IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

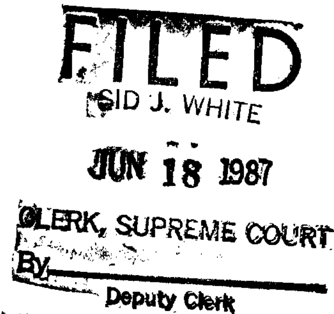
Petitioner,

v.

STANLEY JAMES BARTON,

Respondent.

FSC CASE NO. 70,238
5DCA Case No. 85-1179



PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent was convicted of attempted manslaughter, aggravated battery, and the use of a weapon while committing a felony. The facts arose out of a domestic - type dispute. The argument culminated in the respondent cutting his victim across the neck with a single swipe of a knife.

The issue which respondent appeals and which is germaine to this petition, was whether the convictions for attempted manslaughter and aggravated battery (based upon the single knife wound) violated respondent's constitutional right against double-jeopardy. § 782.04(1)(8); 777.04 (attempted manslaughter); and 784.045(1)(b) (aggravated battery by use of a deadly weapon), Fla. Stats.(1983) (App. 1)

Barton v. State, 12 F.L.W. 1065 (Fla. 5DCA April 10, 1987) analyzed this court's past double-jeopardy law and fashioned a new approach to the issue. Turning to the facts, the district court found that respondent's intent to attempt to commit voluntary manslaughter was mutually exclusive from the intent to commit aggravated battery, i.e., an applied element of aggravated battery is the absence of an intent to kill. Hence the two offenses were "mutually exclusive"and only one of those convictions could stand. (App. 5-7)

The district court then held, based upon the inconsistent verdicts, that the convcition for the greater offense (aggravated battery, a second degree felony) would have to be vacated, based upon its interpretation of Allison v. Mayo, 29 So.2d 750 (Fla. 1947). Therefore, the only conviction remaining was the attempted manslaughter which is a felony of the third degree. The district court, in

essence, held that based upon the inconsistent verdicts, the doctrine of implied acquittal would mandate that the greater conviction be vacated in that only the attempted manslaughter be upheld. (App. 7-8)

Petitioner filed a motion for rehearing and rehearing en banc, asking the district court to certify conflict with other district courts and this court's decisions or to certify the issue as one of great public importance. (App. 9-16) The district court summarily denied this motion on May 20, 1987. (App. 17) Petitioner filed a notice to invoke this court's discretionary jurisdiction. (App. 18) This jurisdictional brief follows.

SUMMARY OF ARGUMENT

Barton v. State, 12 F.L.W. 1065 (Fla. 5th DCA April 10, 1987), directly and expressly conflicts with this court's holdings in Mills v. State, 476 So.2d 172 (Fla. 1985), and State v. Bovin, 487 So.2d 1037 (Fla. 1986). In the latter two cases, this court vacated the lesser conviction but upheld the greater conviction. Under Barton, this court's holdings in those two cases would have to be overturned and the greater offense would have to be vacated.

Barton, based its holding upon viewing the jury verdicts and not the evidence. Such a holding conflicts with cases construing Section 924.34, Florida Statutes (1983) and cases that construe that statute. Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980); GM v. State, 410 So.2d 659 (Fla. 3d DCA 1982) (where both the latter cases specifically construed Section 812.025, Florida Statutes (1985) and affirmed the conviction for the greater offense of dealing in stolen property while vacating the lesser offense of grand theft); Royal v. State, 490 So.2d 484, 486 n. 3 (Fla. 1985); Reeves v. State, 493 So.2d 78 (Fla. 4th DCA 1986) (both applying Section 924.34 by looking at the evidence). Barton, supra, also conflicts with this court's holding in Pitts v. State, 425 So.2d 542 (Fla. 1983), where a defendant was found not guilty of aggravated battery but was found guilty of possession of a firearm in commission of a felony. Pitts, explained the doctrine of implied acquittal vis-a-vis inconsistent verdicts was limited to an affirmative finding that a defendant was not guilty of a necessarily lesser included element of another offense. Moreover, Barton, supra, also conflicts with this court's holding in Goodwin v. State, 26 So.2d 898 (Fla. 1946), where this court explicitly held that the law has never condemned a

verdict for inconsistency, and overruled two prior Florida Supreme Court cases which the district court cited as authority for its holding in Barton.

ARGUMENT

POINT I

THERE IS DIRECT CONFLICT BETWEEN BARTON V. STATE, 12 F.L.W. 1065 (FLA. 5TH DCA APRIL 10, 1987) AND THE DECISIONS OF THIS COURT IN MILLS V. STATE, 476 SO.2D 172 (FLA. 1985), AND STATE V. BOIVIN, 487 SO. 2D 2037 (FLA. 1986).

The rational and ultimate holding of Barton v. State, 12 F.L.W. 1065 (Fla. 5th DCA April 10, 1987), is completely at odds with this court's holdings in Mills v. State, 476 So.2d 172 (Fla. 1985), and State v. Boivin, 487 So.2d 1037 (Fla. 1986). Barton, supra, examined the verdicts and based upon that examination held that the greater offense would have to be vacated based upon a doctrine of implied acquittal. If this court were to apply the rationale of Barton in Mills, supra, this court would be compelled to vacate the first degree murder conviction and sentence the defendant to aggravated battery based upon the doctrine of implied acquittal, according to the district court's rationale. Of course, in Mills, this court vacted the aggravated battery conviction and affirmed the murder conviction. The same dilemma would confront this court in Boivin, supra. In Boivin, the aggravated battery conviction was vacated but the higher offense of attempted first degree murder was upheld.

Petitioner submits that it is virtually impossible to reconcile the holdings of these three cases. The district court's resolution of the issue creates two opposing standards where an appellate court could reach diametrically opposed results. Based upon what the district court perceived as the rule in Allison v. Mayo, 29 So.2d 750 (Fla. 1947), the district court held that a conviction

based upon a lesser verdict would be an implied acquittal of the greater verdict, thus necessitating that the greater verdict be set aside. (App. 7-8) No doubt there are other cases which set aside a lesser conviction based upon double-jeopardy issues or the sufficiency of the evidence, while affirming a separate verdict for a greater conviction. Mills, and Boivin, supra, are just two examples. But this doctrine announced by the district court is revolutionary to say the least and would have severe and far reaching ramifications on the entire criminal justice system. It is inconceivable to respondent how these cases can be reconciled but even if there is some plausible theory, petitioner submits this case must be accepted by this court in order to resolve this very blatant and serious conflict.

POINT II

THE DOCTRINE OF IMPLIED ACQUITTAL AS ANNOUNCED IN BARTON, SUPRA, DIRECTLY AND EXPRESSLY CONFLICTS WITH THOSE CASES THAT LOOK TO THE EVIDENCE, RATHER THAN THE VERDICTS, TO VACATE CONVICTIONS, TO-WIT: COLEY V. STATE, 391 SO.2D 725 (FLA. 1ST DCA 1980); G.M. V. STATE, 410 SO.2D 659 (FLA. 3D DCA 1982); ROYAL V. STATE, 490 SO.2D 484 (FLA. 1986).

In Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980), the defendant was convicted of armed robbery and dealing stolen property. Both verdicts were affirmed despite the defendant's argument that under Section 812.025, Florida Statutes (1979), one of them would have to be vacated. Coley, contrary to Barton, supra, held that there was no implied acquittal and that the doctrine would only apply to those cases which specifically fell under Section 812.025, i.e., verdicts rendered both on dealing in stolen property and grand theft. Under the Barton analysis, the greater conviction of armed robbery would have been vacated, despite the fact that Section 812.025

only pertains to two specific enumerated offenses.

Moreover, the Barton doctrine would alter those cases which affirm the dealing in stolen property conviction but reverse the grand theft conviction pursuant to Section 812.025. Eg., GM v. State, 410 So.2d 659 (Fla. 3d DCA 1982).

Section 924.34, Florida Statutes (1985), mandates that if an appellate court finds evidence insufficient for a greater conviction, then it should remand the cause back to the trial court to impose a lesser conviction which is sustained by the evidence. This court applied that statute in overturning a robbery conviction and reversing to have a conviction imposed for aggravated assault in Royal v. State, 490 So.2d 44, 46 n. 3 (Fla. 1986). Barton, supra, therefore conflicts with the latter decisions because it does not review the evidence but it looks only to the verdicts. The ultimate holding in Barton conflicts with Sections 812.025; and 924.34, Florida Statutes (1985), and cases construing those statutes. Under a Barton analysis, a dealing in stolen property conviction would have to be reversed while a grand theft conviction would be upheld. Once again, respondent can see no consistency between Barton, supra, and the latter cases cited within this point.

POINT III

BARTON, SUPRA, DIRECTLY AND EXPRESSLY CONFLICTS WITH GOODWIN V. STATE, 26 SO.2D 898 (FLA. 1946), AND PITTS V. STATE, 425 SO.2D 542 (FLA. 1983), BECAUSE THE LATTER TWO CASES DO NOT ACKNOWLEDGE THE DOCTRINE OF OVERTURNING VERDICTS BASED UPON INCONSISTENCIES.

Of the three cases that Barton, cited to support its holding that the verdicts were inconsistent and that the greater offense would have to be vacated, two of them were explicitly overruled in

Goodwin v. State, 26 So.2d 898 (Fla. 1946). Bargesser v. State, 116 So. 12 (1928), and Gordon v. State, 122 So. 218 (1929). Goodwin, explained that under Section 924.33, Florida Statutes (1941): "Fundamentally, the law has never condemned a verdict for inconsistency." Id. at 899.

This court did modify the latter doctrine in Redondo v. State, 403 So.2d 954 (Fla. 1981). Yet that case was distinguished by this court's decision in Pitts v. State, 425 So.2d 542 (Fla. 1983), where a defendant was found not guilty of aggravated battery but was found guilty of possession of a firearm in the commission of a felony. Pitts distinguished Redondo, supra, by noting that the jury instruction in Pitts, made it clear that a finding of an aggravated battery did not preclude the jury from finding guilt on the possession of the firearm charge, because the jury could have implicitly found the defendant guilty of attempted aggravated battery. Pitts, distinguishing Redondo, supra, explained: "...[the] jury returned verdicts that were legally inconsistent in that an essential element of the crime for which the jury found the defendant guilty was missing by virtue of its other verdict. Here the jury made no such affirmative finding that the defendant was guilty of a lesser included offense of the crime of aggravated battery." Id. at 544. In Barton, the verdicts do not indicate that the jury acquitted respondent on any element of aggravated battery. Barton's rationale, as well as the holding, cannot be reconciled with Pitts, and Goodwin, supra.

CONCLUSION

WHEREFORE, petitioner prays that this honorable court take jurisdiction in this cause because Barton v. State, 12 F.L.W. 1065 (Fla. 5th DCA April 10, 1987), directly and expressly conflicts with the decisions of this court and the other district courts of appeal cited herein, on the same question of law, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv); and Article V, Section 3(b)(3) of the Florida Constitution.

Respectfully submitted,

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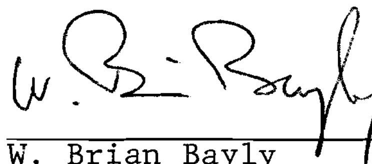
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on Jurisdiction has been furnished, by mail, to Kenneth Witts, Assistant Public Defender for respondent, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 17th day of June, 1987.



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