ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CHARLIE WALLACE,

Petitioner,

vs.

CASE NO. 90-287
(4TH DCA #95-2415)

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal, which consists of the relevant documents filed below.

The symbol "T" will denote the Trial Transcript.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with, among other things, two counts of resisting an officer with violence, in violation of section 843.01, Florida Statutes (1993). (R 26-28).[1] The following facts were elicited during petitioner's jury trial.

On the afternoon of December 29, 1994, Geraldine Melbourne was struck in the face by petitioner, her brother, after she questioned his manner of treating their mother. (T 62-64). Ms. Melbourne fled her mother's house and ran to her own, where she called the police. (T 64). While waiting for the police to arrive, Ms. Melbourne watched petitioner raking their mother's yard. When the police arrived, Ms. Melbourne walked outside, at which time petitioner hit her with the rake causing it to break. (T 64-66).

Upon arrival at the Melbourne residence, Deputy Loudermilk witnessed petitioner hit Ms. Melbourne with a rake until it broke. (T 36-38). Deputy Loudermilk told petitioner he was under arrest and ordered him to lay on the ground. Petitioner ignored the order and walked toward the deputy holding the broken rake handle over his head in a threatening manner, as if to strike him. (T 39-40).

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[1] The additional charges included four counts of battery on a law enforcement officer, and one count each of aggravated assault on a law enforcement officer and aggravated battery.

The deputy, who was in fear of being stabbed, pulled his baton and told petitioner to stop and drop the rake handle. (T 41-42). Although petitioner complied with the order, he assumed a fighting stance, causing Deputy Loudermilk to unsuccessfully use his OC spray upon him. (T 42-43).

Deputy Eisenhut arrived on the scene as petitioner was holding the rake handle above his head. (T 45, 76-77). While Deputy Loudermilk told petitioner to lay on the ground, Deputy Eisenhut took hold of his arm and attempted to place him under arrest. (T 45, 80). Petitioner pulled away from Deputy Eisenhut and punched him in the face. Deputy Loudermilk unsuccessfully sprayed petitioner a second time, while Deputy Eisenhut hit him on the leg with his baton. (T 45, 81-82). Petitioner continued to throw punches and grabbed Deputy Loudermilk in a bear hug, picking him up and throwing him to the ground. (T 47, 84). After Deputy Eisenhut hit petitioner on the hand with his baton, petitioner noticed that he was bleeding and settled down. (T 50, 85-86). Thereafter, the deputies convinced petitioner to sit in the patrol car. (T 51, 86).

Petitioner testified he was at his mother's house when he got into an argument with his sister, Geraldine, concerning her children. During the argument Geraldine hit petitioner with a toilet brush and threatened to call the police. (T 140, 149).

After Geraldine left, petitioner went outside to rake-up the mess her children made in the front yard. (T 141). Geraldine returned and began to call petitioner names (T 141-142), making him so mad he broke the rake in half. However, petitioner did not hit his sister with the rake, instead throwing it in the hedges. (T 142).

A deputy told petitioner to get on the ground and informed him he was under arrest. (T 142-143). Petitioner told the deputy he needed to turn the stove off, causing the deputy to come at him with his baton. After petitioner mentioned the stove a second time, the deputy sprayed him in the eyes. (T 143). While backing away, petitioner was struck with the deputy's baton. (T 143-144). A second deputy arrived and he also sprayed petitioner. Petitioner moved around to avoid getting hit, holding his hands up and trying to speak. (T 144). When a neighbor said that petitioner was bleeding, the altercation ceased and petitioner walked over to the deputy's patrol car. (T 146).

Petitioner's motion for a judgment of acquittal, made at the conclusion of respondent's case and renewed after all of the evidence was presented, was denied. (T 98-103, 164). The jury returned guilty verdicts to both counts of resisting arrest with violence. (R 67; T 213). Petitioner was adjudicated guilty of both counts (R 72-73) and sentenced to concurrent terms of twenty-three

months in prison (R 86-92; T 230-231).

On appeal to the Fourth District Court of Appeal, petitioner argued that his dual convictions for resisting an officer with violence were improper, despite the presence of two officers, because the unit of prosecution was defined by the number of arrests resisted, not the number of officers present during the resistance. The district court disagreed, ruling that "[t]he text of section 843.01 thus undeniably demonstrates that the intended prosecutorial unit is any individual officer who is resisted." Wallace v. State, 22 Fla. L. Weekly D604, 605 (Fla. 4th DCA Mar. 5, 1997). Conflict was certified with the decision of the First District Court of Appeal in Pierce v. State, 681 So. 2d 873 (Fla. 1st DCA 1996), which held in petitioner's favor. Notice of intent to invoke the discretionary jurisdiction of this Court was filed on April 3, 1997. An order postponing a decision on jurisdiction and establishing a briefing schedule was issued on April 15, 1997. This brief follows.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

Petitioner was convicted of two counts of resisting an officer with violence for resisting two police officers while they placed him under arrest. In support of his conclusion, that the allowable unit of prosecution under the resisting statute is based upon the number of instances during which the execution of a legal duty is hindered, not the number of officers hindered, petitioner posits two arguments. First, the wording and purpose of the statute do not permit charging a separate count for each officer present. Second, if the statute does not clearly articulate the allowable unit of prosecution, it must be interpreted in the manner most favorable to him. In either instance, petitioner's dual convictions cannot stand.

ARGUMENT

POINT ON APPEAL

PETITIONER WAS IMPROPERLY CONVICTED OF TWO COUNTS OF RESISTING AN OFFICER WITH VIOLENCE, BOTH OF WHICH AROSE OUT OF HIS ATTEMPT TO AVOID A SINGLE ARREST, WHERE THE ALLOWABLE UNIT OF PROSECUTION IS DEFINED BY THE NUMBER OF ARRESTS RESISTED, NOT THE NUMBER OF OFFICERS PRESENT DURING THE RESISTANCE.

Among the charges filed against petitioner were two counts of resisting an officer with violence.[2] Count seven named Deputy Loudermilk as the victim, while Deputy Eisenhut was named as the victim in count eight. (R 28). The evidence introduced at trial established that both officers were violently resisted while placing petitioner under arrest. Petitioner was convicted (R 67; T 213), adjudicated guilty (R 72; T 231), and sentenced to prison on both counts (R 86-91; T 231). Certifying conflict with the decision of the First District Court of Appeal in Pierce v. State, 681 So. 2d 873 (Fla. 1st DCA 1996), the district court rejected petitioner's argument that the allowable unit of prosecution permitted one conviction only. Wallace v. State, 22 Fla. L. Weekly D604 (Fla. 4th DCA Mar. 5, 1997).[3]

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[2] § 843.01, Fla. Stat. (1993).

[3] This Court has jurisdiction. Art. V, § 3(b)(4), Fla. Const.

The issue raised by petitioner concerns the allowable unit of prosecution under the resisting an officer with violence statute, not whether the double jeopardy clause of the state or federal constitution precludes multiple convictions. See Watts v. State, 440 So. 2d 505, 506 (Fla. 1st DCA 1983) result approved, 462 So. 2d 814 (Fla. 1985). Establishing the unit of prosecution for a given crime is the responsibility of the legislature. State v. Grappin, 427 So. 2d 760, 762 (Fla. 2d DCA 1983) approved, 450 So. 2d 480 (Fla. 1984). The wording and purpose of the resisting statute appear to dictate that the legislature intended the number of arrests violently resisted to define the unit of prosecution. Petitioner acknowledges, however, that it is not unreasonable to conclude that the allowable unit of prosecution is imbued with ambiguity. In that case, "where our own state legislature does not establish the allowable unit of prosecution with clarity, the ambiguity must be resolved in the accused's favor." Id. at 762. Petitioner's dual convictions for resisting an officer with violence cannot stand under either scenario.

I

WORDING AND PURPOSE OF THE STATUTE

Florida law proscribes resisting an officer with violence in the following manner:

> Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aid or supervisor employed by the commission; parole and probation supervisor; county probation officer; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person is guilty of a felony ....

§ 843.01, Fla. Stat. (1993).

In State v. Grappin, 427 So. 2d 760 (Fla. 2d DCA 1983), where the defendant was charged with five separate counts of theft[4] for each firearm taken during a single burglary, the Second District Court of Appeal announced the 'a/any' test for determining the allowable unit of prosecution. Id. at 763. Reversing the trial court's order dismissing the multi-count information, without prejudice to refiling a single count of theft, the district court held that the use of the article 'a' in front of the noun 'firearm' signified the legislature's intent to allow prosecution for the

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[4] Section 812.014(2), Florida Statutes, proscribes theft, in relevant part, stating:

(b) It is grand theft of the second degree ... if the property stolen is:

* * *

3. A firearm.

theft of each firearm as a separate crime. Id. The court further stated, "[t]he article 'any,' unlike the article 'a,' does not necessarily exclude any part of plural activity. Thus, the article 'any,' unlike the article 'a,' does not clearly express the allowable unit of prosecution in singular terms." Id. The test announced by the district court was approved by this Court, which held, "[w]e find that the use of the article 'a' in reference to 'a firearm' in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution." Grappin v. State, 450 So. 2d 480, 482 (Fla. 1984). Subsequently, in State v. Watts, 462 So. 2d 813 (Fla. 1985), this Court discussed the Grappin test stating:

> We specifically contrasted the article 'a' with the article 'any' by pointing out that federal courts have held that the term 'any firearm' is ambiguous with respect to the unit of prosecution and must be treated as a single offense with multiple convictions and punishments being precluded.

Id. at 814.

Because the statute at issue in Watts made it a crime to possess "any firearm or weapon of any kind," § 944.47, Fla. Stat. (1981), this Court concluded that the simultaneous possession of two prison made knives by an inmate in a state correctional institution constituted one crime, not two. Id. The legislature's use of the

article 'any' in reference to 'any officer' requires a finding that it did not intend to make each officer resisted a separate unit of prosecution. Pierce v. State, 681 So. 2d 873, 874 (Fla. 1st DCA 1996); Compare Plowman v. State, 622 So. 2d 91, 92 (Fla. 2d DCA 1993) (simultaneous possession of three weapons constituted but one count of possession of a firearm by a convicted felon) and Schmitt v. State, 563 So. 2d 1095, 1101 (Fla. 4th DCA 1990) (improper to charge multiple counts of possessing photographs exhibiting sexual conduct by a child) approved in part, quashed in part, on other grounds, 590 So. 2d 404 (Fla. 1991) cert. denied, 503 U.S. 964, 112 S. Ct. 1572, 118 L. Ed. 2d 216 (1992) with Marin v. State, 684 So. 2d 859, 860 (Fla. 5th DCA 1996) (dual convictions for intent to defraud another by simultaneously possessing two counterfeit credit cards permitted) and C.S. v. State, 638 So. 2d 181, 182-183 (Fla. 3d DCA 1994) (simultaneous possession of two concealed firearms constitutes two separate crimes); See also Burdick v. State, 594 So. 2d 267, 270 (Fla. 1992) (the judicial construction placed upon a statute is adopted upon its reenactment).[5]

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[5] Contrary to the district court's conclusion, 'any' does not "modif[y] who may be classified as an officer within the coverage of the statute...." Wallace, 22 Fla. L. Weekly at D605. That task is accomplished by the restrictive modifier, "as defined in s. 943.10(1), (2), (3), (6), (7), (8), and (9)...." § 843.01, Fla. Stat. (1993). Instead, the article 'any' applies to each of

The district court's conclusion, that use of the singular 'officer' in the phrase 'by offering or doing violence to the person of such officer,' "undeniably demonstrates that the intended prosecutorial unit is any individual officer who is resisted," Wallace, 22 Fla. L. Weekly at D605, is incorrect. To the contrary, use of the singular 'officer' supports the conclusion that individual officers are not the intended unit of prosecution. 'Officer' in the phrase '[w]hoever knowingly and willfully resists, obstructs, or opposes any officer' is used as a collective noun, viz, it identifies a group of people. See Allstate Insurance Co. v. Sanders, 644 N.E. 2d 884, 887 n.2 (Ind. Ct. App. 1994). Addressing a collective noun in the singular refers to the group as a whole, while addressing it in the plural refers to each individual member of the group. See Hans, B. Guth, Concise English Handbook 27 (4th ed. 1977). The second use of the word 'officer' in the resisting statute is in the singular, thereby referring to the group created by the first 'officer,' not to the individual members of that group. By its very wording, the resisting statute proscribes resisting, obstructing, or opposing any of a group's members, not

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the groups of people whom it is a crime to resist, obstruct, or oppose. To hold otherwise, would leave the other groups standing alone, without introduction by an article.

the individual members of the group.

Finally, discussing its approval of dual convictions for resisting arrest with violence and battery on a law enforcement officer, this Court stated "[a]lthough both offenses sometimes accompany one another, they address essentially separate evils. One is designed to ensure that those suspected of crime submit to lawful authority, while the other is designed to provide special protection to law enforcement officers in fulfilling all of their duties." Carawan v. State, 515 So. 2d 161, 169 (Fla. 1987) superseded by statute on other grounds as stated in State v. Smith, 547 So. 2d 613 (Fla. 1989); See also Ladner v. United States, 358 U.S. 169, 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958) (concluding that an almost identical federal statute may have been aimed at deterring hindrance to the execution of legal duties, rather than protecting federal officers from harm).[6] Unlike its "juristic cousins,

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[6] The statute at issue read:

> Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person ... [if he is a federal officer designated in § 253] while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties ....

Ladner, 358 U.S. at 170, n.1, 79 S. Ct. at 210, n.1.

assault and battery," Wallace, 22 Fla. L. Weekly D605, the aim of the resisting statute is not to vindicate the state's interest in protecting its law enforcement officers from physical harm, but is instead to deter hindrance to the execution of a legal duty. Therefore, the separate instances that the execution of a legal duty is hindered is the "unit of prosecution without regard to the number of [federal] officers affected by the act." Ladner, 358 U.S. at 176, 79 S.Ct. at 213.[7]

The wording and purpose of the resisting statute demonstrate that the allowable unit of prosecution is the separate instances of failing to submit to lawful authority, not the number of officers present during the failure. Although petitioner violently resisted two deputies' lawful execution of the legal duty to place him under arrest, his actions constituted a single failure to submit to lawful authority. Therefore, one of the two convictions for resisting an officer with violence must be vacated.

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[7] As for Butch and Sundance, Wallace, 22 Fla. L. Weekly at D605, despite being subject to conviction for only one count of resisting an officer with violence, a charge of assault, battery, or worse, would lie for each member of the posse shot, or shot at, by the duo. Certainly, the penalties prescribed for those crimes provide ample reason not to shoot the entire posse after having shot one of its members. If they do not, neither will the prospect of being convicted of multiple charges of resisting an officer with violence.

II

THE RULE OF LENITY

Penal statutes must be strictly construed against the state. Harrison v. State, 641 So. 2d 486, 487 (Fla. 5th DCA 1994). "[W]hen a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused." Cabal v. State, 678 So. 2d 315, 318 (Fla. 1996). This 'rule of lenity,' codified by the legislature, states:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

§ 775.021(1), Fla. Stat. (1993).

At a minimum, the phrase 'any officer' is ambiguous with respect to the allowable unit of prosecution. See Grappin v. State, 450 So. 2d 480, 482 (Fla. 1984); State v. Watts, 462 So. 2d 813, 814 (Fla. 1995). As a result of that ambiguity, petitioner may not be convicted of multiple counts of resisting an officer with violence, for resisting a single arrest. See Watts, 462 So. 2d at 814.

The district court's reliance upon section 775.021(4)(b), Florida Statutes (1993), to remove the statute's ambiguity is misplaced. Prior to the 1988 legislative session, section 775.021 read:

> (4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

§ 775.021(4), Fla. Stat. (1987).

In Carawan v. State, 515 So. 2d 161 (Fla. 1987) superseded by statute on other grounds as stated in State v. Smith, 547 So. 2d 613 (Fla. 1989), where a single gunshot resulted in charges of attempted first degree murder, aggravated battery, and shooting into an occupied structure, this Court applied the rule of lenity to vacate the conviction for either attempted manslaughter[8] or aggravated battery. Id. at 171. Concluding that section 775.021(4) was adopted as a rule of statutory construction to aid courts "in determining the intent behind particular penal statutes when that intent is unclear," id. at 167, the court held that despite passing the Blockburger[9] test, convictions for two different crimes might

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[8] The defendant was convicted of attempted manslaughter as a lesser offense of attempted first degree murder.

[9] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

still be improper where they are based upon a single act and "there is a basis for concluding that the legislature intended a result contrary to that achieved by the Blockburger test," id. at 168, such as "where the accused is charged under two statutory provisions that manifestly address the same evil...," id.

The legislature responded to Carawan by amending section 775.021 to read:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the

statutory elements of which are subsumed by the greater offense.

§ 7, Ch. 88-131, Laws of Florida (1988).[10]

That amendment, the purpose of which was to overrule the Carawan holding, articulates the legislative intent to convict for each separate offense committed during one criminal transaction or episode, even when based upon a single act. State v. Smith, 547 So. 2d 613, 616-617 (Fla. 1989). The amendment does not articulate legislative intent vis-a-vis the allowable unit of prosecution where multiple counts of the same offense are charged and, as a result, is not applicable to the issue raised in this appeal. Cf. State v. Chapman, 625 So. 2d 838, 839 (Fla. 1993) (1988 amendment to section 775.021 not meant to overrule prior holding prohibiting dual convictions for DUI manslaughter and vehicular homicide where a single death is involved). Section 775.021(4)(b) does not make it "dangerous to read decisions like Grappin and Watts." Wallace, 22 Fla. L. Weekly at D606. It is the misapplication of section 775.021(4)(b) to situations not intended that is dangerous.

[10] Additions are indicated by underline.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, petitioner respectfully requests this Honorable Court to quash Wallace, approve the opinion in Pierce, and remand this cause with directions to vacate one of petitioner's two convictions for resisting an officer with violence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to MYRA J. FRIED, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 12th day of MAY, 1997.

DAVID McPHERRIN
Assistant Public Defender