

IN THE SUPREME COURT OF FLORIDA

BYRON GORDON,

Petitioner,

v.

CASE NO. 96,834

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF FONT SIZE

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SUMMARY OF ARGUMENT

The crime of commission of a felony causing bodily injury is a relatively recent statutory provision. It is a separate and distinct crime to cause bodily injury to another in the course of the commission of an enumerated felony. In this case, the enumerated felony is Petitioner's armed robbery conviction.

The aggravated battery in this case requires great bodily harm while attempted first degree murder does not. Obviously, attempted murder requires an intent to kill that is not found in the offense of aggravated battery. Thus, Petitioner's narrow and specific issue of whether counts 2 and 3 are subsumed into count 1 was properly decided by the District Court. No other subsumption argument was made below. The decision of the District Court should be affirmed.

ARGUMENT

POINT ON APPEAL

THE FOUR OFFENSES ARE SEPARATE AND
DISTINCT. THERE IS NO VIOLATION OF
THE DOUBLE JEOPARDY CLAUSE.

It is essential to recognize that Petitioner was convicted of *four* offenses: attempted murder, causing bodily injury during a felony (armed robbery), aggravated battery, and armed robbery. The felony bodily injury count applies to Petitioner only through the armed robbery offense; thus count 2 is dependent upon count 4. Count 2 would not exist were it not for the armed robbery offense.

The crime of commission of a felony causing bodily injury is a relatively recent statutory provision. It is a separate and distinct crime to cause bodily injury to another in the course of the commission of an enumerated felony. In this case, the enumerated felony is Petitioner's armed robbery conviction. In §782.051(1), Florida Statutes (1997) the legislature determined that this new felony offense would be a first degree felony; a level 9 offense, and that victim injury points **shall** be assessed under the statute. Clearly, then, the legislature evinced its intent to create a new and substantive offense which is to be scored and sentenced separately from the enumerated felony. The Fifth District Court of Appeal has previously affirmed convictions for this felony and armed carjacking. See Brandon v. State, 727 So.2d 1010 (Fla. 5th DCA 1999). Thus, it is not "subsumed" by the enumerated offense. Such an interpretation would render the statute useless.

Petitioner conveniently omits any reference to the armed robbery offense, but it is the linchpin of the felony bodily injury conviction. Neither of these offenses must be proven in order to convict of attempted murder. Clearly, the legislature intended that if a criminal commits a robbery *and* causes great bodily harm, two crimes are committed. It matters not that the great bodily harm was the result of the attempted murder because the felony bodily injury provision hinges solely upon the armed robbery. It is true that Petitioner was separately convicted for his attempt to kill the victim. But attempted homicide requires neither great bodily harm nor robbery. The attempt to kill the victim was a separate and distinct act which was complete when the gun was fired - regardless of whether the target was hit. To find robbery and the great bodily harm suffered during the robbery subsumed in the attempted murder charge would eviscerate jurisprudence.

Petitioner relies upon Sirmons v. State, 634 So.2d 153 (Fla. 1994), a case which predates the 1997 enactment of §782.051(1), Florida Statutes (1997). Thus, the crime of commission of a felony causing bodily injury postdates the cases relied upon by Petitioner. Moreover, Sirmons is easily distinguished. Not only did Sirmons commit his crime years before the passage of §782.051, he did not batter or attempt to kill his victim. In 1997, Sirmons could have properly been convicted of both carjacking and felony injury. See Brandon, supra. Also, Sirmons was found guilty of robbery of a vehicle and grand theft of the same vehicle. In this case, Petitioner did not just rob the victim, he beat him,

attempted to murder him, and caused great bodily injury. Petitioner's acts do not merely constitute one crime of attempted murder.

Petitioner, who relies almost exclusively on case law handed down long before the enactment of the statute in question, further claims that the legislature does not intend dual convictions to result from a single act. On the contrary, §782.051, Florida Statutes (1997) states:

(1) Any person who perpetrates ...any felony enumerated ...and who commits, aids, or abets an act that causes bodily injury to another **commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life, ... which is an offense ranked in level 9 of the sentencing guidelines. Victim injury points shall be scored under this subsection.**

(emphasis supplied). Clearly, this is a separate substantive offense completely distinct from the enumerated felony. This provision is not even applicable *until* a predicate (enumerated) offense is committed. If the legislature never intended dual convictions it would never have enacted a crime which cannot stand alone. Thus, *ab initio*, one who commits an enumerated offense can be punished twice if bodily injury results.

Plainly, the statute punishes the bodily injury resulting from the commission of an enumerated felony. While the enumerated crimes listed in the statute may be borrowed from its felony murder counterpart, the felony bodily injury statute is not triggered by

battery or aggravated battery offenses. Therefore, Petitioner correctly points out that a defendant cannot be convicted of attempted premeditated murder and attempted felony murder; similarly, one cannot be convicted of battery and felony bodily injury based upon one act of violence. Neither battery nor aggravated battery is an enumerated felony. Petitioner's analogy misses the point; he was convicted of felony bodily injury during the commission of the armed robbery, not during the attempted murder or the aggravated battery.

Finally, Petitioner claims that during trial the State conceded that the felony causing bodily harm was subsumed within the attempted murder charge. (Petitioner's brief on the merits at 11) On the contrary, the prosecutor at one point stated that she was "not in a position to say right now whether or not [the charged offenses] are cumulative." (T2 211) She later stated "...I **think** it would be redundant, **if** you have ... lessers of every crime here." (T2 261-262)(emphasis supplied) At sentencing, the prosecutor said that she would be "inclined" to agree that the felony bodily harm would likely be subsumed in the attempted murder. (T2 332) However, the State's posture during trial falls far short of a concession on this point. A prosecutor's "inclination" or "thought" does not control this issue.

More troublesome is Petitioner's argument that the aggravated battery offense is subsumed within the attempted murder conviction. While the State does not concede this point to Petitioner, it is more susceptible to a double jeopardy violation.

Initially, the focus should be on the charging document. In this case the State charged under the great bodily harm provision of the aggravated battery statute. Thus, it is a separate and distinct offense from attempted murder. Attempted murder does not require bodily injury or a firearm.

Aggravated battery is not a category one lesser included offense of attempted murder because each crime contains an element not contained in the other. State v. Johnson, 601 So.2d 219, 220 (Fla. 1992). Nor has there ever been any prohibition against convicting a defendant of both aggravated battery and attempted murder. See Boone v. State, 615 So.2d 760 (Fla. 4th DCA 1993); Tripp v. State, 610 So.2d 1311 (Fla. 1st DCA 1992).

The crux of this particular issue is the fact that each of the two crimes contains an element that is lacking in the other. The aggravated battery in this case requires great bodily harm while attempted first degree murder does not. Obviously, attempted murder requires an intent to kill that is not found in the offense of aggravated battery. Thus, Petitioner's narrow and specific issue of whether counts 2 and 3 are subsumed into count 1 was properly decided by the District Court. No other subsumption argument was made below. The decision of the District Court should be affirmed.

CONCLUSION

Based on the argument and authorities presented herein, Respondent requests this Honorable Court to uphold the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's brief on the merits in case number 96,834 has been furnished by delivery to Nancy Ryan, Assistant Appellate Public Defender, Seventh Judicial Circuit, this _____ day of December, 1999.

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