OA 1-7-86

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
v.	)	CASE NO. 66,782
KEITH HENRIQUEZ, Respondent.	)	

PETITIONER'S BRIEF ON THE MERITS

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LIST OF CITATIONS

PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

Appendix District court's Opinion.

All emphasis has been added by Petitioner.

STATEMENT OF THE CASE AND FACTS

Respondent was charged, by information, with one count of battery on a law enforcement officer (Count I); one count of resisting arrest with violence (Count II); one count of failure to exhibit a driver's license on demand (Count III); and one count on reckless driving (Count IV)(R 362). Trial was held on August 22, 1983, and the jury returned a verdict finding Respondent guilty on all four counts (R 351-352, 385). Adjudication as to Counts I and II was withheld and Respondent was placed on three (3) years' probation, which included the special condition that Respondent serve the first thirty days in the Broward County Stockade (Special Condition [9]); enroll in Broward Community College (Special condition [10]); and pay up to $100 restitution "as determined by probation officer" (Special Condition [11](R 388, SR 14-17). Respondent was adjudicated guilty as to Counts III and IV and sentenced to time served (SR 14).

On appeal, the Fourth District Court of Appeal affirmed Respondent's convictions under Counts I, III and IV of the information, but reversed and remanded Count II with directions to the trial court to vacate Respondent's conviction to resisting arrest with violence (Appendix, pgs. 4-5). The district court reasoned:

> THE information alleges that appellant 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)

The incident giving rise to the case-at-bar involves the circumstances surrounding the arrest of Respondent Keith Joseph Henriquez at his Miramar residence in the early morning hours of August 26, 1982. Officer Loren E. Slane stated that he and Officer David M. Sells responded to a 1:00 a.m. call to the Henriquez house (R 27). Officer Slane testified that he knocked on the front door, got no answer and called Sergeant Harper for back-up and further instructions (R 29). Officer Slane then heard a car "revving" down the street, travelling at a high rate of speed -- about 35-50 m.p.h. around the corner (R 39). The vehicle swerved from side to side and appeared to the officer to be out of control (R 35). The headlights went off and Officer Slane tried to wave the car down. The car drove up onto a neighbor's lawn, around the policemen, and up into Respondent's driveway (R 31, 32, 34, 35, 44-46, 82-83). The officer asked Respondent for his license (R 32-33), and while talking to Respondent, Respondent bolted, shoving the officer up against the car and ran towards his house (R 35). Officer Slane testified that after Respondent bolted and shoved him out of the way (R 35), he caught up to Respondent and told him something to the effect of "... stand still, stop running, hold it ..." (R 36, 85). Officer Slane testi-

fied Respondent was then trying to push him away (R 36). The two then got into a "slight pushing match". Then Respondent kicked the officer across his knee and punched him. As Respondent ran over him, the officer grabbed his belt and Respondent pulled him up (R 36-37, 55-62).

Inside the house, Respondent yelled for his brother Alex and the struggle continued. The officer allowed that he used his flashlight "to help control him" (R 37-38). 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 Respondent (R 38). The officer said his (Slane's) thumb was dislocated and his knee was injured (R 38, 78, 87).

Officer Sells heard the exchange between Officer Slane and Respondent pertaining to the driver's license (R 95). He next observed them at the front door. He saw Respondent punch Officer Slane in the chest, and knock him into the house. Then Respondent followed the officer into the house. When Officer Sells got to the front door, Officer Slane was against the wall and Respondent was against the wall. Officer Sells pulled Respondent's head to his (Sells') knees, pulled him outside and placed him under arrest (R 96-97).

POINT ON APPEAL

WHETHER RESPONDENT'S CONVICTION FOR RESISTING ARREST WITH VIOLENCE WAS WHOLLY PROPER WHERE THIS CHARGE WAS SEPARATE AND DISTINCT FROM THE BATTERY ON A LAW ENFORCEMENT OFFICER COUNT?

SUMMARY OF THE ISSUE

By holding resisting arrest with violence to be a lesser included offense of battery on a law enforcement officer by virtue of the facts in the case, the Fourth District Court's opinion is in direct conflict with this Court's holding in State v. Carpenter, infra, and other cases which hold that the statutory elements determine whether conviction on two or more offenses may be had from a single incident.

ARGUMENT

RESPONDENT'S CONVICTION FOR RESISTING ARREST WITH VIOLENCE WAS WHOLLY PROPER WHERE THIS CHARGE WAS SEPARATE AND DISTINCT FROM THE BATTERY ON A LAW ENFORCEMENT OFFICER COUNT.

In its opinion, the Fourth District Court of Appeal held that the trial court committed reversible error by convicting and sentencing Respondent for both battery on a law enforcement officer and resisting an officer with violence, since the State relied upon evidence of a single, continuous incident to prove the allegations of both counts. In support of its opinion, the district court cited this Court's holdings in Portee v. State, 447 So.2d 219 (Fla. 1984), and Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982). However, the issue of the validity of multiple convictions arising from the same factual events has been the topic of some controversy and the most recent decisions of this Court were apparently overlooked by the Fourth District Court when the instant case was decided.

In State v. Baker, 452 So.2d 927, 928 (Fla. 1984), this Court noted:

> For double jeopardy purposes, this Court is bound to consider only the statutory elements of the offenses, not the allegations or proof in a particular case. ...Where an offense is not a necessarily lesser included offense, based on its statutory elements, the intent of the legislature clearly is to provide for separate convictions and punishments for the two offenses. §775.021(4), Fla.Stat. (1979).

In State v. Gibson, 452 So.2d 553, 556 (Fla. 1984), this Court held that offenses of robbery while armed and use or display of a firearm during commission of a felony were separate crimes and, even if based on one event, conviction of one did not preclude conviction of the other. The Court reasoned that:

> In Borges v. State, 415 So.2d 1265 (Fla. 1982), we held that the determination of whether two statutory offenses, charged on the basis of a single act or group of acts of the accused, are the same offense by reason of one being a lesser included offense of the other, is to be made by examining the statutory elements of the offenses rather than the allegations in the charging instrument or the factual elements of evidentiary proof presented at trial.

The Gibson Court, at 558, cited Missouri v. Hunter, 459 U.S. 359, 103 S.Ct 673, 74 L.Ed.2d 535, 543 (1983), in which the Supreme Court concluded that:

> ... simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes.

The Supreme Court went on to note that legislative intent is controlling, not the Double Jeopardy Clause. In State v. Baker, 456 So.2d 419, 422 (Fla. 1984), this Court distinguished the term "lesser included offense" for jury alternatives, from what that term means in regard to double jeopardy, holding that use of a firearm during the commission of a

felony is not a lesser included offense of first degree, premeditated murder. Thus Baker could be convicted and sentenced for each of those crimes. State v. Baker, supra, was cited as controlling authority in the cases where it was held that separate punishments are permissible for the use of a firearm during the commission of a felony and the commission of a felony by the use of a firearm. State v. Marshall, 455 So.2d 355 (Fla. 1984), State v. Burke, 455 So.2d 356 (Fla. 1984), State v. Brown, 455 So.2d 356 (Fla. 1984), State v. Fuller, 455 So. 2d 357 (Fla. 1984), State v. Brown, 455 So.2d 358 (Fla. 1984), Capers v. State, 455 So.2d 358 (Fla. 1984). Also, in Scott v. State, 453 So.2d 798 (Fla. 1984), the Court held that the petitioner could be convicted of both manslaughter and child abuse, because the statutory elements of each offense require proof of a fact that the elements of the other do not.

Petitioner submits that the Fourth District overlooked the holding in State v. Carpenter, 417 So.2d 986 (Fla. 1982), in which this Court expressly stated that resisting arrest with violence and battery on a law enforcement officer are offenses which may be violated by a single transaction without violating the double jeopardy clause of the Fifth Amendment.

Petitioner also submits that the Fourth District misapplied this Court's holdings in Borges v. State, supra, and Portee v. State, supra, when the district court found resisting arrest with violence to be a lesser included offense of battery on a law enforcement officer. In State v. Carpenter, supra at

988, 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 a battery on the law enforcement officer as proscribed in Section 784.07, Florida Statutes (1979). In applying the Blockburger test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts as alleged in a particular information. (citation omitted)

Despite the above language, the Fourth District Court considered facts alleged in the information to reach its conclusion.

Petitioner especially maintains this Honorable Court cannot conclude that the trial court erred in finding that the battery in the case sub judice was a separate and distinct offense from the resisting with violence count (R 164) since each charge was factually distinguishable from the other and the record reveals that Respondent committed a battery upon Officer Slane while being detained and questioned by him, when he bolted and shoved Officer Slane out of the way (R 35, 113). The officer then attempted to detain Respondent by telling him to "... stand still, stop running, hold it ..." (R 36, 85). When the officer attempted to effectuate this order, Respondent then tried to push him away and struck him (R 36-37). This conduct produced the second charge of resisting an officer with violence. Petitioner maintains that in light of these circumstances, Respondent's conviction of both offenses was

wholly proper. See, Sawyer v. State, 421 So.2d 4, 5 (Fla. 3rd DCA 1982). Here the Florida legislative has made its intent clear by enacting two separate statutes for separate purposes. The United States Supreme Court in Missouri v. Hunter, 74 L.Ed. at 544, after finding the Missouri Legislature had clearly intended that armed robbery and armed criminal action be separate offenses, commented:

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

In light of the foregoing authority cited, Petitioner maintains that the trial court properly convicted and sentenced Respondent on both counts.

CONCLUSION

For all the reasons and authorities cited herein, the Fourth District's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been furnished, by courier delivery, to ELLEN MORRIS, ESQUIRE, Assistant Public Defender, 224 Datura Street, West Palm Beach, Florida 33401, this 11th day of September, 1985.

Lee Rosenthal

Of Counsel