OA 2-3-88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 70,738

STANLEY JAMES BARTON,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent was charged with the offenses of attempted first-degree murder, aggravated battery, and possession of a weapon in the commission of a felony (R 342-343). A jury trial was held pursuant to the latter information. 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 verdict forms contained a number of lesser-included offenses (R 376-378). The jury found appellant guilty in Count I (attempted first-degree murder) of attempted manslaughter (R 376). In Count II the jury found appellant guilty of aggravated battery, the primary offense (R 377).[1]

Appellee would note the following testimony at trial of the medical examiner. He testified that although the victim had a large laceration on the left side of his neck he was alert when he was brought to the hospital. The cut was four inches in a transverse direction and just below the angle of the mandibal. The doctor performed formal neck exploration and looked for trauma of the carotid, the jugular veins, as well as other major nerves (R 544-545). Photographs of the injury were admitted (R 546, 548). The medical examiner explained that, "...had one of the major vessels been damaged, the victim could have exsanguinated [bled to death] before getting to the hospital." (R 550). On cross-examination, however, the doctor admitted that

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[1] Count III, possession of a weapon in the commission of a felony, is not germaine to this appeal.

none of the arteries or viens in the neck were severed. Blood depicted in the photographs was solely from capillaries and muscle (R 551). When the doctor saw the victim at the hospital, the wound was not bleeding profusely and all of the victim's vital signs were stable (R 551-552). There was no medical possibility of the victim dying from his injuries. The doctor stitched up the wound only; the injury did not appear to be a stab wound (R 552). The medical examiner was asked: "This would be a wound that might be caused by the open face of a blade hitting in this manner in otherwords (demonstrating)?" The doctor replied: "Yes, Sir." (R 552-553). The jury also heard a description of the knife, i.e., a linoleum knife with a blade of two to three inches (R 557).

On direct appeal, respondent argued that the lesser offense of attempted manslaughter should be vacated and the greater offense of aggravated battery should stand under double jeopardy principles. Petitioner argued under section 775.021(4), Florida Statutes (1985), that both convictions and sentences should stand. Notwithstanding respondent's request for relief, the district court held, in Barton v. State, 507 So.2d 638 (Fla. 5th DCA 1987), that the verdicts of attempted manslaughter and aggravated battery were mutually exclusive and hence, only the lesser conviction could stand, pursuant to Allison v. Mayo, 158 Fla. 700, 29 So.2d 750 (1947). Therefore, the district court vacated the greater offense of aggravated battery based upon this doctrine of inconsistent verdicts.

Since respondent had not requested such relief and since the

holding of Barton was based upon a novel theory, petitioner filed a very lenghty motion for rehearing. That motion, however, was denied. Petitioner then filed a timely notice to invoke this court's discretionary jurisdiction and a timely jurisdictional brief was filed. This court granted the petition and petitioner's brief on the merits follows.

SUMMARY OF ARGUMENT

The doctrine of vacating the lesser-included offense under the double jeopardy principles as promulgated by the district court is in error. Double jeopardy issues look to the statutes in question in the legislative intent; not the verdict forms. Moreover, there is no case law or authority to support the premise that the greater offense must be vacated under this new doctrine of "inconsistent verdicts" especially in light of section 924.34, Florida Statutes (1985). The latter doctrine only applies where the jury has acquitted the defendant of a necessary element in one count which would defeat the conviction in another count.

Carawan v. State, 12 F.L.W. 445 (Fla. Sept. 3, 1987), likewise should not be applied because the statutes in question do address separate evils, i.e., an attempted manslaughter (which does not necessarily entail any type of physical touching) and an aggravated battery (which necessarily must include an unauthorized touching or battery with a deadly weapon). In reality, the issue is one of sufficiency of the evidence. The evidence is sufficient to sustain both counts. Assuming arguendo that the evidence is not sufficient to sustain both counts, respondent failed to object on the grounds of sufficiency of the evidence and thus, should be precluded from litigating this issue.

ARGUMENT
POINT ON APPEAL

THERE WAS NO VIOLATION OF DOUBLE JEOPARDY PRINCIPLES BECAUSE EACH OFFENSE ADDRESSES SEPARATE STATUTORY ELEMENTS AND HENCE SEPARATE EVILS AND THE ISSUE IS, IN REALITY, ONE OF THE SUFFICIENCY OF THE EVIDENCE AND THERE IS SUBSTANTIAL, COMPETENT EVIDENCE TO UPHOLD BOTH JUDGMENTS AND SENTENCES.

Whether Barton v. State, 507 So.2d 638 (Fla. 5th DCA 1987) purports to be based on double jeopardy grounds or not, it must be clarified ab initio that the opinion's reasoning is not based on double jeopardy principles. Indeed, it cannot be. In State v. Baker, 456 So.2d 419 (Fla. 1984), this court held that the issue of double jeopardy under the constitution is a question of legislative intent. One looks only to the statutory elements, as opposed to the language of the charging document. Ergo, verdict forms dependent on the charging document certainly are not relevant for purposes of a double jeopardy inquiry. The problem confronting this court in Baker, was whether the "Category Four" offenses would also be included in the definition of "lesser-included offense" under section 775.021(4), Florida Statutes (1983). Baker was charged with and convicted of first-degree premeditated murder and the use of a firearm during the commission of a felony. He argued that the latter crime was a "Category Four lesser-included offense" of first-degree murder; therefore, double jeopardy barred the state from convicting Baker of the "lesser offense". In rejecting this permise, this court held that the term "lesser-included offenses" in section

775.021(4), did not encompass the "Category Four" lesser-included offenses. Baker mandates instead, that one should look to the particular statutes in question and not to the particular pleadings or proof. Yet if one is looking at the verdict form, one naturally must look to the charging document and therefore, eschew the statutory analysis which is required under a double jeopardy analysis. It follows then that if the prosecution does not have the authority to alter the legislative intent by the way it charges particular crimes, the prosecutor would, likewise, not have the authority to alter double jeopardy principles by the way he submits a verdict form. Petitioner submits that this issue is not in reality a double jeopardy issue but only questions the sufficiency of the evidence.

Before discussing the latter premise, petitioner would demonstrate that the analysis in Barton, is in error. The first issue pertains to an instruction which is as follows:

> Now, a separate crime is charged in each of the three counts of the information, and while the three counts have been tried together, each crime and the evidence applicable to each crime must be considered separtely and a separate verdict returned as to each crime charged. The finding of guilty or not guilty or not guilty as to one crime must not effect your verdict as to the other crimes charged.

(R 297). Fla. Std. Jury Instr. (Crim.) 2.08(a). The fifth district ignored the latter jury instruction. That instruction clearly informs the jury that they are not going to have this pardon power via the concept of inconsistent verdicts. In McKee

v. State, 450 So.2d 563 (Fla. 3d DCA 1984), the jury returned a not guilty verdict on attempted second-degree murder and the defendant claimed that the conviction of possession of a firearm during the commission of a felony should likewise be vacated. Based on the aforementioned instruction, the third district held that the defendant was estopped to assert that the jury failed to follow the latter instruction. The latter principle a fortiari should be applied to the case at bar since the jury's verdicts did not constitute any type of an acquittal nor any implicit finding based upon a necessarily lesser-included offense.

Nor does the Barton opinion account for the jury pardon concept. This court in State v. Abreau, 363 So.2d 1063 (Fla. 1978), recognized such an inherent power. (holding that the failure to give a two stepped removed necessarily-lesser-included offense was harmless because such error did not preclude the jury from utilizing its pardon power). In Barton, the jury could well have exercised its jury pardon power by finding the respondent guilty in Count I of the lesser-included offense of attempted manslaughter instead of attempted first-degree murder. The concept of the jury's pardon power certainly undercuts the district court's rationale.

Petitioner submits the district court's reliance upon Allison v. Mayo, 158 Fla. 700, 29 So.2d 750 (1947), to the extent that the higher offense should be stricken based upon the doctrine of implied acquittal, is, likewise, misplaced. In Allison, the jury returned the verdicts of burglary with a breaking and entering and burglary without a breaking. The

decision held, pursuant to a petition for writ of habeas corpus, that the lower offense acted as an implied acquittal on the higher offense. Subsequent to Allison, a number of courts held that the offense of burglary without forcible entry was a necessarily lesser-included offense of burglary with a forcible entry or breaking. Skov v. State, 292 So.2d 64 (Fla. 2d DCA 1974); Lindsey v. State, 330 So.2d 867 (Fla. 1st DCA 1976); and Roberts v. State, 320 So.2d 832 (Fla. 2d DCA 1975), holding that a burglary without a forcible entry or breaking was a necessarily-lesser-included offense of a burglary with a breaking based upon Brown v. State, 206 So.2d 377 (Fla. 1968).

When one considers the latter cases with section 924.34, Florida Statutes (1985), which mandates that an appellate court in reversing a conviction must mandate that a conviction of a lesser offense be entered where the evidence supports that lesser offense, it is apparent that Allison, supra, has been judicially and legislatively repealed. If this court were to make a ruling on the same facts and charges involved in Allison, the necessarily-lesser-included offense of burglary without a breaking or forcible entry would have to be stricken but the higher offense would be upheld. Allison is an anachronism and does not represent valid authority to set aside the aggravated battery offense in the case at bar.

There is another reason why Allison does not apply to the present case. Allison, as well as the case upon which it relies, Bargeser v. State, 95 Fla. 404, 116 So. 12 (1928), and Gordon v. State, 95 Fla. 806, 122 So. 218 (1929), all deal with a situation

which we do not have here, a general verdict, i.e., a defendant charged with multiple and discrete offenses who was told by the jury only that he is guilty "as charged". It then became necessary for the reviewing court to sort out the charges for which the defendant was charged but this court proved unwilling to do so in Bargeser and Gordon, and, instead, reversed all convictions. Here, of course, there are two specific and definite verdicts based upon two separate offenses.

Bargeser and Gordon, the cases underlying the Allison decision were repealed in Goodwin v. State, 26 So.2d 898 (Fla. 1946). The latter case noted that the logic of such decisions had been superceded by the enactment of section 924.33, Florida Statutes (1941), and expressly stated that Florida's position on inconsistent verdicts was aligned with the general rule as set forth in Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932), holding:

> Fundamentally, the law has never condemned a verdict for inconsistency [citations omitted]. Some courts have refused to approve them. What comfort appellants might have gained from the Bargeser and Gordon cases, supra, was removed by the above statute, the effect of which was to place us in line with the rule announced in Dunn v. United States, supra.

Goodwin, at 899. Allison, makes no intentions in altering the law in this regard. As noted above, Allison was predicated upon general verdicts and was decided on the basis of a writ of habeas corpus. Although the prisoner was discharged, the decision

certainly did not affirm the conviction and sentence for the lesser offense. Allison is, indeed, a slender thread on which to weave such a novel proposition as propounded in Barton.

Barton also cited Mahuan v. State, 377 So.2d 1158, 1161 (Fla. 1979); and Redondo v. State, 403 So.2d 954 (Fla. 1981). Yet, these cases, can be distinguished from the facts in the case at bar on the basis of Pitts v. State, 425 So.2d 542 (Fla. 1983). In Pitts, the defendant was found not guilty of aggravated battery but guilty of possession of a firearm in the commission of a felony. Pitts, distinguished Mahuan and Redondo 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 one guilty of the possession of a firearm charge, because the jury could have implicitly found that the defendant was guilty of attempted aggravated battery.[2] In explaining this distinguishing feature, Pitts stated: "...[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. Hence, the doctrine of implicit acquittal is limited to verdicts which are inconsistent by virtue of one verdict being an acquittal of an essential or necessarily-lesser-included element

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[2] The argument in Pitts can also be applied in the case at bar based upon the criminal jury instruction 2.08(a), cited supra. (R 297).

of another verdict. Inasmuch as both offenses in the case at bar involve separate, statutorily unique elements, the finding of guilt on one, cannot act as implicit acquittal on the other. Barton explains that aggravated battery has an "implicit element" of an intent which excludes any intent to commit a homicide. Section 784.021(1)(a), defines an aggravated assault as an assault with a deadly weapon without intent to kill. (emphasis applied) Such wording does not appear in the aggravated battery statute. § 784.045, Fla. Stat. (1985). Moreover, an aggravated battery can be committed by the use of a deadly weapon. § 784.045(1)(b). In any event, it is not logical to argue that the jury has "acquitted" respondent of the aggravated battery by finding that he has a homicidal intent. In Palmes v. State, 397 So.2d 648, 652-653 (Fla. 1981), this court rejected the argument that in a first-degree murder case a defendant could be entitled to a jury instruction that he committed accessory after the fact where the defendant was arguing the latter offense was actually a defense to the primary charge of murder. This court explained just because the defendant committed another crime other than the one for which he was charged would not be a legal defense requiring a jury instruction. The defense must negate the elements of the specific crime being charged: assuming arguendo that an accessory after the fact was charged in Palmes, and the jury returned a verdict of first-degree murder and accessory after the fact, petitioner submits, the conviction of accessory after the fact would not act as any type of implied acquittal for the primary offense. In Barton, the defense could not assert

that attempted manslaughter was a defense to the aggravated battert charge.

Had Barton been decided on double jeopardy principles, as noted above, under section 924.34, the holding would be in error. In section 812.025, Florida Statutes (1985), a jury may only return a conviction of grand theft or dealing in stolen property but not both based upon one transaction. The fifth district in Lennear v. State, 424 So.2d 152 (Fla. 5th DCA 1982), correctly overturned a grand theft conviction but affirmed the greater offense of trafficking in stolen property. Yet the Barton analysis could be applied to the latter situation, wherein the grand theft would be affirmed and the trafficking offense would be vacated. Yet this court when confronted with double jeopardy issues has consistently vacated the lower offense and affirmed the higher offense, when it found that there was a double jeopardy violation. Mills v. State, 476 So.2d 172 (Fla. 1985); Higdon v. State, 490 So.2d 1252 (Fla. 1985); Houser v. State, 474 So.2d 1193 (Fla. 1985). Hence, the Barton decision must be overturned.

This analysis must necessarily discuss this court's decision in Carawan v. State, 12 F.L.W. 445 (Fla. Sept. 3, 1987). Petitioner would agree and indeed emphasize that the power to define crimes and punishments inheres in the legislative branch. Baker, supra: State v. Carpenter, 417 So.2d 986, 988 (Fla. 1982); Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).[3] Carawan procedes to analyze this issue based upon the statements of legislative intent, the

Blockburger test as codified in section 775.021(4), and the rule of lenity pursuant to section 775.021(1). Petitioner respectfully submits that this court misapplied the rule of lenity in according it the "field of operation" which it did. As this court noted, the rule of lenity is not to come to into play unless "the statutes in question are susceptible of different constructions, that is, when the legislative intent is equivocal." Id. at 448. Yet the legislative intent is not at all equivocal as evidenced by the clear, specific and unambiguous language of section 775.021(4). Early on in the case of State v. Hegstrom, 401 So.2d 1343, 1346 (Fla. 1981), this court explained: "Judicial decisions before an enactment do not stand as independent beacons of legislative intent to explain an otherwise unambiguous statute. Section 775.021(4) is specific, and the lesser-included offenses are exempt from multiple sentencing." In State v. Snowden, 476 So.2d 191, n. 1 (Fla. 1985), this court found that the 1983 amendment to section 775.021(4) "... now clearly expresses legislative intent..." Inasmuch as section 775.021(4), is unambiguous, the rule of lenity should not be utilized to undercut that statute. As explained in Albernaz: "Lenity thus serves only as an aid for resolving an ambiguity; it is not used to beget one." Id. 450 U.S. at 342, 101 S.Ct. at

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[3] Carawan explained: "We find that our own double jeopardy clause in article I, section 9, Florida Constitution, which has endured in this state with only minor changes since the constitution of 1845, was intended to mirror this intention of those who frame the double jeopardy clause of the Fifth Amendement." Id. at 446.

1144.

Carawan, also explained: "It is presumed, however, that this legislative prerogative is not excercised by punishing the same offense under more than one statutory provision, since the legislature can acheive the same result with greater economy by merely increasing the penalty for the single underlying offense." Id. at 446. Again, Albernaz, addresses this problem: "Congress cannot be expected to specifically address each issue of statutory construction which arise." Id. 445 U.S. at 696, 100 S.Ct. at 1439. Hence, as noted in Albernaz, the purpose of enacting a statute such as 775.021(4), is to circumvent the tedious problem of addressing each and every specific criminal statute. Furthermore, this court explained: "Unfortunately, comprehensive statements of intent are rare because of our increasingly complex criminal codes which are constantly being changed, modified, and amended, not under some master plan, but in piecemeal fashion." Carawan at 446. Again, Albernaz addresses this problem by explaining: "As a result, if anything is to be assumed by congressional silence on this point, it is that Congress was aware of the Blockburger rule and legislated with it in mind. It is not a function of this Court to presume that 'Congress was unaware of what it accomplished....'" [citations omitted]. Id. 450 U.S. at 341-342, 101 S.Ct. at 1143-1144. Moreover, section 775.021(4) was amended in 1983. To petitioner's knowledge, there have not been a great amount of substantive statutes added to the Florida criminal code. In any event, this issue almost always arises in the context of criminal

statutes that were passed well before the Blockburger statute was enacted.

Carawan also charaterizes section 775.021(4), as a rule of statutory construction. While that premise is true, the fact that this statute is characterized as such, gives it no less credence based upon the premise that this statute clearly defines the legislative intent. Of course, the "bottom line" of any double jeopardy issue is the legislative intent.

In Carawan, this court noted: "Moreover, we have explicitly recognized that the Blockburger test itself, as a rule of construction, will not prevail over actual intent." Id. at 447. Petitioner agrees with the latter premise generally but vehemently disagrees with this court's interpretation of "actual intent". For example, as noted above, section 812.025, manifests a specific intent that only one conviction can be upheld. Other statutes may manifest an actual intent that the Blockburger rule will not be applied because the offenses are set out in degrees. Perhaps the legislative history will indicate that the lawmakers intended that a certain offense not result in dual convictions and penalties with another offense. Absence such considerations, however, the clear, unambiguous language of section 775.021(4) must be applied.

The latter premise was alluded to in Carawan, by the following: "...[m]ultiple punishments are presumed to be authorized in the absence of a contrary legislative intent or any reasonable basis for including that a contrary intent existed." 12 F.L.W. 447. Petitioner very much agrees that multiple

punishments are presumed to be authorized in the absence of a contrary legislative intent based upon the general Blockburger statute. But petitioner takes issue with the conclusion that multiple punishments could be disallowed if there is "...any reasonable basis for concluding that a contrary intent existed." Id. at 447. This court will not nullify legislative acts merely on the grounds that the policy of the wisdom of such an act may seem unpolitic or unwise. Holley v. Adams, 238 So.2d 401, 405 (Fla. 1970). Carawan ultimately held that the offenses of aggravated battery and attempted manslaughter address separate "evils". Based on that interpretation, this court concluded that multiple punishments were not authorized. Yet in his dissent, Justice Shaw, disagreed with such a conclusion by noting that the primary evil of aggravated battery was to punish one who inflicts physical injury on a victim while the primary evil of an attemped homicide was that it could inflict death and there would not be any requirement that the state had to prove physical injury. Id. at 450. This disagreement highlights the basic problem underlying Carawan; there is no logical reason why Justice Shaw's interpretation is any less valid than what was set forth in the majority opinion. In fact, Justice Shaw's position is stronger because if two criminal statutes each have unique criminal elements, by definition under section 775.021(4), they are addressing separate evils. Perhaps this court disagrees with the policy of subjecting an accussed to multiple punishment based upon aggravated battery and attempted manslaughter. Yet if the criminal statutes under consideration are unambiguous on their

face to the extent that each has the unique element that the other does not and there is nothing in the legislative history or wording of the statutes under consideration to the contrary, the judiciary should not substitute its opinion of reasonableness for that of a legislature. Art. II, § 3, Fla. Const.

Reinforcing the premise that Carawan could not be premised on a legislative intent, was the fact that the remedy was to remand the cause back to the trial court to have that court either vacate the attempted manslaughter or the aggravated battery conviction. If this issue is truly one of divining legislative intent, it would not be proper for the trial court to make such an interpretation. Hence, if the trial court is compelled to elect which offense to vacate, such a decision will actually be a determination of the sufficiency of the evidence and not a double jeopardy issue. Such a distinction is crucial.

The case at bar, then, presents a question about the sufficiency of the evidence and not a double jeopardy issue. Did the one act of cutting the victim's throat constitute an aggravated battery or attempted manslaughter or both under the evidence. In other words, to resolve this issue, one must look to the evidence and not to the statutes which entails the double jeopardy issue.

Specifically, is there competent, substantial evidence by which the jury could determine that in the act of cutting the victim's throat, the respondent had the intent to commit an aggravated battery and the intent to commit an attempted manslaughter. Respondent submits the jury could find that the

respondent intended an aggravated battery and attempted homicide. The fact that one stabs a person on any part of that person's body with a knife would constitute an aggravated battery. The fact that respondent did it to the throat and caused such a serious injury would, in addition, support the jury's finding that respondent also had the intent to commit an attempted homicide.

Even if this court were to find the evidence insufficient to support either the aggravated battery conviction or the attempted manslaughter conviction, petitioner submits that this issue was not preserved for appellate review. At the close of the state's case, the defense counsel indicated that the state had met the burden of proving aggravating battery but not the burden of attempted premeditated or attempted second-degree murder. Defense counsel also maintained that Count II (the attempted premeditated murder charge) had to be dismissed based upon double jeopardy (R 72). These grounds were re-raised at the close of all the evidence (R 211-212). It is axiomatic that the issue that the evidence is insufficient must be preserved for appellate review by a specific objection at trial. Estrada v. State, 400 So.2d 562 (Fla. 3d DCA 1981); Johnson v. State, 486 So.2d 657, 658 (Fla. 4th DCA 1986). In the absence of such an objection, petitioner submits both convictions and sentences for aggravated battery and attempted manslaughter should be upheld.

CONCLUSION

WHEREFORE, petitioner requests this honorable court to vacate the decision of Barton v. State, 507 So.2d 638 (Fla. 5th DCA 1987), and remand this cause back to the trial court, so that the trial may enter judgments and sentences for both the attempted manslaughter and the aggravated battery offenses.

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 the Merits, has been furnished, by delivery, to Kenneth Witts, Assistant Public Defender for Respondent, at 112 Orange Avenue, Suite A, Daytona Beach, Fl. 32014, this 17th day of November, 1987.

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Of counsel