IN THE SUPREME COURT OF FLORIDA

DION MICHAEL CARAWAN,

Appellant,

vs. CASE NO. 69,384

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TOPICAL INDEX

AUTHORITIES CITED

STATEMENT OF THE CASE

Appellee accepts appellant's Statement of the Case, subject to the following clarifications:

The information charging appellant with aggravated battery, in violation of Section 784.045(1)(b), Florida Statutes (1983), does not, as appellant contends, allege that such act was committed by appellant's "shooting at the victim" (Brief of Appellant at 1). Instead, the charging document alleges that appellant had committed a battery upon Memphis Knighten "by actually and intentionally touching or stricking said person against said person's will, or intentionally caused [sic] bodily harm," and that in the commission of such battery, appellant "did use a deadly weapon." (R 491).

Additionally, in its opinion, Carawan v. State, 495 So.2d 239, 240 (Fla. 5th DCA 1986), the district court set out the question before it, as follows,

> The issue in this case is whether Carawan can be convicted and sentenced for both aggravated battery and attempted manslaughter arising out of an incident in which the evidence, construed favorably for the state, shows that at least three shots were fired.

STATEMENT OF THE FACTS

Appellee supplements appellant's Statement of the Facts as follows:

On the night before his wedding to Jeannie Spondberg, Memphis Knighten entertained his new in-laws at his apartment on Northwest First Avenue in Ocala (R 162, 164). An uninvited guest at such gathering was appellant, whose brother had formerly dated the bride-to-be (R 166). After repeatedly being told to leave, appellant finally proceeded outside to his vehicle, where he remained with a companion, drinking beer and smoking marijuana (R 167). Knighten went out to the car and again continued to ask appellant to leave (R 167). After some general cussing, appellant started the car but, instead of proceeding into drive, slammed it into reverse and backed toward Knighten. The victim jumped out of the way, and appellant ran into the side of Knighten's car (R 169); according to appellant's companion, Knighten had smashed the windsheld of the car (R 282). Appellant then drove off, tossing out both curses and beer bottles, yelling to Knighten, "I'll be back, Memphis, you're a dead motherfucker!" (R 188, 171).

Later that evening, Knighten heard what sounded like a gunshot outside (R 171, 172), and when he went outside to investigate, saw someone crouched down behind the chainlink fence in the back (R 173-4). The victim then pushed Miss Spondberg, who had followed him, back into the house and, was shot as he turned around in the doorway to follow (R 174). Knighten stated that he knew that he "took a couple of shots" but did not know

how many times "they" had shot him (R 174). He stated that the shot spun him around and that, once inside, he fell to the floor, crawling toward the bathroom to check on his injuries (R 175); Knighten was shot, with shotgun pellets, in the arm, hip, ribcage, chest and stomach (R 178). He subsequently testified that over one hundred (100) pellets, which could not safely be removed, remained in his left arm, and that, as a result, he suffered permanent numbness in his left hand (R 178-180).

Jeannie Spondberg Knighten testified that there were three shots, and that she could see the smoke and fire of the first two, only hearing the third (R 190). Kenneth Knighten testified that he heard two shots, and had come into the house to find his father lying on the floor, bleeding (R 204). Several witnesses testified as to the presence of pellets embedded all around the backdoor and the air conditioner (R 192, 205, 259, 263-4). The police subsequently discovered three empty shotgun shells in the grass of the backyard (R 253,261-2, 264-5). According to one officer, the three shells were all different, one an empty .12 gauge shell, which had contained No. 9 shot, another an empty .12 gauge shotgun shell which had contained No. 6 shot, and the last an empty Magnum .12 gauge shell for "dougle-aught" buckshot (R 253).

SUMMARY OF ARGUMENT

Appellant's convictions of aggravated battery and attempted manslaughter, and the sentence imposed thereon, should be affirmed. Applying State v. Rodriguez, 12 F.L.W. 7 (Fla. December 24, 1986), this court's most recent precedent involving double jeopardy, it is clear that neither offense is a lesser included of the other, in that each requires proof of at least one element which the other does not. Similarly, even turning to this court's other precedents which have, on occasion, looked to legislative intent, as opposed to statutory elements, such convictions are equally proper, in that appellant's conduct, in discharging a firearm at the victim at least three times, hitting him at least once, violated more than one criminal statute. Section 775.021(4) Florida Statutes (1983), fully contemplates that one guilty of such criminal acts pay the requisite penalty, and no legislative intent exists that the two offenses sub judice "merge."

ARGUMENT

POINT ON APPEAL

APPELLANT'S CONVICTIONS OF BOTH AGGRAVATED BATTERY AND ATTEMPTED MANSLAUGHTER ARE PROPER, AND THE SENTENCE IMPOSED, PURSUANT TO THE SENTENCING GUIDELINES, SHOULD BE AFFIRMED.

Appellant contends on appeal, on the basis of this court's decisions of Mills v. State, 476 So.2d 172 (Fla. 1985), and State v. Boivin, 487 So.2d 1037 (Fla. 1986), that he can only be convicted of aggravated battery, in that, for public or legislative policy reasons, his two offenses, while statutorily distinct, must be regarded as merged. Appellee strongly disagrees, and suggests that there is nothing in Section 775.021(4) Florida Statutes (1983)[1] to compel such result. The appellant's acts, which truly caused grievous harm to the victim, violated more than one criminal statute, and conviction on all offenses proven was proper.

In State v. Baker, 456 So.2d 419, 420 (Fla. 1984), this court held,

> [I]n determining whether separate convictions may flow from a single event one looks at the **statutory**

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[1]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 the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

> elements of the charged crimes, as opposed to the language of the charging document. If each crime, under the respective statutes, requires an element of proof that the other does not, then one is not an included offense of the other. They are separate offenses.

The statutory element analysis, of course, is commonly known as the Blockburger analysis, after Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). This court, following Baker, subsequently rendered such decisions as State v. Enmund, 476 So.2d 165 (Fla. 1985) and Vause v. State, 476 So.2d 141 (Fla. 1985), in which it determined that separate convictions and sentences were proper, in instances of felony murder, for both the murder and the underlying felony. In State v. Rodriguez, 12 F.L.W. 7, 8 (Fla. December 24, 1986), this court recently reaffirmed its adherence to the Baker-Blockburger standard and, in holding that a defendant could be convicted of both robbery and second degree grand theft, reiterated,

> [I]t is now well settled in Florida that the determination of whether one offense is a lesser included offense of another, at least for purposes of deciding whether there may be cumulative convictions based on a single factual event, is made by analysis of the statutory elements, without regard to the allegations in a particular charging document or the evidence presented at a particular trial (citations ommitted).

Applying the above analysis to the charges at issue, it is clear, under Baker and Rodriguez, that appellant sub judice can be convicted of both attempted manslaughter, in violation of Sections 777.04 and 782.07 Florida Statutes (1983), and

aggravated battery, in violation of Section 784.045(1)(b) Florida Statutes (1983), in that each offense requires proof of at least one element which the other does not. It should be clear that in order to be guilty of aggravated battery, appellant had to actually wound the victim, whereas, pursuant to Taylor v. State, 444 So.2d 931 (Fla. 1983), in order to be guilty of attempted manslaughter, he need only have fired the gun at the victim with the requisite intent to kill him. It would appear that appellant sub judice does not seriously dispute the fact that Baker and Blockburger authorize separate convictions sub judice.

The problem, however, and, in appellee's opinion, the reason the district court declined to decide this case, is the role, if any, to be afforded those precedents of this court intervening between Baker and Rodriguez, such as Mills, supra, Boivin, supra, and Houser v. State, 474 So.2d 1193 (Fla. 1985). In such decisions, this court, in effect, departed from the Baker-Blockburger statutory analysis and concluded that multiple convictions could not exist in certain instances in which this court perceived the legislature as forbidding such. Thus, in Houser, this court concluded that a defendant could not be convicted of both vehicular homicide and DWI manslaughter, despite the fact that the elements of each offense were different. Similarly, in Mills v. State and State v. Boivin, this court determined that a defendant could not be convicted of both first degree murder, or the attempt to commit such, and aggravated battery, where the homicide or attempted homicide, and lethal act which caused the homicide or attemped homicide, caused

no additional injury "to another person or property." The state respectfully suggests that in determining whether or not, in Mills or Boivin, the lethal act had caused additional injury to another person or property, or, in Houser, in determining whether or not more than "one body" existed, this court, in effect, retreated from its prior precedents of Baker and State v. Carpenter, 418 So.2d 986 (Fla. 1982), which forebade, for double jeopardy purposes, any consideration of the actual evidence presented at trial or facts as alleged in the charging documents. Additionally, Houser, Mills, and Boivin lack any extended discussion as to the those circumstances which determine when a case will be resolved on a public policy, as opposed to statutory element, analysis.

Appellee would first contend that, because State v. Rodriguez is this court's most recent decision, Rodriguez must prevail over any contrary languge or holding in Houser, Mills or Boivin. Thus, Rodriguez can be seen as holding that only the Baker-Blockburger analysis is to be applied for double jeopardy purposes. Such being the case, as argued above, the instant convictions should be affirmed. Appellee would contend, however, that even should this court wish to continue its analysis involving legislative intent, such result would still obtain.

In this case, it is indisputable that the victim was hit by at least one of the shots fired by appellant; appellant's discharge of this bullet, or collection of pellets, constitutes the aggravated battery, of which he was properly convicted. The

evidence further indicates that appellant discharged his firearm two more times. Even if neither of these additional blasts resulted in further injury to the victin, appellant's discharge of the firearm, with the intent to kill the victim, was an independent criminal act, which, but for the jury's pardon, could have constituted attempted murder; instead, the act was properly found to constitute the offense of attempted manslaughter. Had appellant only discharged one shot, as it would appear did the defendant in Boivin, the argument could be made that the legislature intended only that he pay the highest single penalty for such action. Yet, the defendant sub judice committed additional criminal acts, and appellee can see nothing in Section 775.021(4) that bespeaks any legislative intent that he profit by any bizare permutation of the old axiom, "cheaper by the dozen." Whereas in Mills, pursuant, perhaps, to such earlier precedent as Martin v. State, 342 So.2d 501 (Fla. 1977), this court concluded that, when a "successful" homicide occurred, it made little sense to further penalize the defendant for an earlier assault or battery upon the same victim, appellee contends that such logic does not apply when the victim does not die and no "higher" offense occurs.

To some extent, the parties are both left to argue the import of Justice Shaw's concurring opinion in Vause v. State, 476 So.2d 141, 143 (Fla. 1985) (Shaw, J., concurring), wherein the justice wrote,

> I simply do not believe that the legislature intended, for example, that a criminal perpetrator who kills a victim by six gunshots be

convicted of homicide **and** six counts of aggravated battery.

Appellant argues that this language supports his contention that the two offenses sub judice have merged. Appellee contends that the above language supports its position that, if the perpetrator sub judice had shot, or shot at, the victim six times, but had failed to kill him, he could still be guilty of six criminal offenses, and so adjudicated. It is respectfully submitted that a victim who is shot twice is twice as injured as one shot a single time, and that, in the same vein, a defendant who knowingly aims a gun at another twice and chooses to pull such trigger twice is twice as culpable as one who only commits the same act once. The legislature's failure to distinguish between a defendant who shoots once and one who shoots twelve times would hardly seem to be in the public interest. It is to be remembered in this case that, while the attempted manslaughter could have been proven by a shot which missed the victim, it is appellee's contention that it likewise could have been proven by a second shot which further injured Memphis Knighten, a reading of the evidence supported by the record. The state respectfully suggests that any requirement, under Mills or Boivin, that the "additional injury" can only occur to one other than the non-fatally-wounded victim is without logical, or legislative, support.

In conclusion, appellee maintains that appellant's convictions of aggravated battery and attempted manslaughter should be affirmed. Applying the most recent precedent from this court on double jeopardy, State v. Rodriguez, such convictions

are eminently proper. Should this court wish to look beyond a statutory element analysis, and to legislative intent, the same conclusion is reached. Appellee would contend that an anomolous result indeed would exist, if one such as the defendant in Rodriguez, would commits two property crimes, could properly be convicted of all offenses committed, whereas one such as appellant, who commits violent personal crimes, could somehow be deprived of being held to pay his full debt to society, due to some misguided merger of offenses.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgments and sentence of the trial court in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing has been furnished, by delivery, to James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, 112 Orange Avenue, Suite, Daytona Beach, FL 32014, in his basket at the Fifth District Court of Appeal, this 8 day of January, 1987.

Richard B. Martell
Of Counsel