DA 8.29.95

047

FILED
SID J. WHITE
AUG 4 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,854

THE STATE OF FLORIDA,

Petitioner,

-vs-

ROBERT L. JOHNSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. **0239437**
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441
Fax No. (305) 377-5655

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

OTHER AUTHORITIES:

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS THE CHARGE OF AGGRAVATED STALKING IN VIOLATION OF AN INJUNCTION ON DOUBLE JEOPARDY GROUNDS WHERE THE RESPONDENT PLED GUILTY TO CONTEMPT FOR VIOLATING THE INJUNCTION ON CHARGES CONTAINING DIFFERENT ELEMENTS FROM THE AGGRAVATED STALKING CHARGE.

In his answer brief, the Respondent concedes that under a strict Blockburger test, he could be charged and convicted in a successive prosecution with aggravated stalking in violation of an injunction after he pled guilty to contempt for violating the injunction. The Respondent agrees with the State that under the traditional Blockburger test each crime has different elements and therefore does not violate the double jeopardy proscription against successive prosecutions.

However, in order to avoid reversal, Respondent contends that Florida's double jeopardy clause, Art. I, Sec. 9, Fla. Const., is broader than the United States Constitutions double jeopardy clause, U.S. Const., Amendment V., and therefore this Court is free to adopt the "same conduct" test of Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990) which was overruled in United States v. Dixon, __U.S.__ 113 S. Ct. 2849, 125 L. Ed. 556 (1993). Respondent also contends that, even if Florida's double jeopardy clause does not offer broader protection that the United States Constitution, he still prevails because Florida in Section 775.021, Florida Statutes (Supp. 1994)

has expanded the traditional Blockburger test and therefore double jeopardy bars the successive prosecution herein. Respondent's brief at page 8. The State submits that these contentions do not withstand close scrutiny and therefore the aggravated stalking charges should reinstated.

This Court has consistently found that Florida's double jeopardy clause in Art. I, Sect. 9, Florida Constitution is to be interpreted in accordance with the double jeopardy clause of the Fifth Amendment to the United States Constitution. Carawan v. State, 515 So. 2d 161 (Fla. 1987); Wright v. State, 586 So. 2d 1024 (Fla. 1991). Based upon this finding the District Courts of Appeal which have been faced with a trial court's ruling based on Grady v. Corbin, supra, have ruled in the State's favor based on United States v. Dixon, supra. See, State v. Mathews, 654 So. 2d 291 (Fla. 3d DCA 1995)(Double jeopardy does not bar DUI prosecution of defendants who had pled guilty to civil traffic offenses with regard to the same incident since DUI charges required proof of elements not contained in civil traffic offenses and civil traffic offenses required proof of elements not contained in DUI charges). State v. Murray, 644 So. 2d 533 (Fla. 4th DCA 1994)(same); State v. Dean, 637 So. 2d 355 (Fla. 1st DCA 1994)(same); State v. Coupal, 626 So. 2d 1013 (Fla. 2d DCA 1993)(same); State v. Knowles, 625 So. 2d 88 (Fla. 5th DCA 1993)(same); State v. Godwin, 632 So. 2d 228 (Fla. 2d DCA 1994)(Under Dixon a successive prosecution is permitted for

aggravated assault after the defendant pled guilty to reckless driving, even though both charges arose from the same act since the offenses each contained an element that the other did not). Von Deck v. Evander, 622 So. 2d 1160 (Fla. 5th DCA 1993)(Double jeopardy did not bar defendant's successive prosecution for aggravated assault of a law enforcement officer, even though he had been previously acquitted of attempted first degree murder of law enforcement officer since both offenses contained an element not contained in the other offense).

Based on the foregoing it is clear that Florida's double jeopardy clause has always been interpreted in accordance with the Fifth Amendment and the Courts of this State have consistently relied upon this principle in construing double jeopardy law. The State submits nothing has changed or occurred to justify altering the holding that Florida's double jeopardy clause is to be interpreted in accordance with the Fifth Amendment and as such it is required, by stare decisis, to be adhered to. Perez v. State, 620 So. 2d 1256 (Fla. 1993)(Overton, concurring).

The Respondent's alternative theory, that Section 775.021(4) Florida Statutes (Supp. 1994) has expanded the Blockburger test to afford him the relief he requested, also is not supported in the law. In State v. Smith, 547 So. 2d 613 (Fla. 1989) this Court recognized that the Legislature by enacting Section

775.021(4), abrogated this Court's opinion in Carawan v. State, supra. This Court then recognized that Section 775.021(4) is the strict Blockburger test:

> [1-4] It is readily apparent that the legislature does not agree with our interpretation of legislative intent and the rules of construction set forth in Carawan. More specifically:
>
> (1) The legislature rejects the distinction we drew between act or acts. Multiple punishment shall be imposed for separate offenses even if only one act is involved.
>
> (2) The legislature does not intend that (renumbered) subsection 775.021(4)(a) be treated merely as an "aid" in determining whether the legislature intended multiple punishment. Subsection 775.021(4)(b) is the specific, clear, and precise statement of legislative intent referred to in Carawan as the controlling pole-star. Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, 5 all criminal offenses containing unique statutory elements shall be separately punished.
>
> (3) Section 775.021(4)(a) should be strictly applied without judicial gloss.
>
> (4) By its terms and by listing the only three instances where multiple punishment shall not be imposed, 6 subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense, it clearly does not. However, the statutory element test shall be used for determining whether offenses are the same or separate. Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not,

> i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity.
>
> ---
>
> 5 As we pointed out in Carawan, criminal offense statutes rarely contain a specific statement of whether the legislature does or does not intend separate punishment for the offense(s). Theoretically there is nothing to preclude the legislature from inserting a specific statement in a criminal statute that it does or does not intend separate punishment for the offense created therein.
>
> 6 Multiple punishment is prohibited for (1) the same, (2) necessarily included, and (3) degree offenses.

Id. at 615-616.

As this Court recognized multiple punishment are allowed in all but 3 circumstances and those are when the crime is the same, when the crime is a necessarily lesser included offense and when the crime is listed in degrees. Other than those specifically listed exceptions, Section 775.021(4) mandates multiple punishment for different crimes arising from the same act. Since 775.021(4) is in fact a strict Blockburger test, Respondent contention otherwise is meritless.

CONCLUSION

Based on the foregoing, Petitioner submits that the instant decision expressly and directly conflicts with those cited herein and respectfully requests this Court quash the Third District's decision.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. 0239437
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441
Fax No. (305) 377-5655

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF THE MERIT** was furnished by mail to **MANUEL ALVAREZ,** Attorney for Respondent, 1320 N.W. 14th Street, Miami, Florida 33125 on this 31 day of July, 1995.

MICHAEL J. NEIMAND
Assistant Attorney General

mls/