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 REPLY BRIEF ON THE MERITS

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TOPICAL INDEX

PAGE

AUTHORITIES CITED

SUMMARY OF ARGUMENT

The Fifth District of Appeal has already issued an opinion which implicitly overrules its decision in the case at bar. A separate category of "mutually exclusive" elements only adds confusion to this issue. The distinction between the legislative intent for purposes of double jeopardy and the sufficiency of the evidence for purposes of having the judiciary review such evidence is a valid distinction. The latter dichotomy is the only way to avoid confusion in this area of the law.

POINT

THE DISTRICT COURT OF APPEAL WAS INCORRECT IN RULING THAT THE GREATER CONVICTION SHOULD BE REVERSED WHILE THE LESSER CONVICTION AFFIRMED; BOTH CONVICTIONS SHOULD BE AFFIRMED.

Respondent first attempts to justify the result in Barton v. State, 507 So.2d 638 (Fla. 5th DCA 1987), by distinguishing the case of Pitts v. State, 452 So.2d 542 (Fla. 1983). Petitioner initially cited the latter case to critique the Barton's reliance upon Mahuan v. State, 377 So.2d 1158, 1161 (Fla. 1979); Barton used the latter case to justify its holding that the verdicts were "mutually exclusive", and that one verdict must be vacated. Petitioner noted that Pitts distinguished Mahuan; Mahuan 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. Petitioner highlighted the fact in its initial brief that Pitts used the justification of inconsistent verdicts only where one verdict acquitted the defendant of an essential element of the crime. It is not contested and, indeed, respondent seems to argue that the intent elements are "inconsistent". If indeed the intent elements are "inconsistent", it follows that they must have mutually exclusive elements; i.e., a rendering of one verdict does not acquit respondent of a necessarily lesser included element of another verdict.

Moreover, there was a separate jury instruction which explained clearly to the jury that each of the three crimes were

separate counts and that the evidence must be considered separately and a separate verdict returned as to each crime. The instruction continued: "The finding of guilty or not guilty as to one crime must not effect your verdict as to the other crimes charged" (R 297). Clearly such an instruction informs the jury that it does not have any acquittal power when it renders a verdict. There was never an objection to such an instruction. Yet the latter instruction is certainly at odds with the district court's novel theory promulgated in Barton, supra.

Recently in Blankenship v. State, Case No. 86-832, (Fla. 5th DCA, Dec. 3, 1987), on rehearing, the district court acknowledged this court's decision in Carawan v. State, 12 F.L.W. 445 (Fla. Sept. 3, 1987). In Blankenship, the defendant was convicted of attempted third degree murder and aggravated battery. The rehearing was en banc. Three judges voted to vacate the lesser crime. The other three judges voted to follow the procedure promulgated in Carawan by remanding both verdicts back to the trial court, and having the trial judge vacate one or the other. Although the Blankenship opinion did not explicitly state it was receding from Barton, supra, the opinion of all six judges was contrary to the result reached in Barton.

Respondent challenges petitioner's assertion that the issue in the case at bar pertains to the sufficiency of the evidence and not double jeopardy principles. Respondent argues that Barton was not decided explicitly nor implicitly based upon the sufficiency of the evidence, but based upon "mutually exclusive convictions". The latter characterization obfuscates the

issue. If the evidence is indeed "mutually exclusive", then by definition it is insufficient to sustain one count or the other. To engraft this third, nebulous category into this already enimagtic issue, would make the caselaw very confusing to say the least.

Respondent argues that he never should have been charged with the two counts (attempted first-degree murder and aggravated battery) ab initio. Yet the ultimate remedy in Carawan is contrary to such a proposal because both counts were actually remanded back to the trial court. If the statutes truly violated double jeopardy so that under all circumstances the jury could never return a verdict as to both statutes (i.e., the legislature had determined that the offenses were "the same offense"), then the remedy in Carawan would be totally inappropriate.

Respondent submits that this issue should not be decided based upon looking at the evidence. Yet when the case is remanded back to the trial court, that is exactly what the trial court would do. In any event, petitioner strongly agrees with the dissent of Justice Shaw in Carawan. That dissent noted that the primary evil of aggravated battery is inflicting physical injury on the victim; the primary evil of attempted homicide is that it may inflict death, but that there is no statutory requirement that the state prove any physical injury. The latter characterization is absolutely correct. Justice Shaw's analysis also demonstrates that each of the offenses (aggravated battery and attempted manslaughter) have separate, unique elements, as defined by section 775.021(4), Florida Statutes (1985). In this

respect, petitioner submits the prosecutor was correct in charging respondent with both offenses and the trial court was correct in submitting both charges to the jury.

Petitioner submits the "separate evils" test promolgated in Carawan should be modified because the result of that decision gives the judiciary too much discretion in interpreting various criminal statutes and determining what, indeed, are "separate evils". Such a practice could well encrouch on the legislative prerogative of promulgating criminal statutes and defining crimes. It may well be that dual convictions for separate statutes cannot be allowed under double jeopardy principles even though each statute has a separate unique element under Blockburger v. United States, 284 U.S. 299 (1932). Yet, if such be the case, such determination should come from a scrutinization of the specific wording of the statutes.

For example, even if first-degree murder and second degree murder were determined to be separate, unique offenses under Blockburger, this court could decide that because the legislature promulgated the statutes in terms of degrees, that the legislature intended that dual convictions should not result. Petitioner has already mentioned section 812.025, Florida Statutes (1985), which is a specific legislative statute prohibiting dual convictions for dealing in stolen property and grand theft. Perhaps the legislature would note in the legislative history that the intent was not to allow dual convictions for a newly promulgated statute. All the latter examples are justification for disallowing dual convictions,

notwithstanding that the statutes technically meet the Blockburger test. State v. Hightower, 12 F.L.W. 153 (Fla. April 2, 1987), is a good example of an analysis basing the ultimate holding on statutory construction rather than a more subjective test. In other words, this court looked to the wording of the statute to determine whether double jeopardy principles were violated. On the other hand, in Carawan, this court has created a standard in which it looks outside of the statutes in question and, in effect, substitutes its own opinion for the meaning of the legislative intent for that of the legislature.

By examining these issues based on the sufficiency of the evidence, when it is determined that the two statutes meet the Blockburger test, and when it is determined that there is no other legislative intent to preclude dual convictions, petitioner submits the problems encountered in this area of the law will be mollified if not actually eliminated. In the final analysis, it is the legislature and the legislature only, not an appellate court, trial court nor jury, that defines crimes. Unless and until this court makes the latter distinctions proposed herein, petitioner submits that this area of the law will continue to be unsettled.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted

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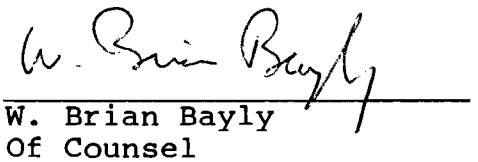
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Reply Brief on the Merits has been furnished by mail to Assistant Public Defender Kenneth Witts, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014 this 16th day of December, 1987.



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