O/a 3-2-87

IN THE SUPREME COURT OF FLORIDA

DION MICHAEL CARAWAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 69,384

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT.)

OTHER AUTHORITIES:

IN THE SUPREME COURT OF FLORIDA

DION MICHAEL CARAWAN, Appellant,	)	
vs.	)	CASE NO. 69,384
STATE OF FLORIDA, Appellee.	)	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

The defendant was charged by information with the offenses of attempted first degree murder (by shooting at the victim), aggravated battery (by shooting at the victim), and shooting into an occupied structure. (R 491)

A jury trial was held before the Honorable Victor J. Musleh, Acting Circuit Judge of the Fifth Judicial Circuit of Florida, in and for Marion County. (R 1) Following the presentation of evidence and the denial of motions for judgment of acquittal, the jury found the defendant guilty of attempted manslaughter (a lesser included offense of attempted first degree murder), aggravated battery, and shooting into an occupied structure. (R 517-519)

Defense counsel objected to the court adjudicating the defendant guilty of both the attempted manslaughter charge and the aggravated battery charge. (R 462-472) The court rejected defense counsel's claim, adjudicated the defendant guilty of all three counts, and accepted the guidelines scoresheet which scored the aggravated battery as the primary offense, and listed the attempted manslaughter and shooting into an occupied dwelling as additional offenses at conviction. (R 586, 520-523) The attempted manslaughter conviction caused an additional fifteen points to be scored, resulting in a presumptive sentence of 3-1/2 to 4-1/2 years imprisonment rather than 2-1/2 to 3-1/2 years. (R 520) The court, over defense objection, sentenced the defendant to a guidelines sentence of 4-1/2 years imprisonment on each offense, to run concurrently. (R 487-489, 524-527)

On appeal to the District Court of Appeal, Fifth District, the defendant argued that the offenses of attempted manslaughter and aggravated battery had, under the facts of the case (where the defendant contended the evidence only established that the victim was struck by a single shotgun blast), merged into one offense, thereby prohibiting convictions on both offenses. Carawan v. State, 495 So.2d 239 (Fla. 5th DCA 1986). The district court, finding that the law of double jeopardy in Florida had become "curiouser and curiouser," declined to rule on the issue, instead asking this Court to review the case which the district court felt "require[d] immediate resolution by the

Florida Supreme Court due to issues of great public importance." Carawan, supra at 240-241.

This Court accepted jurisdiction pursuant to Article V, Section 3(b) (5) of the Constitution of Florida. This brief follows.

STATEMENT OF THE FACTS

On June 7, 1985, the defendant and Jimmy Walters (originally a co-defendant who pleaded guilty and testified for the state) visited the home of Memphis Knighten (the victim) and Jeannie Spondberg (now Knighten) to see if friends were there. (R 280) After they were invited inside and learned that their friends were not there, Carawan sought to speak to Spondberg who had dated his brother. (R 165-166, 185, 280-281)

Spondberg, not wanting any trouble between the defendant and her fiance, Knighten, told the defendant that it would be best if he left. (R 166, 185-186) After being told by Spondberg and Knighten to leave the apartment, the defendant and Walters returned to Walter's automobile in the parking lot, where they sat drinking beer. (R 166, 200, 281-282)

Knighten, learning that the defendant and Walters were still in the parking lot, confronted them and demanded they leave. (R 167-178, 282) During the confrontation, Knighten grabbed a big stick and smashed the car's windshield and the car, being driven by the defendant, sped off, almost hitting Knighten. (R 169-171, 282-283) Walter and the defendant, being angry about the damage to the car and being intoxicated, threatened to get revenge on the victim. (R 188, 210-212, 243, 284-285)

Walters testified at trial that he and the defendant returned to the apartment some time later that night. (R 286-288) Walters stated that when the defendant pulled out a

shotgun, he told the defendant that he did not want to be involved and drove off before the shooting began. (R 287-290) (Previously, he had told police that he knew nothing of the incident and on another occasion told them that while they were driving to Knighten's apartment he knew that the defendant had a shotgun. [R 313, 355-358]) Friends of Jimmy Walters claimed that they saw the defendant with the shotgun after the incident. (R 215-221, 225-229)

The victim testified that he heard a shotgun blast directed at his apartment and went to his back door. (R 172-174) He was unable to see the perpetrator. (R174) When the victim turned to go inside, a shotgun blast of birdshot struck him in both the arm and side. (R 174-175) While the victim stated that he "took a couple of shots" (R 174), he did not know how many times (if more than once) that he was shot and said that "after that one hit [him]," he did not know what was happening. (R 174-175) The shotgun blast spun him in the doorway and knocked him over a dining room chair to the floor. (R 175)

Two or three shots were fired in the incident, one prior to the victim's approaching his back door and maybe two in rapid succession, "so close together" that the victim could not tell how many were fired. (R 175, 190, 204) Three spent shotgun shells were recovered from the scene, one which had contained buckshot, one which had contained number 6 birdshot, and one which had contained number 9 birdshot. (R 253) Examination of the scene of the shooting revealed that the buckshot had struck

the electrical box and that birdshot had struck the kitchen window ledge and had struck the area surrounding the back door. (R 259-262) The victim was hit with shot that was small and he had over a hundred pellets in him, indicating that it was birdshot, which is packed with over a hundred in a single shell casing. (R 175, 179-180, 261-262)

A neighbor of Knighten observed the perpetrator and the incident. (R 366-367) Although unable to positively identify anyone he gave a general description of the shotgun-bearing perpetrator which matched the description of the co-defendant and chief state's witness, Jimmy Walters. (R 367, 370-372)

The defendant denied taking part in the incident explaining that he and Jimmy Walters had parted company shortly after the initial argument at the victim's residence, necessitating a long walk home for the defendant. (R 344-345, 383-384) He denied having possession of the shotgun and denied taking it to Walter's trailer. (R 385-388, 394-397)

SUMMARY OF ARGUMENT

Under the facts of this case, where the record does not show that the victim was struck by more than a single shotgun blast the defendant cannot be convicted of both attempted manslaughter and aggravated battery where the felonious conduct merged into one criminal act. Even if the victim was struck by two shots, they were fired in such a rapid succession that the two shots were indistinguishable, occurring in the same temporal and spatial relationship with each other, thus causing only a single criminal offense for which the legislature did not intend dual convictions. The conviction for attempted manslaughter must be vacated. The guidelines sentence for the remaining offenses, which scored the conviction of attempted manslaughter as an additional offense, must be vacated and recalculated without scoring the attempted manslaughter.

ARGUMENT

A DEFENDANT CANNOT BE CONVICTED FOR BOTH ATTEMPTED MANSLAUGHTER AND AGGRAVATED BATTERY FOR A SINGLE CRIMINAL ACT.

The method for determining whether two criminal charges are two separate, distinct offenses or are really only one offense is not as simple as the test enunciated in Blockburger v. United States, 284 U.S. 299 (1932). See also §775.021(4), Fla. Stat. (1985). As this Court and others have recognized, the Blockburger test (whether each charge requires proof of an element which the other does not) is not controlling and, in some cases, produces an incorrect result. Rather, it is merely a rule of statutory construction which serves as an **aid** in determining legislative intent and double jeopardy violations. See, e.g., State v. Boivin, 487 So.2d 1037 (Fla. 1986); Mills v. State, 476 So.2d 172, 177 (Fla. 1985); Houser v. State, 474 So.2d 1193 (Fla. 1985); Bing v. State, 492 So.2d 833, 834 (Fla. 5th DCA 1986) (Cowart, J., concurring). See also Ball v. United States, ___ U.S. ___, 84 L.ed.2d 740 (1985); Albernaz v. State, 450 U.S. 333 (1981). "The assumption underlying the Blockburger rule is that [the legislative body] ordinarily does not intend to punish the same crime under two or more statutes." Ball v. United States, 84 L.Ed.2d at 746.

In Mills v. State, supra at 177, and again in State v. Boivin, supra, this Court noted that a strict Blockburger analysis would have allowed for multiple convictions. But in each case, this Court went further to discern the legislative intent and find that the multiple convictions were contrary to that intent and hence improper. In Mills, this Court struck the conviction for aggravated battery where the defendant was also convicted of first degree murder which was the result of the same shotgun blast. Although, aggravated battery was not a lesser included offense of first degree murder under the Blockburger test, the Court nonetheless held that under the context of a single shotgun blast, the felonious conduct had merged into one criminal act. Mills, supra at 177.

In Boivin, supra, using the same rationale, this Court vacated a conviction for aggravated battery where the defendant had also been convicted of attempted first degree murder. Citing Mills, the Court stated that it found no legislative intent or recognition that society needs multiple punishment for both of these offenses "where both the attempted murder and the aggravated battery caused no additional injury." State v. Boivin, supra at 1038.

In the instant case, where the record does not conclusively show that the victim was struck by more than one shotgun blast, these cases are controlling. Both the attempted manslaughter and the aggravated battery merged into one criminal act which caused no additional injury to the victim. See also

Hamilton v. State, 487 So.2d 407 (Fla. 3d DCA 1986); and Castleberry v. State, 402 So.2d 1231 (Fla. 5th DCA 1981), wherein the courts, finding that the offense of grand theft had merged into the greater offense of robbery, struck the grand theft convictions.

This rule of law must still apply and the same legislative intent be presumed even if, under the circumstances of this case, there had been a showing that the victim was struck with more than one shot. Would the legislature intend and the courts allow, in the context of a single fight with a single victim, a separate battery charge for each blow struck? Or, in the context of a theft, would multiple convictions for each dollar and/or coin taken be tolerated? Are separate burglary convictions allowed each time the perpetrator carried out some item from the burgled structure and re-entered immediately for another item? The appellant submits that these multiple conviction situations would not be countenanced, just as the instant dual convictions should not be allowed to stand. Cf., Castleberry v. State, supra; Houser v. State, supra; Hallman v. State, 492 So.2d 1136 (Fla. 2d DCA 1986); State v. Peavey, 326 So.2d 461 (Fla.2d DCA 1976).

As pointed out in the concurring opinion of Justice Shaw in Vause v. State, 476 So.2d 141, 142 (Fla. 1985) (Shaw, J., concurring), in defining homicide offenses and the various potentially lethal criminal acts (such as aggravated battery) that can result in a homicide, the legislature obviously did not

intend that there be convictions on both the homicide and the act which caused the homicide.

> 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.

Vause v. State, supra at 143 (Shaw, J., concurring). It makes no difference to this rationale that here the victim did not die, but that the other offense was **attempted** manslaughter. In a single criminal **action**, the defendant violated two criminal statues, attempted manslaughter and aggravated battery. These charges are really one offense, differing only in degree and not in substance. See Judge Cowart°s concurring opinion in Bing v. State, supra at 835-836; and his dissenting opinion in Gotthardt v. State, 475 So.2d 281, 282-285 (Fla. 5th DCA 1985) (Cowart, J., dissenting). In urging that court's not look at the **names** of the offenses, the **form** of the charges, or the differing **degrees** of the crimes, Judge Cowart quotes from State v. Cooper, 1 Green Law 361, 25 Am.Dec. 490 (N.J. 1833), regarding the importance only of their **substance** in determining double jeopardy questions:

> At first view, it appears as if there were two crimes distinctly indictable and punishable . . . . Had the law called it [felony murder offense] by some other name, as, for instance, an aggravated arson, the propriety of prosecuting but one crime would have been more striking. **Yet names cannot alter the substance of things.** If the whole offense, in the eye of reason and philosophy, is one (and it requires the whole of it to

> constitute murder) we ought not to presume that the legislature meant to punish it as two. And, indeed, **the power of the legislature to subdivide offenses must be restrained by the constitutional provision** which I have noticed; **otherwise that provision may be evaded at pleasure.** In this case, the arson is a necessary constituent of the murder . . . . (emphasis supplied) 25 Am.Dec. at 493.

Gotthardt v. State, supra at 283 (Cowart, J., dissenting). Applying this rationale to the instant setting, it is clear that dual convictions would not be allowed if the legislature had chosen to call attempted murder or attempted manslaughter "aggravated, aggravated battery" or "especially aggravated battery." Yet, it should be equally clear that when the different form or wording of the two statutory offenses of attempted homicide and aggravated battery is stripped away, the same substantive offenses are present, different only in degree. "The independent, but overlapping statutes simply are not 'directed to separate evils' under the circumstances." Ball v. United States, 84 L.Ed.2d at 747; Vause v. State, supra at 143 (Shaw, J., concurring).

The appellant does not suggest that multiple convictions for the same offense can never be had. Rather, the focus in determining whether there are separate and distinct crimes for multiple acts, or merely one charge, should be the chronological and spatial relationships between the acts. This test has been utilized successfully by Florida courts in cases such as Castleberry v. State, supra (whether there was a single

taking versus multiple takings in charges of robbery and theft) or cases concerning the propriety of consecutive minimum mandatory sentences for a single criminal action as in Palmer v. State, 438 So.2d 1 (Fla. 1983). The test in these cases to determine the legislative intent for single or multiple punishments is whether the acts were separated in time and space and whether there were successive **distinct** actions with a separate and independent intent for each transaction (permitting multiple punishments), or whether the acts were so close in time and space and with only a single intent as to render them indistinguishable (allowing for only single punishment). Compare Hamilton v. State, supra, and Castleberry, supra; with Green v. State, 11 FLW 2271 (Fla. 5th DCA October 28, 1986), and Brown v. State, 430 So.2d 446 (Fla. 1983). And Compare Palmer v. State, supra; with State v. Thomas, 487 So.2d 1043 (Fla. 1986).

Under this spatial and temporal test, it is clear that in the instant case there is but single offense. Even if the victim was struck by two shots, they were so close together in time and space as to be indistinguishable, as the victim admitted. (R 174-175) There were no distinct offenses with separate intents in the act(s) constituting the charges of attempted manslaughter and aggravated battery.

The felonious conduct concerning the attempted manslaughter and aggravated battery convictions merged into one criminal intent. The legislature obviously did not intend for multiple punishments for the action which, although in form and

name it may violate two statutory offenses, in reality and substance it is but one offense, the crimes differing only in degree. The multiple punishments for both attempted manslaughter and aggravated battery are violative of the Double Jeopardy provisions of the Florida and federal constitutions.

Either the attempted manslaughter or the aggravated battery conviction must be vacated. The sentences on the remaining offenses must then be recalculated under the guidelines without the improper conviction being scored.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court vacate either the judgment and sentence for attempted manslaughter or for aggravated battery, and remand for resentencing on the remaining convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Ave., Fourth Floor, Daytona Beach, FL 32014, in his basket at the Fifth District Court of Appeal, and mailed to: Mr. Dion M. Carawan, Inmate Number 100615, P.O. Box 667, Bushnell, FL 33513, this 12th day of December, 1986.

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