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IN THE SUPREME COURT OF FLORIDA

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SID J. WHITE
JUL 28 1997
CLERK, SUPREME COURT
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CHARLIE WALLACE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 90,287

PETITIONER'S REPLY BRIEF ON THE MERITS

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AUTHORITIES CITED

FLORIDA STATUTES

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 the Court.

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

The symbol "T" will denote the Transcript.

The symbol "RB" will denote Respondent's Brief.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon the statement of the case and facts as submitted in his initial brief.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

Although the issue raised by petitioner was not brought to the trial court's attention, it concerns fundamental error, thus allowing it to be raised for the first time on appeal. Determination of the allowable unit of prosecution under the resisting statute requires application of the a/any test previously announced by this Court, without regard to the nature of the crime. Application of that test yields the conclusion that the separate instances of resistance to a lawfully executed legal duty, rather than the number of officers executing the duty, defines the unit of prosecution.

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 MAKING THE ARREST.

Petitioner, convicted and sentenced for two counts of resisting an officer with violence, asserted in his initial brief that two counts was one too many, arguing that the allowable unit of prosecution is defined by the number of lawfully executed legal duties resisted, not the number of officers executing the legal duty.[1] In its answer brief, respondent initially argued that the issue was not preserved for appellate review. Thereafter, respondent challenged the merits of petitioner's argument, relying heavily upon the reasoning suppled by the district court. Respondent's arguments are unpersuasive.

I

PRESERVATION

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[1] Section 843.01, Florida Statutes (1995) proscribes resisting with violence the lawful execution of a legal duty. Because the legal duty being executed in the case at bar was an arrest, petitioner argues that the number of arrests resisted defines the unit of prosecution.

Respondent contends that petitioner, having failed to raise the issue in the trial court, may not now be heard to complain. (RB 3-4). To support its argument, respondent cites the general rule which states that "[t]he specific legal ground upon which a claim is based must be presented to the trial court, in order to preserve an issue for appeal." Bertolotti v. State, 565 So. 2d 1343, 1345 (Fla. 1990). As is often the case with general rules, exceptions to the rule are the rule, not the exception. Error deemed fundamental may be raised for the first time on appeal. Ray v. State, 403 So. 2d 956, 960 (Fla. 1981). "[A] conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error." Troedel v. State, 462 So. 2d 392, 399 (Fla. 1984). If, as asserted by petitioner, the allowable unit of prosecution for resisting an officer with violence is defined by the number of arrests resisted, rather than the number of officers making the arrest, than he violated the statute a single time. Pierce v. State, 681 So. 2d 873, 874 (Fla. 1st DCA 1996). In that case, petitioner's second conviction for resisting an officer with violence is "totally unsupported by the evidence," Vance v. State, 472 So. 2d 734, 735 (Fla. 1985), thus allowing its erroneous imposition to be raised for the first time on appeal, Troedel, 462 So. 2d at 399.

II

MERITS

Relying upon the district court's opinion, Wallace v. State, 689 So. 2d 1159 (Fla. 4th DCA 1997), respondent contends that the outcomes in State v. Watts, 462 So. 2d 813 (Fla. 1985) and Grappin v. State, 450 So. 2d 480 (Fla. 1984) were the result, not only of the language found in the statutes interpreted, but also of the nature of the crimes at issue, and that resisting an officer with violence is more closely akin to theft than to possessing a weapon, thus allowing multiple convictions. (RB 5-7). Neither opinion contains a single word suggesting that anything other than statutory language was relied upon to determine the allowable units of prosecution. The Grappin Court stated, "[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." 450 So. 2d at 482. Watts held, "[t]hus applying the a/any test of Grappin, we conclude that Watt may not be charged with multiple offenses for the possession of two prison made knives." 462 So. 2d at 814. It is readily apparent that the allowable units of prosecution announced in Watts and Grappin would have been reversed, without regard to the nature of the crime involved, had it been a crime to steal "any

firearm" and possess "a weapon", rather than "a firearm" and "any weapon". Therefore, it is the language of the resisting statute, not the nature of the crime, that is dispositive in determining the allowable unit of prosecution. See Marin v. State, 684 So. 2d 859, 860 (Fla. 5th DCA 1996); C.S. v. State, 638 So. 2d 181, 182-183 (Fla. 3rd DCA 1994); Schmitt v. State, 563 So. 2d 1095, 1101 (Fla. 4th DCA 1990) approved in part, quashed in part, on other grounds, 590 So. 2d 404 (Fla. 1991). That language, which prohibits resisting any officer, not a[n] officer, precludes multiple convictions under the facts of the instant case. See Pierce, 681 So. 2d at 874.

Contrary to respondent's opinion (RB 7), the resisting statute is not similar in nature and purpose to that proscribing assault and battery upon a law enforcement officer. The purpose of the former is to induce submission to lawful authority, while the latter seeks to protect the physical well-being of individual law enforcement officers engaged in 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). The difference is evidenced by the precise language used in the statutes. The resisting statute prohibits "resist[ing], obstruct[ing], or oppos[ing] any officer ...." § 843.01, Fla. Stat.

(1995) (emphasis added). The assault and battery upon a law enforcement officer statute prohibits "knowingly committing an assault or battery upon a law enforcement officer ...." § 784.07(2), Fla. Stat. (1995) (emphasis added). By prohibiting assault or battery upon "a" law enforcement officer, section 784.07(2)(c) clearly shows that the legislature intended to protect each individual officer from physical attack. See Grappin, 450 So. 2d at 482. Using "any" officer in section 843.01 suggests the legislature's reason for enacting the statute was something other than the protection of individual law enforcement officers.

Petitioner previously addressed the inapplicability of section 775.021(4)(b), Florida Statutes (1993) to the allowable unit of prosecution argument raised herein. Section 775.021(4)(b) requires convictions for each separate[2] criminal offense arising out of a single act, State v. Smith, 547 So. 2d 613, 616 (Fla. 1989), but does not address legislative intent concerning the allowable unit of prosecution for a given crime. Respondent makes no attempt to counter petitioner's argument pointing out the district court's misapplication of section 775.021(4)(b), content merely to recite

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[2] "[O]ffenses 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)(a), Fla. Stat. (1995).

the district court's unsupportable position. (RB 7-10). The allowable unit of prosecution for a given crime, and how many separate crimes may be charged based upon a single act, are very different issues.

Respondent's contention that defining the allowable unit of prosecution in the manner sought by petitioner will lead to disastrous results is without merit. (RB 11).[3] Violent resistance to arrest will continue to be deterred by the resisting statute and other statutes enacted to protect the physical well-being of law enforcement officers. See § 784.07(2), Fla. Stat. (1995). This Court is not a legislative body; its decision cannot be shaded by speculative untoward consequences that might result from its action. Baker v. State, 636 So. 2d 1342, 1344 (Fla. 1994). If the legislature disagrees with the Court's conclusion it can amend the resisting statute at the first available opportunity. State v.

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[3]Respondent also suggests that it would lead to an absurd result. To the contrary, defining the unit of prosecution by the number of officers involved in executing the legal duty would lead to an absurd result. Imagine an armed individual waiving his gun in the direction of the 100 officers unsuccessfully attempting to induce his surrender. Or imagine the motorist who continues driving despite an order to pull-over, resulting in a chase involving 100 squad cars, each occupied by two officers. Is it reasonable to believe that the legislature contemplated the single acts of resistance to constitute 100 counts of resisting an officer with violence and 200 counts of resisting an officer without violence?

Hamilton, 660 So. 2d 1038, 1045 (Fla. 1995).[4]

Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994) approved, State v. Christian, 692 So. 2d 889 (Fla. 1997), relied upon by the district court and respondent (RB 12-13), is inapposite. There, the question was whether the defendant, convicted of attempting to murder one victim and aggravated battery upon another, could receive consecutive three year minimum mandatory prison terms for the use of a firearm. Lifred, 643 So. 2d at 95. The court answered the question in the affirmative stating, "in the case of multiple discharges of a firearm at multiple victims, there are, by definition, separate violations of each victim's rights." Id. at 98. Drawing upon that conclusion, the Wallace court stated, "[a]s in Lifred, each one of these officers was a separate 'victim'." 689 So. 2d at 1163. The district court suggests that if consecutive three year firearm minimum mandatory sentences can be imposed for each victim, each victim constitutes a separate unit of prosecution. The court's reasoning assumes that each individual officer is a victim under the resisting statute. That assumption

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[4] Since 1984 the legislature has been aware of this Court's use of the "a/any" test for determining the allowable unit of prosecution. Despite that knowledge, and a number of subsequent amendments to the resisting statute, the legislature has not replaced "any" officer with "a[n]" officer.

has previously been shown incorrect. Since Lifred was not concerned with the allowable unit of prosecution its analysis cannot be applied to the issue raised herein.

Respondent correctly asserts (RB 13-14) that legislative intent can be derived, in part, by considering a statute's title. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). However, the evil to be corrected and the language of the act need also be considered. Id. at 824. The title of the instant statute, "[r]esisting officer with violence to his person," does not suggest one way or another the allowable unit of prosecution. The evil sought to be corrected, resistance to lawfully executed legal duties, Carawan, 515 So. 2d at 169, and the language of the statute, "any officer," Watts, 462 So. 2d at 814, do, and do so in the manner asserted by petitioner.

Finally, respondent's reliance upon Coleman v. State, 569 So. 2d 870 (Fla. 2d DCA 1990) is misplaced. (RB 14). In Coleman, the court rejected a double jeopardy challenge to three convictions for resisting an officer with violence, concluding that while each charge arose out of the same transaction, they were separate acts and, as a result, separate punishment of each did not violate the rule announced in Carawan. 569 So. 2d at 872. The district court reached that conclusion based upon its view that "the statute at

issue proscribes the act of resisting any officer by doing violence to the person of such officer and not the act of resisting arrest ...." Id. The court's conclusion that the resisting statute's purpose is not to induce submission to lawful authority, but to protect the physical well-being of police officers, is contrary to this Court's view expressed in Carawan. 515 So. 2d at 169. In addition, the opinion does not address the allowable unit of prosecution argument raised herein. Merely because multiple convictions for the same crime do not constitute a double jeopardy violation, does not mean that multiple convictions do not exceed the legislature's intended unit of prosecution.

III

CONCLUSION

Although the issue raised herein was not first addressed to the trial court, it is one of fundamental error which may be raised for the first time on appeal. The purpose of the resisting statute, and the language used therein, indicate that the legislature intended to make the separate instances of resisting a lawfully executed legal duty, not the number of officers executing the duty, the unit of prosecution. At a minimum, the unit of prosecution is imbued with ambiguity, requiring resolution of the issue in petitioner's favor. As the law now stands, those accused

of resisting an officer with violence within the geographic area covered by the Fourth District Court of Appeal are subject to far greater penalties than are similarly situated defendants who resist an officer with violence within the First District Court of Appeal. To provide uniformity of law throughout the state this Court should exercise its discretion to review this cause. See Lake v. Lake, 103 So. 2d 639, 642-643 (Fla. 1958).

WHEREFORE, petitioner respectfully requests this Honorable Court accept jurisdiction over the instant cause, quash the decision of the district court in Wallace v. State, 689 So. 2d 1159 (Fla. 4th DCA 1997), and approve the decision of the district court in Pierce v. State, 681 So. 2d 873 (Fla. 1st DCA 1996).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Myra J. Fried, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this 24th day of JULY, 1997.

Attorney for Charlie Wallace