OA 2-7-89

FILED
SID J. WHITE
DEC 6 1988
CLERK, SUPREME COURT
By________
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WEBSTER F. McKINNON,

Petitioner,

v.

CASE NOS. 72,503
72,601
73,218

STATE OF FLORIDA,

Respondent.

______________________________/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Webster F. McKinnon, Appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's statement that the facts of the offenses are not particularly relevant to the issues on appeal.

The Respondent would add only the following:

1. The Petitioner, by indictment, was charged with second degree murder and the indictment alleged that the offense was committed with a firearm (R 3).

2. The Petitioner's resentencing was held on June 13, 1988. On June 20, 1988, Petitioner filed his notice of appeal of that order (Record, DCA Case #88-1563 at pages 10-12).

3. Respondent filed its notice to invoke discretionary jurisdiction of this Court on May 27, 1988. Petitioner filed his on June 16, 1988.

SUMMARY OF ARGUMENT

ISSUE I

The decision of the First District Court of Appeal should be reversed because it is based on faulty legal reasoning. The District Court's opinion incorrectly adds elements to statutory offenses, incorrectly interprets the elements of the crime of manslaughter, and misapplies this Court's Carawan opinion.

Further, the District Court's opinion should be reversed because Carawan has been overruled by Chapter 88-131, Laws of Florida, which places Petitioner in the same status as when he committed his offense.

ISSUE II

On this issue the State argues that there appears to be a conflict between the district courts that this Court needs to resolve. The State asserts that this Court should give the trial courts adequate standards to determine when stays are appropriate.

ARGUMENT

ISSUE

THE FIRST DISTRICT COURT OF APPEAL WAS CORRECT IN RECLASSIFYING McKINNON'S MANSLAUGHTER CONVICTION BUT WRONG IN REVERSING HIS CONVICTION FOR USE OF A FIREARM IN THE COMMISSION OF A FELONY. (RESTATED).

Respondent agrees that the District Court's opinion in McKinnon v. State, 523 So.2d 1238 (Fla. 1st DCA 1988), is incorrect. Respondent asserts that the District Court's opinion is flawed in several ways.

A. MISAPPLICATION OF CARAWAN AND BAKER

First, the District Court's application of Carawan v. State, 515 So.2d 161 (Fla. 1987), is, at best, bizarre. The keystone of the District Court's analysis is its treatment of the elements of the crime of manslaughter. The Court took a punishment provision, §775.087, Florida Statutes, and used it to create a new homicide offense; an offense which has as an element the use of a firearm.

With this judicially created statute in hand the Court applied a reverse Blockburger, 284 U.S. 299, 76 L.Ed 306 (1932), test and found a single element common to both §775.087 and §790.07(1) and that these statutes address the same evil. The District Court found that this required the application of the rule of lenity because "reason dictates that the legislature did

not intend cumulative punishments for two offenses which contain the same element." McKinnon, supra at 1240.

The First District's purported Carawan analysis contains more holes than a sieve.

First of all, criminal offenses are created by the legislature. The elements of an offense are established by the statute and are limited to the statutory requirements set out by the legislature. State v. Carpenter, 417 So.2d 986 (Fla. 1982). The fact that the State may be required to plead or prove additional matters in order to obtain a particular sentence does not alter, increase or in any way modify the statutory elements of the crime.

A perfect example is first degree murder. The elements of first degree murder are set out in §782.04, Florida Statutes. However, §921.141, Florida Statutes, sets out additional items the State must establish if it is going to be able to impose the death penalty. These additional items of proof go to penalty, the items found in §921.141, Florida Statutes, do not alter the statutory elements of murder. Other similar provisions can be found in the habitual offender statute.

The First District is incorrect in holding that the facts necessary to use the enhanced punishment provision of §775.087, Florida Statutes, add elements to the crime of manslaughter. The elements of manslaughter are defined by §782, Florida

Statutes, and do not include the use of a firearm The remainder of the court analysis fails because of this flawed premise.

Besides misreading the statutes, the First District's opinion rejected this Court's determination in State v. Baker, 456 So.2d 419 (Fla. 1984), and in Strickland v. State, 437 So.2d 150 (Fla. 1983), regarding what constitutes the essential elements of a homicide and the essential elements of use of a firearm. In Baker this Court specifically held that: "...use of a firearm and murder have no elements in common." Baker, supra at 422. In Strickland v. State, supra, this Court held that alleging use of a firearm in the information charging attempted first degree murder, did not add an element to the crime of attempted murder. Strickland, supra at 152. See also Whitehead v. State, 472 So.2d 730 (Fla. 1985).

The District Court also rejected this Court's statement in Carawan that homicide and use of a firearm in the commission of a felony address separate evils. Carawan, supra at 169. The District Court did so without analysis and apparently by reversing the Blockburger test and holding that offenses which share one element in common address the same evil. This portion of the opinion is nothing more than a thinly veiled attempt to distinguish the instant case from Whitehead, Strickland, and Baker; and thus, to avoid the mandate of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), and the mandate of Carawan itself.

Where Carawan and Baker control, the Courts must look at the statutory elements of the crime of manslaughter and use of a firearm. Since those elements are different and the legislatively passed statutes address separate evils, multiple punishments are appropriate.

Finally, the First District's analysis flounders in what it calls "a presumption of lenity approach adopted in Carawan". Carawan contains no presumption of lenity approach. This Court, in Carawan, went through a multiple step analysis before stating that:

> The rule of lenity comes into play only where the statutes are susceptible of differing constructions, that is when legislative intent is equivocal as to the issue of multiple punishments.

Carawan, supra at 168.

This Court, as part of the multi-step approach in Carawan, examined the legislative intent behind each of the statutes and applied the rule of lenity only when the Court determined that the legislature was equivocal regarding multiple punishments. This Court, in Carawan, did not presume anything; it examined the statutes for indications of legislative intent. The First District, in it's opinion, analyzes nothing and presumes everything; such an approach is wrong.

What the First District has done is to reenact the legislatively rejected single transaction rule, Borges v. State, 415 So.2d 1265 (Fla. 1982), and to effectively repeal §790.07(1), Florida Statutes. This action should not be allowed to stand.

Therefore, because the opinion is based on the District Court's improperly adding elements to legislatively created statutes, ignoring Supreme Court precedent on what are the elements of the offenses in question and improperly presuming the rule of lenity applies without analyzing legislative intent the decision must be reversed.

B. APPLICATION OF CHAPTER 88-131, LAWS OF FLORIDA

However, these reasons are not the only reasons the opinion must be reversed. By the time the mandate in McKinnon issued on June 6, 1988, Carawan itself was dead. Chapter 88-131(7) signed by the Governor on June 24, 1988 killed it. This Court, in Carawan, while acknowledging the legislature prerogatives to impose multiple punishments; hypothesized that the legislature did not intend multiple punishment be the rule, but exist only when the legislature specifically indicated a desire for multiple punishment. The Court construed the legislative intent behind §775.021, Florida Statutes, to include that the codified rule of lenity was coequal with the codified Blockburger rule. Carawan, supra.

In this analysis, the Court misconstrued legislative intent in several ways. First, when it postulated that the codified rule of lenity and the codified Blockburger tests were coequal rules of construction. Second, when it misconstrued the legislature's position on multiple punishments.

The test intended by the Legislature is simple and straight forward. It is set out in Missouri v. Hunter, 459 U.S. 359, 74 L.Ed.2d 535 (1983); and its application can be seen in Garrett v. United States, 471 U.S. 773, 85 L.Ed.2d 764 (1985). First apply Blockburger to determine if the offenses are the same.

1. If they are not, multiple punishments are presumed to be warranted unless the legislature specifically says otherwise[1];
2. If the offenses are the same, multiple punishments are not authorized unless the legislature specifically says so.

Where Carawan misinterpreted legislative intent was in the substituting of the phrase same evil for same offense. The phrases are not interchangeable. By making this substitution the court did the very thing the United States Supreme Court recognized should not be done in Albernez v. United States, 450 U.S. 333, 342, 343, 67 L.Ed.2d 275, 284, 285 (1981), and Justice Shaw warned against in his dissenting opinion in Carawan, supra

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[1] Section 812.025, Florida Statutes, prohibits multiple convictions for theft and dealing in stolen property in certain circumstances.

at 171, 172. This Court used the rule of lenity to create ambiguity where none existed.

Chapter 88-131, Laws of Florida, put that construction to rest forever. Chapter 88-131 clarifies the legislature's original intent. It does not change the law. Chapter 88-131 was passed specifically to overrule this Court's interpretation of the legislative intent behind §775.021(4), Florida Statutes. As such it is a legislative determination that its intent and thus, the law in this area never was what this Court said it was in Carawan.

As Justice Shaw said in State v. Barritt, 13 F.L.W. 591, 592 (Fla. Sept. 30, 1988):

> It is clear from the above amendment that the legislature intends and previously intended that separate **offenses** as defined by the legislature are subject to separate convictions and sentences.

This fact is buttressed by the purpose set out in the preamble of Chapter 88-131, Laws of Florida, where it says that it is an act:

> ... providing legislative intent as to the rules of construction for determining criminal penalties ...

And further buttressed by the Senate staff analysis[2] which states that:

> ... this bill would make it clear that it is the legislative intent to convict and sentence the defendant for every act which constitutes a separate criminal offense.

The question becomes what effect does Chapter 88-131 have on this case. The answer is that it has great effect. Carawan was a case interpreting legislative intent. This Court in Carawan clearly misunderstood and misconstrued the legislative intent behind §775.021. It now has the opportunity to set the record straight.

The proper way to interpret Chapter 88-131 was set out in Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985), when this Court said:

> [3] When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. **United States ex rel. Guest v. Perkins,** 17 F.Supp. 177 (D.D.C. 1936); **Hambel v. Lowry,** 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute. **Gay v. Canada Dry Bottling Co.,** 59 So.2d 788 (Fla. 1952).

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[2] Staff analysis SB1082, May 10, 1988, Appendix.

This concept is not new or unique to the Lowry situation, nor is it restricted to civil cases. In State v. Lanier, 464 So.2d 1192 (Fla. 1985); this court looked at a clarifying legislative amendment in order to determine whether the legislature intended to prohibit lewd and lascivious acts on children without regard to the victims consent or prior chastity. The court in Lanier looked to the subsequent legislative enactment and stated that:

> ... we are not bound by statements of legislative intent uttered subsequent to either the enactment of a statute or the actions which allegedly violate the statute. However, we will show great deference to such statements, especially in a case such as this, when the enactment of an amendment to a statute is passed merely to clarify ...

Lanier, supra at 1193. See also Brooks v. State, 478 So.2d 1052, 1053 (Fla. 1985). This Court should apply the principles of Lanier and Lowry, although it is not bound to do so.

C. EX POST FACTO

Contrary to Petitioner's assertion, treating the subsequent legislative enactment in this fashion does not create an ex post facto application. In order for a law to be ex post facto, it must be (1) retrospective and (2) must disadvantage the offender. Miller v. Florida, 482 U.S. __, 96 L.Ed.2d 351 (1987).

This case is just like Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344 (1977). In Dobbert the death penalty, which was available at the time Dobbert committed his crime, was subsequently declared unconstitutional by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972). The Florida Legislature reenacted a modified death penalty statute and Dobbert was sentenced under it. He complained that it was ex post facto but the United States Supreme Court said no, because it did not increase the penalty from what it was when he committed the crime. Dobbert, 432 U.S. at 294, 298, 53 L.Ed.2d at 357-359.

At the time Petitioner committed his offense this Court's interpretation of that statute specifically allowed for multiple punishments to be imposed. Baker, supra; Strickland v. State, 437 So.2d 150 (Fla. 1983). It was subsequent to Petitioner's criminal acts that this Court modified its interpretation of the statute based on its perception of legislative intent. Chapter 88-131, Laws of Florida, corrects the inaccurate interpretation and restores the law to the condition that it was in at the time the offense was committed. This Petitioner is in exactly the same position as he was when he committed the offense, thus there is no expost fact problem.

Chapter 88-131, Laws of Florida, is not a statutory change: it is a legislative declaration that is consistent with the dissenting opinion of Justice Shaw in Carawan. As Justice Shaw said in his dissenting opinion with regard to §775.021(4):

> The majority concedes that if this unequivocal mandate of the legislature is followed, the crimes of attempted manslaughter and aggravated battery are separate offenses subject to separate convictions and sentences. Nevertheless, it reaches the conclusion that the legislature did not intend that the separate offenses here, each with a unique element, should be punished with separate convictions and separate sentences. To reach this conclusion, the majority postulates three propositions of law, none of which support the conclusion reached.

The legislature has said its intent is, and always was, unequivocal as Justice Shaw stated it. Therefore, this Court should reverse the Carawan based opinion of the First District Court of Appeal and affirm the judgments and sentences of the trial court.

D. APPLICATION OF STATE V. OVERFELT

The second question in McKinnon dealt with the sufficiency of the jury finding to support the enhancement. The leading case in this area of the law is State v. Overfelt, 457 So.2d 1385 (Fla. 1984). It is important to an understanding of Overfelt to understand the factual scenario. In Overfelt, the defendant was charged by

> ... information with second degree felony murder of Schlagmuller, attempted first degree murder of one undercover agent, attempted first degree murder of the other undercover agent, attempted robbery of the cocaine with a firearm, possession of a firearm during the robbery, and carrying a concealed firearm. During the trial, the

> court granted appellant's motion for **judgment of acquittal with respect to the last count, carrying a concealed firearm.** The jury returned **verdicts** of **not guilty** to the charges of **second degree felony murder, attempted robbery with a firearm, and possession of a firearm during robbery.** With respect to the two attempted first degree murder charges, appellant was found guilty of attempted murder in the third degree for one and aggravated assault for the other, both of which were presented to the jury as lesser included offenses of the crimes charged.

Overfelt v. State, 434 So.2d 945 at 946 (Fla. 2d DCA 1983).

Overfelt was therefore, acquitted of every charge involving the use of a firearm by the jury. The Florida Supreme Court in State v. Overfelt, 457 So.2d 1385 (Fla. 1984), stated:

> To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice **in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.**

Thus the decision in Overfelt was predicated in part on the fact that the jury rejected convictions on counts involving firearms. In the same vein in Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982), the trial judge specifically instructed the jury that if they found that a firearm had been used they were to enter the finding on the verdict form.

> ... and, more significantly, "should you find the Defendant guilty of the applicable crime it would be necessary for you to find on your verdict whether or not it has been proven beyond a reasonable doubt that the Defendant during the commission of the crime ... did ... attempt to use any weapon ...".

Id. at 1205.

The trial court obviously intended that the jury would itself write in the additional finding on the forms provided. Because the jury refused to make the finding the appellate court properly would not infer a finding based on Counts III or IV in the charging document. Streeter, supra at 1206.

However, in Fischer v. State, 488 So.2d 145 (Fla. 3d DCA 1986), the appellate court recognized that in certain instances the charging instruction by the court coupled with the finding by the jury, would supply the appropriate indication of jury finding.

In the case sub judice, the trial court instructed the jury as follows:

> The second count of the information charges 'displaying or using a firearm in the commission of a felony.
>
> Before you can find the defendant guilty of displaying, using or threatening to use a firearm, the State must prove the following two elements beyond a reasonable doubt: 1, Webster Fleming McKinnon displayed, used, threatened to use, or attempted to use a firearm. 2, He did so while committing or attempting to commit the felony of second degree murder.

The jury returned a verdict of guilty of unlawful killing (manslaughter), and guilty of use of a firearm during the commission of a felony. Therefore, the jury made a specific finding sufficient to withstand the dictates of Overfelt, supra, Streeter, supra, Fischer, supra, and their progeny.

The Respondent asks this Court to go one step further and clarify Overfelt, supra, and hold that in cases where the jury convicts the defendant of use of a firearm in the commission of a felony that is sufficient factual finding by the jury to support enhancement. This holding would be constant with Overfelt, yet would not allow Overfelt to be extended further than the facts warrant.

ISSUE II

DOES THE PENDENCY OF A PETITION FOR REVIEW IN THE FLORIDA SUPREME COURT DEPRIVE THE TRIAL COURT OF JURISDICTION TO RESENTENCE A DEFENDANT PURSUANT TO THE DISTRICT COURT'S MANDATE REVERSING AND REMANDING THE CAUSE FOR RESENTENCING?

This issue was certified to this Court as an issue of great public importance. However, the answer to the question will have no effect on this case.

As Petitioner notes in his statement of the case, the parties had not challenged the actions of the trial court other than the Petitioner's challenge to the specific sentence imposed. The parties merely asked that the District Court proceeding challenging the new sentence be stayed until the Supreme Court decided the merits of the Carawan - Overfelt issues.

The Respondent's position is the Rule 9.310, Fla.R.App.P., does not clearly control all requests for stays. The committee note to rule 9.310(b)(2) indicates that in criminal cases when state appeals Rule 9.140(c)(2) control. The problem that this presents is that Rule 9.140(c)(2) does not contain the grant of continuing jurisdiction found in Rule 9.310(a); thus leaving in a state of flux the question of which court has jurisdiction to issue the stay, and whether that jurisdiction is exclusive or joint.

As Petitioner indicates, there appears to be a conflict between Vicknair v. State, 501 So.2d 755 (Fla. 5th DCA 1987) and the cases of Everage v. State, 516 So.2d 81 (Fla. 1st DCA 1987), Payne v. State, 493 So.2d 1104, approved on merits, 498 So.2d 413 (Fla. 1986). A conflict this Court should resolve.

The State suggests that this Court for criminal cases leave continuing jurisdiction in the trial court. The trial court is the appropriate place because in criminal cases it will decide when and under what conditions to allow post conviction bond.

The State requests that the Court indicate that requests for stay be granted by the trial court when in the interest of justice, they are appropriate. The State suggests the factor relevant to the granting of a certificate of probable cause found in Barefoot v. Estelle, 463 U.S. 880, 77 L.Ed.2d 1090 at 1104, fn. 4, 1105, 1106, (1983), are reasonable criteria for this purpose. These criteria are that the individual desiring a stay must demonstrate that (1) the issues are debatable among jurists of reason, (2) there must be a significant possibility of reversal, (3) there must exist a likelihood that irreparable harm will result if the decision is not stayed.

Finally, the State asserts that the standard of review of a trial court's ruling granting or denying a stay should be abuse of discretion.

CONCLUSION

Based on the above cited legal authorities, Petitioner prays this Honorable Court reverse the First District Court of Appeal decision and reinstate the original judgments and sentences imposed by the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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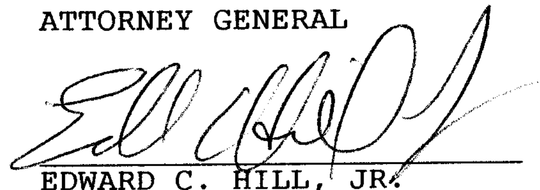

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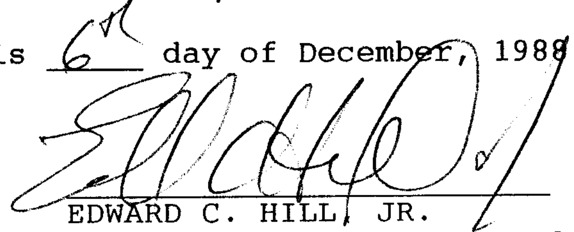
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. David P. Gauldin, Special Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 6th day of December, 1988.



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