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IN THE SUPREME COURT OF FLORIDA

DAVID WILLIAM TRAPPMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC21-1479
1D19-1883

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ON DISCRETIONARY REVIEW
OF THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner Allen, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PIB" will designate Petitioner's Initial Merits Brief. That symbol will be followed by the appropriate page number. The record on appeal will be referenced by “R” followed by the volume and page number. The trial transcript will be referenced by the letter “T” followed by any pertinent volume number and page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is an appeal from Trappman v. State, 325 So. 3d 944, 946 (Fla. 1st DCA 2021). The First District Court of Appeal certified conflict with the decision of the Fourth District Court of Appeal in Olivard v. State, 831 So. 2d 823 (Fla. 4th DCA 2002). This Court accepted jurisdiction. Trappman v. State, SC21-1479, 2022 WL 110726, (Fla. Jan. 12, 2022).

The State accepts Appellant's statement of the case and statement of the facts as reasonably reflecting the record subject to any additions, corrections, amplifications or elaborations, which will be set out below.

SUMMARY OF ARGUMENT

Petitioner's convictions for aggravated battery on a law enforcement officer (LEO) and battery on a LEO do not violate double jeopardy. This Court has stated the principal that "even if the offenses occur within the same criminal episode such that *Blockburger* applies, double jeopardy is not implicated where each offense is a 'distinct criminal act.'" Furthermore, this Court has determined that acts are distinct if there were based on separate impulses.

In its opinion, the First District Court of Appeal held that the evidence supported a finding that both of Petitioner's convictions, though part of the same criminal episode, were based on two distinct acts. Petitioner's conviction for aggravated battery on a LEO was for Petitioner verbally ordering one of his dogs to attack a police officer. Petitioner's conviction for battery on a LEO was based on Petitioner personally shoving the police officer in the chest. Because Petitioner's convictions were based on two separate distinct acts which were based upon separate impulses or intents, a *Blockburger* analysis is not triggered. Therefore, it does not matter that the elements of a battery are subsumed into the elements of an aggravated assault.

ARGUMENT

THE FIRST DISTRICT COURT CORRECTLY RULED THAT PETITIONER'S CONVICTIONS WERE BASED ON TWO DISTINCT ACTS. BECAUSE THERE WERE TWO DISTINCT ACTS TO SUPPORT PETITIONER'S CONVICTIONS, IT IS NOT NECESSARY TO EXAMINE WHETHER THEY WOULD SURVIVE A SAME ELEMENTS TEST UNDER BLOCKBURGER.

STANDARD OF REVIEW

A determination of whether double jeopardy is violated is reviewed *de novo*. State v. Drawdy, 136 So. 3d 1209, 1213 (Fla. 2014).

JURISDICTION

This Court has jurisdiction based on the First District Court of Appeals certifying conflict with the Fourth District Court of Appeal in Olivard v. State, 831 So. 2d 823 (Fla. 4th DCA 2002). See Article V, § 3(b)(4).

MERITS

The constitutional protection against double jeopardy "prohibits subjecting a person to multiple prosecutions, convictions, and punishments for the same criminal offense." Valdes v. State, 3 So. 3d 1067 (Fla. 2009). Where "'there is no clear statement of legislative intent to authorize or to prohibit separate punishments,' courts employ the *Blockburger* same-elements test, codified in section 775.021(4), Florida Statutes, to determine

if there is a double jeopardy violation." Lee v. State, 258 So. 3d 1297 (Fla. 2018) (quoting Valdes, 3 So. 3d at 1069). The '*Blockburger*' test "'inquires whether each offense contains an element not contained in the other; if not, they are the same offense,' and double jeopardy principles prohibit separate convictions and punishments based upon the same conduct."' Id (quoting State v. Shelley, 176 So.3d 914 (Fla. 2015)); See § 775.021(4) ("[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.")

However, "the prohibition against double jeopardy does not prohibit multiple convictions and punishments where a defendant commits two or more distinct criminal acts." Hayes v. State, 803 So. 2d 695 (Fla. 2001); see State v. Paul, 934 So.2d 1167, 1172 n. 3 (Fla. 2006)("Of course, if two convictions occurred based on two distinct criminal acts, double jeopardy is not a concern.")[1]; Sanders v. State, 101 So. 3d 373, 375 (Fla. 1st DCA 2012)

[1] Some of the confusion on this issue has been caused because courts sometimes use the terms criminal episode and act interchangeably when they should not. Petitioner cites State v. Paul, 934 So. 2d 1167, 1172–73 (Fla. 2006) where this Court stated that "Because the Blockburger test applies to crimes occurring in only "one criminal transaction or episode," the first step is to review whether there was one criminal episode or multiple episodes. However, this Court in Paul also stated that double jeopardy was not concerned if convictions were based on distinct acts. An

("If it is determined that the charged offenses occurred in different criminal episodes or constituted different acts, no further analysis is necessary and the separate offenses do not violate double jeopardy.")

This Court examined a double jeopardy analysis occurring within the same criminal episode in State v. Drawdy. Drawdy was charged with one count of sexual battery under section 794.011(8)(b), Florida Statutes (2006), for allegedly penetrating the victim's vagina with his penis, and one count of lewd or lascivious molestation under section 800.04(5)(a), Florida Statutes (2006), for the alleged intentional touching, in a lewd or lascivious manner, of the victim's breasts, genitals, genital area, buttocks, or the clothing covering them. At the trial, the victim testified that while Drawdy was penetrating her vagina with his penis, Drawdy also reached up underneath her shirt and touched her breasts. Drawdy, 136 So. 3d at 1211. The jury convicted Drawdy of both charges. On appeal, the Second District Court held that double jeopardy prohibits convictions for both sexual battery and lewd or lascivious molestation in a single criminal episode. Drawdy v. State, 98

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episode can be composed of multiple different acts. This Court should clarify that courts should use the Blockburger test to determine whether there were distinct acts rather than using the phrase criminal episodes.

So. 3d 165, 172 (Fla. 2d DCA 2012).

This Court recognized the principal that "even if the offenses occur within the same criminal episode such that *Blockburger* applies, double jeopardy is not implicated where each offense is a "distinct criminal act[ ]." Drawdy, 136 So. 3d at 1213. This Court went on to quash the decision of the Second District explaining that:

> Drawdy was convicted of sexual battery for penetrating the victim's vagina with his penis. He was convicted of lewd or lascivious molestation for intentionally touching the victim's breasts in a lewd or lascivious manner during the vaginal penetration. These offenses are distinct criminal acts of a separate character and type… [T]ouching the victim's breasts was not incidental to the vaginal penetration—as grabbing the victim's buttocks to facilitate the sex act, for example, might be. Additionally, proving that Drawdy touched the victim's breasts during vaginal penetration will require different elements of proof than proving he had vaginal intercourse with the victim. The lewd touching here was not an integral or necessary part of the sex act, but a separate and distinct act by itself. As such, Drawdy's convictions involve offenses "of a separate character and type," which are "distinct criminal acts" that "do not violate double jeopardy."

Drawdy, 136 So. 3d at 1214. (internal citation omitted).

This Court revisited the double jeopardy analysis in Graham v. State. In Graham, this Court reviewed the original holding of Blockburger. The Blockburger court looked at two issues: "(1) whether a defendant could be

charged more than once under the same statute for multiple acts within a single criminal episode and (2) whether a defendant could be charged under more than one statute for a single act that occurred within a single criminal episode." Graham v. State, 207 So. 3d 135, 139 (Fla. 2016). This Court summarized Blockburger's conclusion to the first issue as "the defendant being charged under the same statute twice did not result in a double jeopardy violation because each sale represented a distinct act that warranted separate punishments under the statute." Id. This Court determined that acts are distinct if there were based on separate impulses. This Court, quoting Blockburger, stated:

> "[W]hen the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." Wharton's Criminal Law (11th Ed.) § 34. Or, as stated in note 3 to that section, "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. If the latter, there can be but one penalty."

Id. at 139, citing Blockburger v. United States, 52 S.Ct. 180 (1932). Thus, "under Blockburger, a defendant can also commit a number of sequential acts within a single criminal episode, and each distinct act may be punished under the same statute." Id. at 140. If two charges are based on the same

act, then the different element test is employed. Id. at 139. "Resolving the conflict in this way clarifies that Blockburger ultimately provides courts with two tests to apply: (1) where the defendant is convicted multiple times under the same statute for acts that occurred during the course of a single criminal episode, a "distinct acts" test is used, but (2) where a defendant is convicted under multiple statutes for one act, the "different elements" test applies." Id. at 141.

The First District addressed this procedure to examine double jeopardy in Mercer v. State. The First District stated:

> The double jeopardy analysis proceeds in three steps. State v. Paul, 934 So.2d 1167, 1172–73 (Fla. 2006). We examine (1) whether the convictions were based on an act or acts occurring during the same criminal transaction and/or episode; (2) whether the convictions were predicated on the same or distinct acts; and (3) if the convictions did not occur during separate episodes and were not based on distinct acts, whether the two convictions "survive a same elements test as defined by section 775.021, Florida Statutes, [(2014)], commonly referred to as the Blockburger analysis." Partch v. State, 43 So.3d 758, 760 (Fla. 1st DCA 2010) (citing Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)).

Mercer v. State, 219 So. 3d 936, 937–38 (Fla. 1st DCA 2017).

In Mercer, the First District held that the "defendant's convictions for aggravated battery and manslaughter did not violate double jeopardy, even

though they involved a punch and a kick upon the same victim, in the same location, during the course of approximately one minute and were part of a single criminal episode." The district court found there was sufficient evidence of two distinct acts from which the jury could have convicted defendant of both offenses. The evidence was sufficient for the jury to find the defendant was a principal to aggravated battery, occurring when his co-conspirator punched the victim in the head, and the jury could have found from the evidence that the victim was alive when the defendant kicked him, and that the defendant's kick contributed to his death. Mercer, 219 So. 3d 936.

Like Drawdy and Mercer, Petitioner's convictions were based on a single criminal episode. Petitioner's shove of Sergeant Bird and instigation of the dog attack were upon the same victim, occurred at the same location, and occurred over the course of approximately one minute. However, like the two aforementioned cases, the convictions were based on two distinct acts. The two distinct acts were also alleged in the Information against Petitioner. (R. 17). See Lee v. State, 258 So. 3d 1297 (Fla. 2018). The two acts were not incidental to each other. Siccing the dog on the officer was not an integral or necessary part of pushing the officer, but a separate and

distinct act by itself. Indeed, the first act involved the use of Petitioner's hands, whereas to accomplish the second act Petitioner resorted to a weapon—the dog. And the facts reflect that he likely did so because his initial act of showing the officer failed to dissuade the officer from coming closer. In other words, when the shove failed to repel the officer, Petitioner formed a "successive impulse[]," Graham, 207 So. 3d at 139, seeking out another method to commit an unwanted touching against the officer. The jury could have reasonably concluded that those acts were undertaken with separate intents. Hence, Petitioner's convictions involve offenses "of a separate character and type," which are "distinct criminal acts" that "do not violate double jeopardy." see Drawdy, 136 So. 3d at 1214.

Petitioner argues that double jeopardy applies because the elements of Battery on a LEO are subsumed into the elements of Aggravated Battery on a LEO. (PIB. 19). Petitioner's argument is flawed because it only considers two elements of the analysis: whether the act or acts occurred during the same criminal episode and whether the two convictions survive the same elements test. Petitioner's argument fails to account for the fact that the prohibition against double jeopardy does not prohibit multiple convictions and punishments where a defendant commits two or more

distinct criminal acts. As previously noted, it is well-established that separate criminal acts within a single episode should result in a conviction for each criminal act.

The instant case can be easily distinguished from the cases cited by Petitioner. In Munoz v. State the court held that convictions for simple battery and aggravated battery violate the constitutional prohibition against double jeopardy because both convictions stemmed from a single criminal episode and the elements of simple battery are subsumed by the elements of aggravated battery. However, because the State conceded error and the court did not recite the underlying facts, it is not known if the underlying convictions constituted a single act or distinct acts. Munoz v. State, 212 So. 3d 1146 (Fla. 5th DCA 2017). Based on the concession, it is likely they stemmed from a single act, but no conclusion can be drawn. Similarly, the court in Arnold v. State held that an "examination of the record reveals that the simple battery and the aggravated battery each refer to the **same act**." Arnold v. State, 514 So. 2d 419, 421 (Fla. 2d DCA 1987)(emphasis added). In Rivera, the defendant grabbed the victim, stabbed him six times in quick succession, and placed a knife to his throat. Rivera v. State, 286 So. 3d 930, 931-32 (Fla. 5th DCA 2019). The court, without asking whether distinct acts

had occurred, simply asked whether the entirety of the attack occurred during "the same criminal transaction." Id. at 932-33. Finding that it did, the court applied the *Blockburger* analysis and determined that Rivera's convictions for aggravated battery and battery violated double jeopardy. Id. at 933. As explained above, that analysis was incomplete: the district court should also have inquired whether distinct acts occurred during that single criminal episode. Rivera thus lacks precedential value on how that inquiry would turn out here.

The First District cases cited by Petitioner also involve the *Blockburger* analysis without finding distinct acts. For example, in Green v. State the court rejected the argument that the two stab wounds to the victim constituted different acts. The court held that double jeopardy applied because "reclassification" between aggravated battery and aggravated battery in a detention facility, does not create a new offense but changes the degree of felony already charged. Green v. State, 84 So. 3d 356, 357 (Fla. 1st DCA 2012). Likewise in Hill v. State and Pruett v. State, the First District held that double jeopardy applied to aggravated battery on a person 65 or older and aggravated battery when applied to the same event. Hall v. State, 654 So. 2d 253 (Fla. 1st DCA 1995); Pruett v. State, 731 So. 2d 113 (Fla. 1st DCA

1999).

The First District's decision in the instant case is distinguishable because the First District applied the "distinct acts" test, not the "different elements" test. The First District held that there was sufficient evidence of two distinct acts from which the jury could find that Petitioner's convictions were based on distinct acts. Petitioner's case is very similar to the facts of the First District's decision in Mercer. In both cases, the defendants were convicted of a physical assault they performed personally, pushing the officer here and kicking the victim in Mercer. Each case also had a similar distinct act in the respective defendants acting as a "principal" for another assault. Ordering the dog to attack the officer in the instant case and agreeing to attack the victim before a co-defendant punched the victim in Mercer. The physical attacks in each case had different impulses from the encouragement for another to attack each victim.

This Court's decision in State v. Tuttle is also distinguishable from the instant case. In Tuttle, the State conceded that convictions for attempted home invasion robbery with a firearm and armed burglary violated double jeopardy. The State did so because the convictions were not for separate and distinct acts and would not pass a *Blockburger* different element

analysis. The burglary conviction required the State to prove Tuttle entered the dwelling with intent to commit a crime. The crime in the case was the attempted home invasion robbery. Additionally, the issue was not whether the convictions violated double jeopardy, but which of the two convictions the court should vacate. State v. Tuttle, 177 So.3d 1246 (Fla. 2015). Because the robbery was an integral or necessary part of the burglary, the two convictions were not for separate and distinct acts.

Petitioner further argues that the test for double jeopardy is not whether there was sufficient evidence of two distinct acts from which the jury could have convicted Appellant of both offenses, because juries are not instructed on double jeopardy law. (PIB. 33). Petitioner is partially correct in that the jury in this case was not tasked with a double jeopardy analysis but was asked to determine if Petitioner committed the acts as charged in the Information. As noted by Judge Bilbrey's concurring opinion, "the distinct acts were alleged in the information thereby avoiding any additional double jeopardy concern." Trappman, 325 So. 3d at 947. The jury was properly tasked with rendering a verdict on the two offenses as charged. Then, it becomes a legal question to determine whether the court must dismiss one of the charges because double jeopardy is implicated. When the convictions

are based on distinct acts, as here, there is no need to dismiss one of the charges because double jeopardy is not implicated.

Finally, Petitioner argues that, based on this Court's holding in Hayes v. State, this Court should find that the Petitioner's convictions violate double jeopardy because they occurred during the same criminal transaction and episode, because they were committed upon the same victim, in the same location, with the same criminal intent, and there was never a temporal break between the offenses. (PIB. 34-35). In support, Petitioner cites this Court's holding in Hayes, in part, but omits part of the holding. (PIB. 34). Hayes' convictions stemmed from an incident in which he and two others entered a residence and stole various items from the victim, including computers, cell phones, a beeper, a camera, and keys to the victim's van. After exiting the residence with these items, Hayes and the two others used the keys to steal the van, which was parked outside of the victim's residence. Hayes argued that his convictions for armed robbery and grand theft of a motor vehicle violated double jeopardy. Hayes v. State, 803 So. 2d 695, 697-98 (Fla. 2001).

The Hayes Court held that "in reaching a determination of the double jeopardy issue in a case involving a single victim's **property**, courts should

look to whether there was a separation of time, place, or circumstances between the initial armed robbery and the subsequent grand theft, as those factors are objective criteria utilized to determine whether there are distinct and independent criminal acts or whether there is one continuous criminal act with a single criminal intent." Hayes, 803 So. 2d at 704. (emphasis added). As the unabridged quote makes clear, Hayes applies to cases involving theft of property where the theft of the items was a single criminal act with a single criminal intent or impluse. It is important to contrast the holding in Hayes with this with this Court's holding in Drawdy. As in Hayes, Drawdy's convictions were based on the same criminal transaction and were committed upon the same victim, in the same location, and with no temporal break between the offenses. However, Drawdy's lewd touching was not an integral or necessary part of the sex act, but a distinct act of a separate character and type. Double jeopardy was not violated because the convictions were for distinct criminal acts. Hayes is an example of why this Court should instruct courts to back away from the "criminal episode" language and clarify that the *Blockburger* different element test is only implicated when convictions are based on the same criminal act or stem from a non-specific charging document. This Court should clarify that the test for

a distinct act is if each act is of a separate character and type with a different criminal intent and charged as individual acts on the criminal information. Here the Appellant's physical push of the officer and verbal command for the dog to attack were acts of a separate character and type and were charged separately on the information.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the decision of the First District Court of Appeal.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically via the Florida Courts E-Filling Portal on May 5, 2022 and was serviced the same day via the E-Filling Portal on Assistant Public Defender Maria Ines Suber, Esq., ines.suber@flpd2.com.

Respectfully submitted, served and certified,

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CERTIFICATE OF COMPLIANCE

I hereby certify that based on the "word count" feature in Microsoft Word the foregoing contains 3684 words, pursuant to Florida Rule of Appellate Procedure 9.045(e).

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