IN THE SUPREME COURT OF FLORIDA

BRYON GORDON,

Petitioner,

vs. CASE NO. SC96-834

STATE OF FLORIDA,

Respondent.
_____)

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The District Court of Appeal should have affirmed only the petitioner's armed robbery conviction and one of his three additional convictions; those three additional convictions, for aggravated battery, attempted murder, and causing bodily injury during a felony, are all degree variants on the same core offense.

ARGUMENT

IN REPLY: THE JUDGMENT AND SENTENCING ORDERS ENTERED IN THIS CASE VIOLATE THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND FLORIDA CONSTITUTIONS; THE CONVICTIONS ENTERED ON COUNTS II AND III MUST BE VACATED AND THE PETITIONER RESENTENCED ON THE REMAINING COUNTS, SINCE THE DUPLICATIVE CONVICTIONS WERE SCORED ON HIS SENTENCING GUIDELINES SCORESHEET.

The State, in its merits brief, asserts that Petitioner "conveniently omits" any reference to his armed robbery conviction in his initial brief on the merits. That complaint reflects an apparent misperception of the Petitioner's argument. Petitioner accepts that his conviction for armed robbery, and his conviction for *one of the other three offenses of which he stands convicted*, will withstand double jeopardy analysis. His position is that two or at the very least one of those other three offenses–aggravated battery, attempted murder, and causing bodily injury in the course of a felony–must be vacated.

The State argues that it "would eviscerate jurisprudence" to hold that Petitioner's conviction for attempted murder is subject to the rule of Sirmons v. State, 634 So. 2d 153 (Fla. 1994), since "[n]ot only did Sirmons commit his crime years before passage of [the causing-bodily-injury-during-a-felony statute], he did not batter or attempt to kill his victim." (Merits brief at 3) The point is not a persuasive one, since in Sirmons a grand theft conviction was vacated because it was subsumed in a robbery

conviction; this court's holding was that those two offenses share a common core, and that where a single act of taking property is charged as the gravamen of two theft-type offenses only one conviction may stand. In this case Petitioner's argument is that his three convictions for aggravated battery, attempted murder, and causing bodily injury in the course of a felony, based as they are on the firing of a single gunshot, share the common core of deliberately causing personal injury to another person.[1]

Where a criminal defendant is impermissibly convicted of dual offenses, his remedy is to have the lesser of the two vacated by the appellate court. State v. Barton, 523 So. 2d 152 (Fla. 1988). Here Petitioner was convicted of the first-degree felony of attempted first-degree murder, see Sections 782.04(1)(a), 777.04(4)(b), Florida Statutes (1997), which was enhanced to a life felony by his use of a firearm, see Section 775.087(1)(a), Florida Statutes (1997); of the first-degree felony of causing bodily injury during a felony, see Section 782.051(1), which was enhanced to a life felony by use of a firearm, see Section 775.087(1)(a), Florida Statutes (1997); and of the second-degree felony of aggravated

[1]In the District Court of Appeal, the State argued in its answer brief that the aggravated battery conviction in this case was supported by the defendant's act of punching the shooting victim. See Appendix to Petitioner's initial brief on the merits (Appellee's answer brief at 5). The State has abandoned that argument in this proceeding, apparently in light of the District Court's of Appeal's opinion which correctly noted that Mr. Gordon was charged with aggravated battery *causing great bodily harm* and that there was no evidence introduced at trial indicating there was any injury from the punch.

battery, see Section 784.045, Florida Statutes (1997), which was enhanced to a first-degree felony by use of a firearm, see Section 775.087(1)(a), Florida Statutes (1997).

The lesser aggravated battery conviction entered below shares a common core with both of the greater offenses, causing bodily injury and attempted murder, and should be vacated regardless whether this court vacates either of the greater offenses and regardless which of them it vacates. As to aggravated battery and causing bodily injury, the State reasonably concedes that "one cannot be convicted of battery and felony bodily injury based upon one act of violence"; the Petitioner agrees.(State's merits brief at 5.)

The State further makes the partial concession that "the Petitioner's argument that the aggravated battery offense is subsumed within the attempted murder conviction" is "troublesome" and that "[w]hile the State does not concede this point to Petitioner, [dual convictions for attempted murder and aggravated battery are to some extent] susceptible to a double jeopardy violation." (State's merits brief at 5.) However, later in its brief the State relies on Boone v. State, 615 So. 2d 760 (Fla. 4th DCA 1993) and Tripp v. State, 610 So. 2d 1311(Fla. 3rd DCA 1992) for the principle that dual convictions may be entered for aggravated battery and for attempted murder. The Petitioner agrees that dual convictions for attempted murder and aggravated battery based on a single act of violence are "troublesome," and submits that reliance

on Boone and Tripp is misplaced. Boone involved separate acts which supported separate convictions for battery and attempted murder, and the Tripp opinion does not establish whether a single act or multiple acts of violence were involved in that case. The Third and Fourth District Courts of Appeal have clearly set out their intentions with regard to dual convictions for attempted murder and aggravated battery *based on a single act* in Campbell-Eley v. State, 718 So. 2d 327 (Fla. 4th DCA 1998)and Laines v. State, 662 So. 2d 1248 (Fla. 3rd DCA 1995), rev. den. 670 So. 2d 940 (Fla. 1996), receded from on other grounds, Grene v. State, 702 So. 2d 510 (Fla. 3rd DCA 1996) (en banc); both cases hold that dual convictions are impermissible for aggravated battery and attempted second-degree murder based on same act. See also Boivin v. State, 487 So. 2d 1037 (Fla. 1986), discussed in Petitioner's initial brief on the merits at 10, in which this court held that dual convictions are impermissible for aggravated battery and attempted first-degree murder when the two offenses are charged based on the same act.

The Petitioner submits that not only his aggravated battery conviction but also one of his life-felony convictions should be vacated based on the rule of Sirmons. Causing bodily injury during a felony, causing a death during a felony, intentionally causing great bodily harm, unintentionally causing great bodily harm (felony battery), causing a death through an act imminently dangerous to another regardless of human life, and simple battery all are degree

variations of the same offense–culpably causing bodily harm to another person. See (Joseph) Thompson v. State, 650 So. 2d 969 (Fla. 1994) (sexual battery on physically incapacitated person and sexual activity while in custodial authority of a child are degree variants on same core offense). Neither Thompson nor any of the other decisions in this court's Sirmons line of cases has been effectively overruled by any legislative act; the "core offense" theory plainly has sound underpinnings, and for that reason only one of the petitioner's three non-robbery convictions should have been affirmed by the District Court of Appeal.

CONCLUSION

The petitioner requests this court to answer the certified question in the affirmative, to quash the decision and opinion issued by the District Court, to vacate the convictions entered in the trial court on Counts II and III, and to remand for resentencing on the remaining counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Assistant Attorney General Carmen F. Corrente, of 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by way of the Attorney General's in-basket at the Fifth District Court of Appeal, and mailed to Mr. Bryon Gordon, No. X12693, Central Florida Reception Center, Main Unit, P. O. Box 628050, Orlando, FL 32862 on this 18th day of January, 2000.

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NANCY RYAN
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