms. Spain was upset. Ordinarily he does not drive her car. He doesn't own a vehicle and usually doesn't drive his family's car. Ms. Spain wanted a drink, then they returned to his house (R165-168, 206).

Mr. Henriquez stated he was driving about 15 m.p.h., had control of the car, and did not make an excessively wide turn (R169). Mr. Henriquez slowed as he neared his residence then parked in his driveway (R169-170). Ms. Spain was "O.K."; the two were not arguing anymore (R176, 197-199, 202).

Officer Slane approached and asked him why he was driving with his lights off. Mr. Henriquez said that he wasn't, he shut them off to pull into the driveway. Mr. Henriquez also denied he was speeding around the corner. When asked for his driver's license, Mr. Henriquez said it was in the house (R176). Officer Slane said he could get it, so Mr. Henriquez walked to the door. The officer followed him and never told him to stand still. Mr. Henriquez never attempted to flee (R187). At the door, Mr. Henriquez felt someone jump on his back and he was knocked forward. Inside the house, he was struck with something. He yelled for his brother, screaming "Alex help, he's killing me." At this point Officer Slane was on his back, pounding his head five or six times (R177-178, 185-186).

Mr. Henriquez sustained a two-inch cut on the back of his head. His ear was ripped off "almost completely," his thumb was broken in three places, and he had six lumps on his head (R179-180). He required stitches for his ear and head and his hand was put in a brace (R181-182). Photographs of his injuries were admitted into evidence (R181-183).

At the police station he heard Sergeant Harper tell Officer Sells to get his story straight because "the Henriquez family is getting a lawyer" (R184).

At the hospital, Mr. Henriquez found his license in his wallet. It had been in his pocket during the tire incident, although he thought he left it on the couch (R186-188). Mr. Henriquez knew both officers. The earlier incident involving Officer Sells occurred at 2:00 a.m. Mr. Henriquez was walking down the street and the officer pulled him over. Officer Sells asked "aren't you on probation or something" and Mr. Henriquez said no (R187).

On cross-examination, Mr. Henriquez said he did nothing to provoke Officer Slane (R189). Mr. Henriquez also stated that he never hit Ms. Spain. On re-direct, he said that she got hysterical only after he was taken out of the house (R203). Mr. Henriquez testified he had never been arrested for anything prior to this incident (R204).

Alexander Albert Henriquez, Keith's brother, stated that he was awakened by his brother's screams. He grabbed a gun, opened his bedroom door and saw Officer Slane on top of Keith, dragging him out of the hall. His brother was full of blood. There was also blood on the floor and walls of the house (R209-210). He did not see Officer Slane strike his brother (R211-212). On cross-examination, the witness said he heard his brother crying that they were going to kill him (R212).

Mr. Henriquez's mother, Lily Henriquez, testified that the living room of her residence faces the driveway. She said it was customary for the family to turn the car lights off before

getting to the driveway so that they would not shine into the living room (R219-220). Mrs. Henriquez alluded to the prior incident involving Appellant and Officer Slane. The officer came to the door and asked for her son. Mrs. Henriquez asked what he did. The officer got a billy club from his car and said "either you let him out or I'm going in to get him" (R220-221). Mrs. Henriquez told him to get off her property. She said the officer was furious and she was scared. She complained to the Miramar Police Department by phone but did not pursue the matter further. (R222, 224). Her son was never charged (R221-222).

Ms. Jean Spain testified that she and Mr. Henriquez had resolved an argument when they went for a drive. Since she was still a little upset, Mr. Henriquez drove her car (R230-231, 239-243). He approached his residence at about 10-13 m.p.h. Officer Slane asked for Mr. Henriquez's driver's license (R232, 234). Mr. Henriquez told him it was in the house and the officer said he could go to get it. Officer Slane followed Mr. Henriquez into the house (R234-235). The officer did not yell after him (R235, 247). Ms. Spain heard a scuffle and she walked up to the house. She saw blood on the floor. Officer Slane hit Mr. Henriquez on the head with a flashlight. Mr. Henriquez was on his knees yelling to this brother for help (R235-236, 247-248). Ms. Spain said she became hysterical. There was blood all over and she thought her boyfriend was going to die (R237, 245).

Ms. Spain stated that when they first stopped in the driveway, she was sniffing and her eyes were probably puffy, but she was "more or less o.k." She never told Officer Sells "thank God you're here" or said that Mr. Henriquez hit her (R233, 245,249).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal properly held that Respondent's convictions for resisting arrest with violence and battery on a law enforcement officer, involving the same conduct during the same episode, violate the double jeopardy clause. Moreover, the statutes at issue are overlapping and the legislature did not intend duplicative punishment in the present circumstances.

POINT I
[Restated]

RESPONDENT'S CONVICTION FOR RESISTING ARREST
WITH VIOLENCE CANNOT STAND WHERE THIS CHARGE
VIOLATES HIS DOUBLE JEOPARDY RIGHTS UNDER V
AMENDMENT OF THE UNITED STATES CONSTITUTION AND
ARTICLE I, §9 OF THE FLORIDA CONSTITUTION

The Fourth District Court of Appeal properly held that Respondent's convictions for resisting arrest with violence and battery on a law enforcement officer violate his double jeopardy rights. [Appendix I, pp 2-4]; See: Sections 784.07, 843.01 Florida Statutes (1983); Amendment V, United States Constitution; Article I, §9, Florida Constitution. This Court, in State v. Carpenter, 417 So.2d 986 (Fla. 1982), considered the offenses of resisting arrest with violence and battery on a law enforcement officer. In light of the double jeopardy issue, this Court stated 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. Respondent maintains that the holding of the Fourth District Court of Appeal comports with the fundamental purpose of the Double Jeopardy Clause and with decisional analysis.

The Double Jeopardy Clause states: "[N]or shall any person be object for the same offense to be twice put in jeopardy of life or limb ..." United States Constitution, Amendment V. This constitutional proscription preserves the finality of judgments in criminal prosecutions and protects the defendant from prosecutorial over reaching. See e.g.: Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). The United States Supreme

Court stated:

"... the Fifth Amendment double jeopardy guarantee serves principally as a restraint in courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments, but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that a punishment in more than one trial."

Id., 97 S.Ct. at 2225.

The Fourth District Court of Appeal correctly concluded that the convictions for battery on a law enforcement officer and resisting arrest involved the same conduct during the same episode, and accordingly violated Respondent's double jeopardy rights [Appendix 2-4]. Petitioner's claim that two distinct acts were somehow involved here cannot be supported by the record.

At trial, Petitioner sought to prove Respondent "did actually and intentionally touch and strike" Officer Slane [Count I] and that Respondent resisted, obstructed or opposed by "pushing or striking" Officer Slane (R362). The Petitioner's testimony was that Officer Slane asked Mr. Henriquez for his driver's license in front of his residence (E.g., R33, 95). A struggle ensued - although there was some dispute as to the precipitating event. Officer Slane stated that Respondent bolted, pushing him against the car (R35-36, 51-54). However, Officer Sells, who was at the car speaking to Ms. Spain, stated that he did not hear officer Slane fall against the car (R113). Respondent stated that Officer Slane gave him permission to get his license from the house, then jumped him from behind (R177-179, 185-186). In any event, it is clear that a fight occurred

in front of and inside Respondent's residence. Officer Slane hit Respondent with his flashlight and Respondent sustained extensive injuries from the melee (R38, 66-67, 73, 76, 68, 116-117, 119-120, 123). Analyzing these circumstances, it is clear that the battery charge and the resisting charge are factually intertwined: each charge constitutes the "same offense." The prohibition against double jeopardy precludes multiple convictions and punishments for the same offense. Thus, Respondent's conviction for resisting arrest with violence cannot stand. Amendment V, United States Constitution; Article I, §9, Florida Constitution.

Second, Respondent takes issue with Petitioner's assertion that two separate statutes were enacted for separate purposes and that the legislative intent in this regard is clear.

In determining whether legislative bodies intend the same conduct to be punishable under two criminal provisions, the courts consistently rely on the test of statutory construction stated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 356 (1932). The appropriate inquiry under Blockburger is "whether each provision requires a proof of a fact which the other does not." Ball v. United States, 105 S.Ct. 1668, 1672 (1985); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Blockburger applied as a rule of statutory construction, serves as a tool to determine legislative intent. E.g. Garrett v. United States, 105 S.Ct. 2407, 2412 (1985).

Petitioner's assertions notwithstanding, the Fourth District Court of Appeal properly invoked Blockburger, consistent with prescribed decisional analysis, to reach the double jeopardy issue in the present case.

The fact remains that the statutes involved here - Section 784.07 and 843.01, Florida Statutes (1983) - are overlapping. Soverino v. State, 356 So.2d 269 (Fla. 1978). Under the present circumstances, they are not directed to separate evils. Moreover, the legislature had no intention of creating duplicative punishment for Respondent, who falls within the overlap of the statutes. Ball v. United States, supra, at 1673; Cf. Mills v. State, 10 FLW 498, 499-500 (Fla. 1985).¹

In Soverino v. State, supra, this Court upheld the constitutionality of Section 784.07 Florida Statutes. This Court also discussed Section 843.01, resisting an officer with violence, as follows:

"Sections 843.01 and 784.07 will frequently overlap and a prosecutor is imbued again with the discretion to decide under which statute he wishes to charge ... In those situations where an accused may be charged under either statute but the elements of Section 843.01 are difficult to prove, Section 784.07 effectively "closes the gap" by permitting prosecution

¹ Notably, State v. Carpenter, supra, upon which Petitioner relies, is not in conflict with the present cause. This Court Stated:

Under section 843.01 Florida Statutes (1979), one could obstruct or oppose a law enforcement officer by threatening violence and still at the same time not be committing battery on the law enforcement officer as proscribed in section 784.07, Florida Statutes (1979). [Emphasis added].

417 So.2d at 988. Clearly, the present case involves not a threat of violence and violence but a singular act.

under the latter statute." [Emphasis added].

Id. at 273.

In the instant case, the battery charge and the resisting charge are factually intertwined and each charge constitutes the "same offense." Accordingly, the Fourth District Court of Appeal properly held that the prohibition against double jeopardy precludes multiple convictions and punishments for the same offense.

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 23rd day of September, 1985.

Ellen Morris
Of Counsel