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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 68,810

RICHARD CRUMLEY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The State of Florida was the prosecution in the circuit court and the Appellee in the First District Court of Appeal and will be referred to herein as "Petitioner". Richard Crumley was the Defendant in the circuit court and the Appellant in the First District Court of Appeal and will be referred to herein as "Respondent".

The Record on Appeal consists of two volumes consecutively numbered at the bottom of each page. Citations to the record will be referred to by the symbol "R", followed by the appropriate page number in parantheses.

STATEMENT OF THE CASE

On October 8, 1984, Respondent was charged by three count information with one count of battery upon Kenneth Phillips, with a deadly weapon, to-wit: a wooden club; one count of battery on a law enforcement officer; and one count of possession of a weapon, to-wit: a wooden club, in a state correctional institution. The offenses occured on September 14, 1984. (R-1-3).

Respondent entered a plea of not guilty, (R-7) and a jury trial took place before Circuit Judge R.A. Green, Jr., on February 20, 1985. The jury rendered a verdict of guilty on all three counts. (R-23-24, 152). The trial court entered a judgment of guilt and imposed separate sentences within the sentencing guidelines recommended range of eight (8) years to run concurrent on counts one and two with the sentences to run consecutive to previous sentences imposed. (R-27-31). (R-153). (R-158-159).

Respondent filed a timely Notice of Appeal to the first district on March 5, 1985. (R-35). The first district reversed its separate judgment and sentences for battery with a deadly weapon and battery on a law inforcement officer on May 15, 1985.

Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction of this court on May 20, 1985. This court accepted jurisdiction on September 15, 1986. This is the Petitioner's Brief on the Merits.

STATEMENT OF THE FACTS

On September 14, 1984, Correctional Officer Kenneth Phillips was making a routine building inspection in Building 65 at Union Correctional Institution. Phillips entered Respondent's cell and told Respondent to clean up his cell and then left. While Phillips was walking up the stairs to the upper tier, Respondent struck him on the back of the head with a wooden table leg. (R-50). Respondent continued beating Officer Phillips all over the head until the table leg broke. Two inmates, John Lee Walker and J.P. Walker, pulled Respondent away. (R-51). Officer Phillips was unable to physically resist Respondent's violent attack because he was still in a dazed condition as a result of the surprise blow. (R-51).

SUMMARY OF ARGUMENT

Battery on a law enforcement officer and aggravated battery are separate offenses as each require proof of a statutory element and the other does not.

The legislature incorporated the above standard into the sentencing provisions of the Florida Statutes to mandate that a sentencing judge shall impose separate offenses for each separate offense.

The legislature has likewise specifically amended Florida Statutes to include correctional officers as law enforcement officers for purposes of the battery on a law enforcement officer statute.

ARGUMENT

ISSUE

RESPONDENT MUST BE SEPARATELY CONVICTED AND SENTENCED FOR THE OFFENSES OF AGGRAVATED BATTERY AND BATTERY ON A LAW ENFORCEMENT OFFICER WHEN ONLY ONE BATTERY OCCURED.

The District Court below accepted the Respondent's argument that the battery of a law enforcement officer is a lesser included offense to aggravated battery and, therefore, the trial court should have ignored the legislative mandate of Section §775.021 (4), Fla.Stat. (1983), and imposed judgment and sentence for the offense of aggravated battery only.

Respondent and the First District somehow managed to ignore or refuse to apply this court's construction of the Blockburger[1] test as stated in Carpenter v. State, 417 So.2d 986 (Fla. 1982), and as incorporated into Florida Statutes by the legislature in its amendment to Section §775.021(4), Fla.Stat. (1983), in deciding the case below, Judge Booth's suscint and correct desenting opinion notwithstanding:

Section §775.021(4), Fla.Stat. (1983) states that:

> ". . . whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For purposes of this subsection, offenses are separate if each offense requires proof of an element

[1] Blockburger v. United States, 284 U.S. 299 (1932)

> that the other does not, without regard to the accusatory pleading or the proof adduced at trial."

Section §775.021(4) essentially codifies the Blockburger test. In Rotenberry v. State, 468 So.2d 971 (Fla. 1985) the Supreme Court of Florida expressly approved language in Judge Cowart's desenting opinion in Baker v. State, 425 So.2d 36, 50 (Fla. 5th DCA 1982) which explained the Blockburger test, to-wit:

> ". . . [T]wo statutory offenses are not "the same offense" for double jeopardy purposes if each requires proof of an additional fact which the other does not. This means that the two statutory offenses are essentially independant and distinct if each offense can possibly be committed without necessarily committing the other offense. This is just a poor way of saying that the test is an abstract test and that two statutory offenses are not "the same offense" if each statutory offense has at least one constituent element that the other does not." [emphasis on original]

Rotenberry, supra, at 976.

The District Court below held the offenses for which Respondent was convicted at sentence, aggravated battery and battery on a law enforcement officer, are separate and distinct crimes under the Blockburger test. However, in the same paragraph, the court below cites Section §775.021(4), Fla.Stat. (1983) which clearly states it is the intent of legislature that Respondent shall be sentenced separately for each separate and distinct offense. This court is held that a specifically worded amendment stating that the trial judge shall do something is mandatory, "to interpret it otherwise would mean that the

amendment was meaningless and accomplished nothing." Tascano v. State, 393 So.2d 540, 541 (Fla. 1981). Likewise, in State v. Carpenter, 417 So.2d 986 (Fla. 1982), the court, per Justice Atkins, upheld separate sentences for battery on a law enforcement officer and resisting arrest with force whereas, in this case, there was only one episode and one victim of both offenses. Carpenter, supra, involved construction of Section §784.07, Fla. Stat. (1979) and Section §843.01, Fla.Stat. (1979). The court held that:

> ". . . while resisting arrest with violence and battery on a law enforcement officer are similar offenses, and while they usually happen in conjunction with one another, one does not necessarily involve the other. Under Section §843.01, Fla.Stat. (1979), one could obstruct or oppose a law enforcement officer by threatening violence and still at the same time, not be committing a battery upon the law enforcement officer as prescribed in Section §784.07, Fla.Stat. (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. See Whalen v. United States, 445 U.S. 684, 685 n.8, 100 S.Ct. 1432, 1439 n.8, 63 L.Ed.2d 715 (1980).

Id. at 988.

Carpenter, preceded the amendment to Section §775.021(4), Fla.Stat. (1983), and involved construction of Section §784.07, Fla.Stat. (1979).

In 1980, Senate Bill No. 405, which created Section §784.07, Fla.Stat. (1979), did not include state correctional officers as a member of this protective status. This oversight was corrected by House Bill No. 1378, Chapter 80-43, by the specific addi-

tion of State, County, or Municipal Correction Officers to the language of Section §784.07, Fla.Stat.. This statute was involved below, as the victim of the battery was a state correctional officer on duty and in uniform.

Likewise, it is important to know that State v. Baker, 452 So.2d 927 (Fla. 1984), per Justice Ehrlich, held that:

> " . . . when an offense is not a necessarily lesser included offense, based on a statutory element, the intent of the legislature clearly is to provide for separate convictions for the two offenses. Section §775.021(4), Fla. Stat. (1979).

This court, once again, per Justice Ehrlich, recently reaffirmed this principle of law and State v. Carpenter, supra, in State v. Henriquez, 485 So.2d 414 (Fla. 1986), where he cited Baker, supra, for the above proposition with the sole distinction being his newfound reliance on the amended version of Section §775.021(4), Fla.Stat. (1983). Justice Ehrlich also noted that the district court in Henriquez failed to cite Carpenter as did the majority opinion below.

In Scott v. State, 453 So.2d 798 (Fla. 1984), this court held that "the legislature adopted the Blockburger test when it amended Section §775.021(4), Fla.Stat. (1983)" and affirmed separate convictions and sentences for manslaughter and child abuse. Apparently, the status of the victim, i.e., child or adult, law enforcement officer or civilian, seems to be the controlling factor in the determination of legislative intent to separately convict and punish.

The district court below, for some reason, cited to State v. Baker, 456 So.2d 419 (Fla. 1984), even though there was no question of a jury instruction involved here as was the case in Baker, supra.

The majority opinion erred in relying on Houser v. State, 474 So.2d 1193 (Fla. 1985), instead of Carpenter and Scott, supra. There is no basis to apply Houser to this case in light of the clear legislative intent to separately convict and sentence those who commit a battery upon a law enforcement officer. This point was correctly seized upon by Judge Booth in her desent below which found Carpenter, not Houser, to be controlling.

Houser stated that "Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two different statutes". Id. at 1197. However, the cases relied on in Houser for the above proposition, were all decided prior to and without benefit of Section §775.021(4), Fla.Stat. (1983) and makes no mention of long standing principle of Blockburger.

The first district's majority opinion below says if you place an unwanted hand on a law enforcement officer you violate Section §784.07, Fla.Stat., as intended by the legislature, (See Larkins v. State, 476 So.2d 1383, 1384 (Fla. 1st DCA 1985), but if you beat him with a table leg about the head and body then the legislature meant for the court's to look the other way and forget the fact that the victim was a law enforcement officer in uniform and on duty.

CONCLUSION

This court should grant certiorari, quash the First District opinion, and reinstate Respondent's separate convictions and sentences for battery on a law enforcement officer and aggravated battery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 10th day of October, 1986.

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