ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 93,439

CLINTON R. WOODS, :

Respondent. :

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

I. STATEMENT OF THE CASE AND FACTS

By information filed January 23, 1997, the State charged respondent with three counts of battery of a law enforcement officer (Counts I-III) and three counts of resisting an officer with violence (Counts IV-VI). (I-10-11). This case proceeded to trial on all six counts.

The facts relevant to the issue on appeal are these. A judge signed a warrant for respondent's arrest. Four law enforcement officers were dispatched to execute the warrant. When the officers attempted to arrest respondent, respondent allegedly resisted. During the ensuing struggle, respondent allegedly punched, grabbed, and/or kicked three of the four officers.

The jury returned a verdict finding respondent guilty on all six counts. (I-52-57; II-224-26). The trial court sentenced respondent to ten years as a habitual felony offender on each of

the six counts, with the sentences to run concurrently. (I-70-84, 119). Respondent appealed.

The First District reversed two of the counts for resisting an officer without violence citing Pierce v. State, 681 So. 2d 873 (Fla. 1st DCA 1996) and Wells v. State, 22 Fla. L. Weekly D2010 (Fla. 1st DCA Aug. 19, 1997), review granted, 705 So. 2d 10 (Fla. 1997). See Woods v. State, 710 So. 2d 1379, 1380 (Fla. 1st DCA 1998). In so doing, the First District acknowledged conflict with Coleman v. State, 569 So. 2d 870 (Fla. 2d DCA 1990), and Wallace v. State, 689 So. 2d 1159 (Fla. 4th DCA), review granted, 699 So. 2d 1377 (Fla. 1997). Id. This Court accepted jurisdiction over this case by order dated October 19, 1998.

II. SUMMARY OF THE ARGUMENT

The issue on appeal is whether a defendant can be convicted of multiple counts of resisting an officer with violence for resisting multiple officers during a single criminal episode. This precise issue is currently pending before this Court in State v. Wells, Case No. 91,279.

In the case at bar, respondent was convicted of three counts of resisting an officer with violence for punching, grabbing, and/or kicking, three officers during a single criminal episode. The First District Court of appeal reversed two of respondent's convictions for resisting an officer with violence, concluding that a defendant cannot be convicted of multiple counts of resisting an officer with violence for resisting multiple officers during a single criminal episode.

Section 843.01, Florida Statutes (1995), provides that it is unlawful to resist, obstruct, or oppose with violence "**any** officer" in the lawful execution of any duty. The term "any" is ambiguous with respect to the unit of prosecution. See State v. Watts, 462 So. 2d 813, 813-14 (Fla. 1985). A criminal statute suspectible of differing constructions must be construed most favorably to the accused. § 775.021(1), Fla. Stat. (1995). Construing section 843.01 most favorably to respondent, respondent cannot be convicted of multiple counts of resisting an officer with violence for resisting multiple officers during a single criminal episode. Accordingly, this Court should approve the decision below.

III. ARGUMENT

ISSUE: WHETHER A DEFENDANT CAN BE CONVICTED OF MULTIPLE COUNTS OF RESISTING AN OFFICER WITH VIOLENCE FOR RESISTING MULTIPLE OFFICERS DURING A SINGLE CRIMINAL EPISODE.

The sole issue on appeal is whether a defendant can be convicted of multiple counts of resisting an officer with violence for resisting multiple officers during a single criminal episode. Respondent maintains that a defendant cannot be convicted of multiple counts of resisting an officer with violence for resisting multiple officers during a single criminal episode because section 843.01 is ambiguous with respect to the unit of prosecution.

In Grappin v. State, 450 So. 2d 480 (Fla. 1984), this Court discussed the unit of prosecution doctrine in addressing the issue of whether a defendant can be convicted of five counts of theft for stealing five firearms during a single burglary. Section 812.014, Florida Statutes, proscribes the theft of "[a] firearm." This Court held that section 812.014 permits a defendant to be convicted of a separate count of theft for each firearm stolen during a single burglary, explaining:

> [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, 450 So. 2d at 482.

In State v. Watts, 462 So. 2d 813 (Fla. 1985), this Court

considered whether a defendant could be convicted of two counts of possession of contraband for possessing two handmade knives in prison. This Court held that the defendant could be convicted of only one count of possession of contraband, explaining:

> In Grappin, we held that the unlawful taking of two or more firearms during the same criminal episode is subject to separate prosecution and punishment under the theft statute as to each firearm taken. Grappin was prosecuted under section 812.014(2)(b)[3], Florida Statutes (1981), which reads as follows:
>
> > (b) It is grand theft of the second degree and a felony of the third degree, punishable as provided in Secs. 775.082, 775.083 and 775.084, if the property stolen is:
> >
> > 3. A firearm.
>
> (Emphasis supplied.) We reasoned that Grappin may be charged in a five-count information with five thefts because the article "a" prefaced firearm. We noted that the use of the article "a" in reference to "firearm" in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution. . . . 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.
>
> . . .
>
> Applying the rationale of Grappin to the instant case, it is apparent that Watt can only be charged with one count of possession of contraband. Watt [was] prosecuted under section 944.47, Florida Statutes (1981), which provides in relevant part:
>
> > (1)(a) Except through regular

> channels as authorized by the officer in charge of the correctional institution, it is unlawful to introduce into or upon the grounds of any state correctional institution, or to take or attempt to take or send therefrom, any of the following articles which are hereby declared to be contraband for the purposes of this section, to wit:
>
> . . .
>
> 5. Any firearm or weapon of any kind or any explosive substance.
>
> . . .
>
> (c) It is unlawful for any inmate of any state correctional institution or any person while upon the grounds of any state correctional institution to be in actual or constructive possession of any article or thing declared by this section to be contraband, except as authorized by the officer in charge of such correctional institution.
>
> (2) Whoever violates any provision of this section is guilty of a felony of the third degree . . . .
>
> (Emphasis supplied.) Thus applying the a/any test of Grappin, we conclude that Watt may not be charged with multiple offenses for the possession of two prisonmade knives.

Watts, 462 So. 2d at 813-14.

The a/any test, as enunciated in Grappin and reiterated in Watts, continues to be the appropriate analytical framework for determining the allowable unit of prosecution in Florida. See, e.g., Marin v. State, 684 So. 2d 859, 860 (Fla. 5th DCA 1996) (relying on Watts and holding that a defendant can be convicted of a separate count of possession of counterfeit credit cards for

each counterfeit credit card possessed by the defendant because the applicable statute proscribes the possession of "a counterfeit credit card"); C.S. v. State, 638 So. 2d 181, 182-83 (Fla. 3d DCA 1994) (relying on Watts and Grappin and holding that a defendant can be convicted of two counts of carrying a concealed firearm for simultaneously concealing two firearms because the applicable statute proscribes concealing "a firearm").

In the case at bar, respondent was convicted of three counts of resisting an officer with violence for resisting three officers during a single criminal episode. Section 843.01, Florida Statutes (1995), provides:

> Whoever knowingly and willfully resists, obstructs, or opposes **any officer** . . . 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 of the third degree. . . .

The word "any" as employed in section 843.01 cannot be distinguished in any meaningful way from the use of the term "any" in the statute at issue in Watts. Thus, under the a/any test enunciated in Grappin and reiterated in Watts, a defendant cannot be convicted of multiple counts of resisting an officer with violence for resisting multiple officers during a single criminal episode. See Jones v. State, 711 So. 2d 633, 634 (Fla. 1st DCA 1998); Morris v. State, 23 Fla. L. Weekly D1495, 1495 (Fla. 1st DCA June 15, 1998); Wells v. State, 22 Fla. L. Weekly D2010, 2010 (1st DCA Aug. 19, 1997), review granted, 705 So. 2d

10 (Fla. 1997); Pierce v. State, 681 So. 2d 873, 874 (Fla. 1st DCA 1996); but see Wallace v. State, 689 So. 2d 1159, 1161-64 (Fla. 4th DCA), review granted, 699 So. 2d 1377 (Fla. 1997); Coleman v. State, 569 So. 2d 870, 871-72 (Fla. 2d DCA 1990).

The State argues that the a/any test of Watts and Grappin does not apply to section 843.01 because the term "any" as used in 843.01 is not ambiguous. More specifically, the State argues:

> The statute says that a person who resists **"any officer"** in the listed class by "offering or doing violence **to the person of such officer"** is guilty of resisting arrest with violence. § 843.01, Fla. Stat. (1995) (emphasis added). The phase [sic] "to the person of such officer" refers to one officer and not to a group of officers. If the Legislature had intended that a defendant be convicted of only one count, it would have not used the singular construction "to the person of such officer." See Wallace, 689 So. 2d at 1161. . . . The holdings in Woods, Wells, Pierce, Jones, and Morris treat all the police officers as a group and makes the phrase "doing violence to the person of such officer" meaningless. The proper reading of this statute allows a separate conviction for each officer that a defendant resists.

(State's Br. at 6-7). The State misses the point. The issue in the case at bar is whether the use of the term "any" renders section 843.01 ambiguous with respect to the unit of prosecution. If anything, the fact that the phrase "any officer" is followed by a phrase in the singular renders the statute more ambiguous not less. By proposing the "proper reading" of section 843.01 the State necessarily recognizes that section 843.01 is susceptible of differing constructions -- the statute is

ambiguous with respect to the unit of prosecution.

The State also argues that "[u]nder the rule announced by the First District in this case, a criminal defendant has no incentive to surrender to multiple officers once he or she has resisted the first one." (State's Br. at 7). Such a position is patently absurd as evidenced by the facts of the case at bar. Respondent allegedly punched, grabbed, and/or kicked three of the four officers. Respondent was convicted of three counts of battery of a law enforcement officer -- one count for each officer he allegedly struck. Thus, contrary to the State's position, there is a very real disincentive with respect to striking more than one officer during the course of a single criminal episode.

Next, the State argues that "[e]ven if this Court finds some ambiguity in section 843.01, that ambiguity is resolved [sic] the clear statement in section 772.021 that a defendant should be punished for each crime. (State's Br. at 9-10). Again, the State misses the point.

If section 843.01 is ambiguous with respect to the unit of prosecution then it must be construed in favor of the accused. § 775.021(1), Fla. Stat. (1995). To the extent the State suggests otherwise, the State errs.

Lastly, the State argues that the continued vitality of Grappin and Watts, decided in 1984 and 1985 respectively, is suspect in light of the legislature's 1988 amendments to section 775.021, Florida Statutes. In so arguing, the State mixes apples

and oranges.

In 1988, the legislature renumbered section 775.021(4), Florida Statutes (1987), as subsection 775.021(4)(a) with an insertion, and added subsection 775.021(4)(b) in its entirety. Subsection 775.021(4)(a) was amended to read in relevant part: "Whoever, in the course of one criminal 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." Ch. 88-131, § 7, at 709, Laws of Fla. (insertion is underlined). In State v. Smith, 547 So. 2d 613, 616 (Fla. 1989), the Florida Supreme Court recognized that by adding the verbiage "an act or acts which constitute one or more separate criminal offenses," "[t]he legislature rejects the distinction [the Supreme Court previously] drew between act or acts. Multiple punishment shall be imposed for separate offenses even if only one act is involved."

Under the unit of prosecution doctrine, a term such as "any firearm" is ambiguous with respect to the unit of prosecution and the possession of several firearms at the same time therefore must be treated as a single offense. See Watts, 462 So. 2d at 814. The unit of prosecution doctrine thus has nothing to do with whether multiple punishment shall be imposed for separate offenses even if only one act is involved. In short, the State's argument regarding section 775.021 is a non sequitur. See Hill v. State, 711 So. 2d 1221, 1224 (Fla. 1st DCA 1998) (concluding that the 1988 amendment to 775.021 has nothing to do with the

unit of prosecution doctrine).

In short, under Grappin and its progeny, respondent should have been convicted of only one count of resisting an officer with violence. Accordingly, this Court should approve the decision below.

IV. CONCLUSION

Based on the foregoing arguments, reasoning, and citation of authority, respondent respectfully requests that this Court approve the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to L. Michael Billmeier, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 7th day of December, 1998.

Respectfully submitted,

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