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IN THE SUPREME COURT OF FLORIDA

DAVID WILLIAM TRAPPMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

______________________________/

CASE NO. SC21-1479
DCA CASE 1D19-1883
LT NO. 2017-CF-2011

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, **David William Trappman,** was the Appellant and the Defendant below and he will be referenced in this Initial Brief as Petitioner or by his proper name. Respondent, **the State of Florida**, will be referred in this Initial Brief as Respondent or the state.

In this Initial Brief, the Record will be identified as "R," and the Trial Transcript as "T."

STATEMENT OF THE ISSUES

The issue on this appeal is whether Petitioner can be convicted of both Aggravated Battery on a Law Enforcement, and Battery on a Law Enforcement without violating double jeopardy principles since both offenses occurred during a single episode, upon the same victim, in the same location, and within seconds of each other, and Battery on a Law Enforcement is a degree lesser of Aggravated Battery of a Law Enforcement Officer, the statutory elements of which are subsumed by the greater offense. In the absence of a specific and clear legislative intent[1] that there be separate convictions and punishments for the offenses of Aggravated Battery on a Law Enforcement and Battery on a Law Enforcement Officer, both occurring during the same criminal episode and upon the same victim, double jeopardy principles require that an analyses be conducted as to whether the offenses fit within the exceptions

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[1] Compare the legislative intent as to sexual battery offenses and Florida Court cases holding that sexual battery cases are particularly susceptible to the distinct acts exception because the statutes "may be violated in multiple, alternative ways. . . ." **See**, **e.g.**, **State v. Meshell**, 2 So.3d 132 (Fla. 2009).

contained in Section 775.021, Florida Statutes, commonly referred as to the **Blockburger**[2] analysis.

This Court must answer the above question in the negative, since it is clear that the offense of Battery on a Law Enforcement is a degree lesser of the offense of Aggravated Battery on a Law Enforcement Office, the statutory elements of which are subsumed by the greater offense. Therefore, This Court should quash the decision of the First District Court of Appeal and remand with directions that Petitioner's conviction and sentence for Battery of Law Enforcement Officer be set aside, and that Petitioner be re-sentenced for the offense of Aggravated Battery since it is not clear that the trial court would have imposed the sentence it did on this greater offense knowing that a conviction and sentence for Battery on a Law Enforcement was barred by double jeopardy principles.

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[2] **Blockburger v. United States**, 284 U.S. 299 (1932).

STATEMENT OF THE CASE

An Information was filed on November 7, 2017, and it charged Petitioner with Aggravated Battery on a Law Enforcement, Battery on a Law Enforcement, and Resisting Arrest without Violence. (R,17,18)

A jury trial was held on September 17 and 27, 2018, and the jury convicted Petitioner as charged. (R,80,81; T, 168,169) Petitioner was adjudicated guilty, and he was sentenced to 10 years in prison with a minimum mandatory of 5 years for the Aggravated Battery on a Law Enforcement Officer; to 5 years in prison for the Battery on a Law Enforcement Officer; and, to time served in jail for the Resisting Arrest without Violence. (R, 102-112; 134) A Motion for Leave to File a Belated Appeal was filed on February 2, 2019, which was granted by the District Court of Appeal. (R,138; 142)

On appeal, Petitioner challenged the propriety of convicting him of both Aggravated Battery on a Law Enforcement (Sergeant Bird), and Battery on a Law Enforcement (Sergeant Bird), since both offenses occurred during the same short episode, at the same place and upon the same victim. The First District Court of Appeal affirmed the convictions and sentences ruling that jeopardy

principles did not apply because there was sufficient evidence introduced by the state from which the jury could find that he committed both of the offenses. **See**, **Trappman v. State**, 325 So.3d 944, 946 (Fla. 1st DCA 2021), rendered on February 10, 2021, motion for rehearing and rehearing in banc denied September 29,2021, but granting the request to certify a conflict to the Supreme Court that its decision conflicted with the district court's decision in **Olivard v. State**, 831 So.2d 823 (Fla. 4th DCA 2002).

STATEMENT OF THE FACTS

A jury trial was held on the charges of Aggravated Battery on a Law Enforcement Officer, Battery on a Law Enforcement Officer, and Resisting Arrest without Violence and the following is the summary of the evidence the state introduced to prove the charges.

Detective Christina Reaves worked for the Santa Rosa County Sheriff's Department as a detective with the Narcotics Unit. (T,39) On October 9, 2017, while on duty, she responded to a residence located at 4367 Woodville Road in Milton, Florida, to serve a felony warrant on Nickole Trappman, Petitioner's wife. (T,41) As Reaves approached the residence, she saw Petitioner and his wife standing in the back. Reaves approached Ms. Trappman; however, she ran inside of the residence. Reaves followed her while at the same time she yelled "Sheriff's Office, Stop," "Sheriff's Office, Stop." Ms. Trappman did not stop. (T,42)

Upon request, Reaves explained to Petitioner that she was there to serve a felony warrant on his wife. Petitioner demanded that she show him the warrant and stated that she could not go into his residence to get his wife. Reaves told Petitioner to stop

interfering because she could arrest him for obstructing. (T, 43; 51-52) Petitioner was very agitated and went to the front where Deputy Seth Smead and Sergeant Lance Bird were. (T,43) However, before he went to the front, he told Reaves "good luck going in the house, and I hope you don't get bitten by my dog." (T,44; 54)

Reaves was still at the back of the residence when she heard a commotion, the dogs were barking and howling and there was yelling back and forth. Reaves heard Petitioner scream and holler and heard Petitioner scream "dog up, dog up." Reaves yelled to Petitioner from the back of the house if "[he was] trying to sic the dogs on those officers." (R,45) A few moments later, Reaves heard two shots. Reaves went to the front of the residence to ensure the safety of the officers and everyone involved, and as she approached, she saw a female and two small children at the side of the house. Reaves told them to stand off to the side until she could figure out what was going on. (T,46) Immediately thereafter, Reaves heard Sergeant Bird and Deputy Smead yell and give commands to Petitioner to get to the ground. Reaves heard Petitioner yell and she went to the back to make sure nobody could run out of the back. (R,46) According to Reaves, Sergeant Bird sustained a dog bite. He

had a puncture wound, a laceration to the back of his upper thigh. (T,49)

During cross-examination, Reaves testified she was not present in the area when Petitioner stated "dog up, dog up"; and testified she had no knowledge of what the term meant nor did she know the effect that it had on the dog. (T,54)

John Seth Smead worked for the Santa Rosa Sheriff's Department. (T,58) Smead worked on October 9, 2017, and during his shift, and in full uniform, he went to the residence located at 4367 Woodville Road in Milton, Florida, to assist with the service of a warrant on Nickole Trappman. (T,59,60) Smead and Detective Reaves walked up the driveway and observed Nickole Trappman standing in the driveway. Petitioner and Zachary Cat were also in the driveway. (T,59; 68) Detective Reaves announced, "Sheriff's Office," and upon seeing them, Ms. Trappman took off and in a fast pace, beelined towards the back of the residence. (T,60) Smead went towards the front of the residence to secure it to make sure she did not exit through the front. Sergeant Lance Bird arrived, and he too proceeded toward the front of the residence. According to Smead, Petitioner was at the front of the residence, and he

walked inside for a brief moment. (T,61) Petitioner seemed pretty aggravated that they were at his home. (T,61) Petitioner yelled, cussed, and demanded to see the warrant. (T,61)

Smead and Sergeant Bird entered the residence through the front door. Inside there was Petitioner, another female and two small children. Inside of the residence there were also two pit bull dogs. (T,61,62) Smead described the dogs as medium to large build dogs, approximately three feet long and maybe two and a half foot tall, weighing approximately 60 pounds. (T, 62,63) The dogs scurried around them at the time, not really aggressive at all. (T,63) Smead and Bird ordered everyone to step outside while they continued searching for Ms. Trappman. They also ordered Petitioner to take the dogs out of the residence which he did. (T,63)

According to Smead, he and Sergeant Bird were about to search the residence for Ms. Trappman when Petitioner stepped back into the doorway of the residence with the dogs. Petitioner kept yelling and screaming at Sergeant Bird and the dogs were growling and barking. Detective Bird ordered Petitioner to get out of the house and when he did not, he pushed Petitioner towards the exit of the door. Petitioner jumped back, pushed Bird and yelled

"dog up, dog up." When Petitioner yelled "dog up, dog up," the dog attacked Sergeant Bird. (T,65,66) The dog latched on his leg and bit him on the upper part of his leg. (T, 66) Smead feared for Bird's safety. He pulled his firearm, got right over the dog and shot him twice. (T, 66,67)

Once the dog was incapacitated, Smead and Bird went outside and arrested Petitioner. Petitioner resisted. Petitioner pushed off Bird and jumped out into the yard. Bird took Petitioner to the ground. Petitioner continued to resist by pushing the ground and by not putting his hand behind his back. Smead grabbed one of Petitioner's arms and Bird handcuffed him. (T,67)

Lance Richard Bird worked for the Santa Rosa Sheriff's Office. (T,72) Bird responded to 4367 Woodville Road, Milton, Florida, to serve a felony warrant on Nickole Trappman. When he arrived, Deputy Smead had Zachary Cat handcuffed and he was walking him to his patrol car. Petitioner was in the front yard. (T,74) Petitioner was very agitated and heated, and he cussed and screamed. Bird advised that he had a warrant for the arrest of his wife, at which time; Petitioner went inside of the residence. (T,75) A couple of minutes later, Petitioner exited the home without the

wife and continued yelling and cussing and demanding to see the warrant. Bird told Petitioner that he will show him the warrant after she was in custody. (T,75)

It became evident that Petitioner was not going to give consent to enter the home, therefore, Bird went into the residence. The room that he first saw was small, probably ten by ten and it had a large double-size mattress inside. Inside there were another female, two small children, and two dogs that walked around between the officers. (T,76) Bird described the dogs as some type of pit-bull, roughly 40 to 50 pounds, about two feet tall. (T,76,77) According to Bird they ordered the female and children to get out, and ordered Petitioner to get the dogs which he did. Bird and Smead remained in the living room. (T,77) However, from the living room Bird observed Petitioner's interaction with the dogs outside. Bird testified Petitioner was about ten feet from the front door, he had ahold of the dogs by the skin of their neck, and Petitioner was literally banging their heads into each other. Petitioner hollered and screamed at the dogs getting them agitated. (T, 78)

As Bird turned to go to another room in the house, Petitioner reentered the home. Bird told Petitioner that he needed to stay out

in the yard; however, Petitioner continued to come into the room. Bird pushed Petitioner back and at that time, Petitioner pushed him. Bird grabbed Petitioner with both hands just to drive him out of the front door and into the yard. Petitioner hollered "dog up, dog up," and Bird felt the dog latch onto his leg. Deputy Smead shot the dog twice and Petitioner ran outside. (T, 79; 88)

According to Deputy Bird, the dog attacked him on his upper right thigh below his butt cheek on the left leg. (T, 79) Thirty seconds after the attack, Bird and Smead made contact with Petitioner. Bird wanted to arrest Petitioner for obstructing, however, Petitioner decided to resist. There was a short struggle outside in the front yard after which Petitioner was arrested and placed into a patrol car. (T, 80) Bird and Smead reentered the home and arrested Mrs. Trappman. (T, 80)

According to Bird, he sustained an injury as a result of the dog bite. (T,80) Exhibit 2 consisted of photographs which depicted the leg and the site where the dog bite on it. The photographs (3) were introduced into evidence and published to the jury. (T,81) Exhibit 5 consisted of photographs which depicted the scar (a dark section) which the dog bite left as of three days prior to trial. (T,83) The

photographs (2) were introduced into evidence and published to the jury. (T,84)

During cross-examination, Bird testified that he did not have any reason to believe that "up dog," was a command to attack, however, Bird only knew that as soon as Petitioner said it, the dog bit him. (T,88) Bird did not know if Petitioner still had control of the dog or if he let them go. All Bird knew was that once he grabbed Petitioner, the dog bit him. At the time, Bird did not know if the dog was loose or if Petitioner had a hand on the dog. (T,87,88) As a result of the bite, Bird did not miss any time from work, and testified that he did not suffer from any disability because of it. And the only disfigurement left out of the bite, was what was depicted in the photograph. (T, 89,90) On redirect, Bird, however, testified that on October 9, 2017, it appeared that the "dog up, dog up" was a command to the dog because the dog bit him immediately upon Petitioner's words. (T,92)

David Trappman took the stand on his own behalf. Petitioner testified he was 27 years of age and lived and was raised in the Milton, Florida area. (T,99,100) Petitioner testified that on October 9, 2017, he was home with his wife and some friends when

the officers arrived. Petitioner asked them about the reason for their presence and law enforcement told him that they had an active warrant for his wife. Petitioner told Reaves and Smead his wife was inside of the residence and asked if he could see the warrant because they were on private property. (T, 101) Reaves and Smead told Petitioner they did not have the warrant, however, a third officer, Sergeant Bird arriving soon had the warrant and could present it to him. (T, 101) Appellant came in contact with the third officer only upon his entry into the home. (T,102) Upon his arrival, Petitioner asked for a copy of the warrant, however, the officer did not show it to him. (T,102)

Petitioner became more agitated when the children that were at the home started to cry and the dogs started to bark. He did not want the officers to enter the home out of concern for the officers. Dogs were protective of their owners and homes, and when and if they heard children cry, they could become more aggressive. (T,103) That was the reason he alerted Detective Reaves that the dogs could bite if they were to enter the home. Petitioner did not mean the comment as a threat of any kind. (T,104)

As Sergeant Bird was approaching the home to make entry, Petitioner followed him. Bird, however, wanted Petitioner to stay outside, and once he learned that there were dogs inside, Bird requested that Petitioner also get the dogs and get them outside. Petitioner called the dogs. He hollered "bull dogs, come, bull dogs, come," but only his three-year-old female dog obeyed and came outside. The thirteen-month-old dog never made it outside. (T,104,105) Bird asked Petitioner to go inside and get the dog out. Petitioner went inside the home and found the dog "Rascal," in his dog bed in an adjacent room. (T,105)

Petitioner called for Rascal once again, but he did not obey. Therefore, Petitioner walked over and grabbed the dog by his scruff and attempted to pull him to no avail. Petitioner stated, "dog up, dog up," but the dog would not move. The dog was not listening to Petitioner. Petitioner addressed Sergeant Bird and questioned his procedure of breaking into the home and making children cry and scaring the dog, instead of showing him the warrant. Petitioner admitted he used foul language. In response, Sergeant Bird pushed Petitioner so hard that it made his face swell up. Petitioner responded by telling the Sergeant Bird "don't put your hand on m;"

and by shoving the officer back. Bird grabbed ahold of Petitioner, told him that he was going to get back out, and that is when the dog jumped and bit him. (T,106,107) Petitioner denied he sicced the dog on Sergeant Bird at any time. Petitioner's dog was only thirteen months old, and he was not trained to attack on command. (T,107)

Once the dog latched onto Sergeant Bird, the two fell on a bed that was in the room. Deputy Smead, who was some six to eight feet away, pulled his firearm and shot the dog twice, (T,107, 108) Petitioner froze up and was scared. Petitioner did not know what to do. Petitioner walked out of the house but before he did, he was pushed from behind down the steps in front of his house. Petitioner stumbled down the steps and fell to the ground. (T, 108) Both Bird and Smead were on top of him. Bird beat him on his side, back and head. And Smead handcuffed him. (T, 108) Petitioner was arrested. (T, 109)

During cross-examination, Petitioner reiterated that the main issue on October 9th was not that he did not want his wife arrested since she was released the day after arrest. The issue was that he wanted to insure all the paperwork was in order. (T,110) Petitioner

denied both of his dogs were outside at the same time and reiterated that only one of the dogs obeyed his command to come outside. Petitioner denied he screamed at the dogs or hit the dogs' heads together. (T,111) Petitioner never told his wife to hide from the police and reiterated Deputy Smead shot at his dog from six to eight feet away while the two children and the female were still inside of the home. (T,113)

The state recalled **Deputy Seth Smead and Sergeant Bird** on rebuttal. **Smead** testified he was familiar and had known Sergeant Bird approximately five to six years, and he had never heard Bird curse. (T,115,116) On October 9, 2017, Sergeant Bird did not curse at Petitioner, and testified that he shot the dog from a foot away. No children or people were present when he fired the gun. Petitioner was never polite. He yelled, and he cursed, the whole time he was there. (T, 117)

Sergeant Bird testified he had not cursed since he was in the fifth grade; and he did not curse at Petitioner on October 9, 2017. According to Bird, Smead shot at the dog from two feet away at the most. (T,120)

SUMMARY OF ARGUMENT

As testified during trial by Sergeant Lance Bird, the crimes of Battery on a Law Enforcement and Aggravated Battery on a Law Enforcement constituted a continuous criminal episode because they were committed against the same victim, in the same location, without intervening circumstances, and without any lapse in time, and with one continuous criminal intent. Moreover, the Battery on the Law Enforcement Officer was subsumed into the greater offense of Aggravated Battery on the Law Enforcement and therefore not subject to the Legislature's intent that there be multiple convictions and sentences for all offenses committed during one criminal episode. As a consequence, this Court must quash the decision of the First District Court of Appeal below and remand with directions that Petitioner's conviction and sentence for Battery on a Law Enforcement be set aside and the case remanded to the trial court for resentencing as to the Aggravated Battery on a Law Enforcement.

ARGUMENT

I. PETITIONER'S CONVICTIONS FOR AGGRAVATED BATTERY ON A LAW ENFORCEMENT OFFICER AND BATTERY ON A LAW ENFORCEMENT OFFICER VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The state charged Appellant with one count of Aggravated Battery on a Law Enforcement Officer and one count of Battery on a Law Enforcement Officer based upon a factual scenario where the Petitioner pushed and sicced his dog on Sergeant Lance Bird, the offenses occurring at the same location, within seconds of each other, and during an altercation with the police who were at the Petitioner's residence to serve a warrant on his wife. Because both offenses occurred during a continuous criminal episode, and because the offense of Battery on a Law Enforcement Officer is subsumed in the crime of Aggravated Battery on a Law Enforcement Officer, this court must quash the decision of the First District Court of Appeal below, and order that the Petitioner's conviction and sentence for Battery on a Law Enforcement be set aside. Moreover, because it is not clear that the trial court would have sentenced the Petitioner to the same sentence that it did for

Aggravated Battery on a Law Enforcement with the knowledge that the conviction and sentence for Battery on a Law Enforcement Officer was barred by double jeopardy principles, this Court must order that Petitioner be re-sentenced on that offense. The issue of a potential violation of double jeopardy is reviewed upon a de novo standard. **State v. Drawy,** 132 So.3d 1209 (Fla. 2014); **Capron v. State**, 948 So.2d 954,957 (Fla. 5th DCA 2007). Moreover, a double jeopardy violation constitutes fundamental error which can be raised for the first time on appeal. **Grant v. State**, 770 So.2d 655 (Fla. 2000); **Jones v. State**, 711 So.2d 633 (Fla. 1st DCA 1998); **Mathis v. State**, 106 So.3d 73 (Fla. 2nd DCA 2013); Pruett v. State, 731 So.2d 113 (Fla. 1st DCA 1999); **Rosado v. State**, 129 So.3d 1104, 2207 n.1 (Fla. 5th DCA 2013).

The double jeopardy clauses contained in the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution, prohibit the imposition of multiple punishment for the same criminal offense. **Roughton v. State**, 185 So.2d 1207, 1209 (Fla. 2016); **Hayes v. State**, 803 So.2d 605 (Fla. 2001); **Valdes v. State**, 3 So.3d 1067 (Fla. 2009). But the double jeopardy clauses do not prohibit multiple punishments for different

offenses arising out of the same criminal transaction or episode if the Legislature intended to authorize separate punishments. **Id**. (citing **Valdes v. State**, 3 So.3d 1057, 1069 (Fla. 2009); **McKinney v. State**, 24 So.3d 682, 683 (Fla. 5th DCA 2009) (citing **Hayes v. State**, 803 So.2d 695, 699 (Fla. 2001)).

Section 775.021(4) (b), Florida Statutes, is an expression of legislative intent that separate convictions and sentences be imposed for each criminal offense:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. **Exceptions to this rule of construction are:**
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. **Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.**

(e.s.) **See**, **e.g.**, **McAllister v. State**, 718 So.2d 917, 918 (Fla. 5th DCA 1998). Section 775.021(4) (b) is very specific, and it provides that there not be multiple convictions and sentences for offenses

which are lesser offenses, the statutory elements of which are subsumed by the greater offenses, when the offenses occurred with a single criminal episode or transaction. **That statutory exception to the legislative intent that there are multiple convictions and sentences for each criminal offense committed in the court of a criminal episode is applicable to the instant case, and prohibits that the Petitioner be convicted for both Aggravated Battery on a Law Enforcement and Battery on a Law Enforcement**.

Several Florida Courts have held that double jeopardy bars convictions for Aggravated Battery and Battery. For example, the issue in **Rivera v. State**, 286 So.3d 930 (Fla. 5th DCA 2019) was whether the prohibition against double jeopardy applied to Rivera's convictions for aggravated battery and battery. In **Rivera**, the evidence revealed that there had been an altercation between Rivera and Rojas wherein Rivera grabbed Rojas by the helmet and tried to pull him out of his car. Rojas exited his car and Rivera began striking Rojas, but Rojas was able to push him away. Rivera paused his attack only long enough to put his knife to Rojas' throat while threatening to put him to sleep. Rojas again pushed Rivera away and immediately afterwards, Rivera resumed striking Rojas. It

became clear that Rivera was holding a knife in his hand and that every time he punched Rojas, he also stabbed him. Rojas suffered six stab wounds. The jury found Rivera guilty of both aggravated battery and battery. In holding that convictions for both aggravated battery and battery violated double jeopardy, the appellate court held at 933:

> This Court has previously held that the elements of battery are subsumed within the elements of aggravated battery. . . . This comports with aggravated battery definition, which states "[a] person commits aggravated battery who, in committing battery . . . . causes great bodily harm . . . or . . . uses a deadly weapon." Section 784.045(1) (a), Fla. Stat... (emphasis added). Accordingly, because this was one criminal transaction, and because battery is subsumed within aggravated battery, Appellant's separate convictions violate double jeopardy.
>
> The appropriate remedy under these circumstances is to vacate the conviction and sentence as to the lesser offense, battery. . . . Accordingly, we reverse Appellant's conviction and sentence for battery, and remand to the trial court with instructions to enter an amended judgment finding Appellant guilty only of aggravated battery and sentencing him to fifteen years in the Department of Corrections with credit for jail time and for time served.

See also **Munoz v. State**, 212 So.3d 1146, 1147-48 (Fla. 5th DCA 2017)(convictions for aggravated battery and battery stemmed from

a single criminal episode violate the prohibition against double jeopardy because the elements of simple battery are subsumed by the elements of aggravated battery); **Rosado v. State**, 129 So.3d 1104 (Fla. 5th DCA 2013)(convictions for aggravated battery causing great bodily harm and two counts of misdemeanor battery arising out of same criminal episode violate the prohibition against double jeopardy); **Maxwell v. State**, 803 So.3d 815 (Fla. 5th DCA 2001)(finding that convictions for aggravated battery causing great bodily harm and aggravated battery with a deadly weapon violated double jeopardy because the beating and stabbing of the victim occurred at the same time).

In addition, in **Olivard v. State**, 831 So.2d 823 (Fla. 4th DCA 2002)[3], Olivard was charged with aggravated battery with a deadly weapon (Count I), and aggravated battery causing great bodily harm and permanent disfigurement (Count II). The jury found Olivard guilty of Count II as charged but found him guilty of simple battery, the lesser of the charged offense in Count I. The Court found

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[3] The First District Court acknowledged that its decision was contrary to the decision of the Fourth District Court of Appeal in **Olivard v. State**, 831 So.2d 823 (Fla.4th DCA 2002), and certified conflict to this Court.

double jeopardy prohibited convictions for simple battery and aggravated battery:

> Appellant was charged with two counts of aggravated battery: one for hitting Thanis with the bicycle pump and the other for biting off Thanis' ear. He was convicted of aggravated battery (causing great bodily harm and permanent disfigurement) for severing Thanis' ear but was found guilty of simple battery or hitting Thanis with the bicycle pump.
>
> * * *
>
> **Here, appellant committed a battery and an aggravated battery against the same victim, in the same location, within seconds of each offense. Appellant's actions were within the course of one continuous episode attacking Thanis. As such, only one conviction may stand.**

(e.s) (footnote and citations omitted). **See also**, **Russo v. State**, 804 So.2d 420, 422 [Fla. 4th DCA 2001) (holding that double jeopardy barred dual convictions for aggravated assault where the defendant threatened his neighbor with a broken beer bottle and then swung a shovel at him; **the incident involved only one victim, all of the conduct occurred at the same location, and there was no temporal break between each act**).

Similarly, in **Arnold v. State**, the 514So.2d 419 (Fla.2nd DCA 1087), Arnold was convicted of simple battery, aggravated battery,

attempted kidnapping, and attempted sexual battery. At trial, the facts partially revealed that the while returning to her car in a shopping area parking lot, the female victim reached down to pick up a receipt on the floor of her car. As she did that, she felt "something" touch her shoulder. She turned and saw Arnold, a male, holding an eight-inch knife. The defendant touched her side with the knife and told her he wanted her to drive him away to have sex with her. Subsequently, Arnold told the victim to unbutton her blouse, and when she complied, he touched her breasts. The defendant unsuccessfully tried to grab her keys. The defendant then pointed the knife at the victim's neck and told her that if she did not give him the keys, he would hurt her. When a car pulled close to the victim's car, the defendant took some money from the victim and ran. On appeal, the appellate court affirmed the convictions and judgments for aggravated battery, attempted kidnapping and attempted sexual battery, but reversed the conviction and sentence for simple battery finding that notwithstanding the separate acts, the convictions for simple battery and aggravated battery violated double jeopardy principles:

In determining whether separate punishments can

> be imposed, **Blockburger v. United States**, 284 U.S. 299, . . . (1932), mandates that courts examine the offenses to ascertain whether each offense requires proof of a fact that the other does not. **See**, [Section] 775.021(4), Fla. Stat. (1985), which represents a legislative codification of the **Blockburger** test. If each requires proof of fact that the other does not, the Court must find that the offenses are separate, and multiple punishment are presumed to be authorized In the absence of a contrary legislative intent or any reasonable basis for concluding that a contrary intent exists. (Citations omitted)
>
> Our examination of the record reveals that the simple battery and the aggravated battery each refer to the same act. The battery is a necessary lesser offense of the aggravated battery, and the constitutional protection against double jeopardy prohibits separate convictions and sentences. With the exception of the battery conviction, we find that the remaining offenses are separate acts and the convictions and sentences for those convictions should stand. . . .

Id., at 421.

Moreover, the issue of whether the offenses of aggravated battery and battery on the same victim during the same episode as presented in this appeal violated double jeopardy has been resolved by the First District Court of Appeal in **Green v. State**, 84 So.3d 356 (Fla. 1st DCA 2012). In **Green**, the facts revealed that the defendant attacked another detainee in the Duval County jail. The single encounter lasted only a few moments but it resulted in a

puncture wound and a cut or gash on the victim's torso. Green was charged with aggravated battery with a deadly weapon and aggravated battery with a deadly weapon upon another detainee. On the facts, the **First District Court of Appeal rejected the state's arguments "that the two stab wounds to the victim constituted separate offenses for each wound,**" and therefore justified the two convictions. ***Id***. at 357. The Court held that under the clear language of section 784.082, Florida Statutes, aggravated battery with a deadly weapon and aggravated battery with a deadly weapon by one detainee upon another were degree variants of the same offense and not separate offenses, quoting to Section 775.021(4) (b), Florida Statutes (statutes describing degrees of the same offense to be construed most favorably to accused). And that, a defendant could not be convicted twice for the same offense arising from the same set of circumstances. **Id**., at 357. **See also**, **Hall v. State**, 654 So.2d 253 (Fla. 1st DCA 1995), wherein the First District reversed convictions for aggravated battery and aggravated battery on a person 65 years of age or older which arose from the same facts:

> [W]e conclude that the record clearly reflect that the convictions for aggravated battery upon a person 65 years of age or older and aggravated battery arose from the same facts. Therefore, appellant may not be convicted of both.
>
> . . .
>
> In summary, we affirm the convictions for sexual battery, kidnapping and aggravated battery upon a person 65 years of age or older; we reverse the conviction and sentence for aggravated battery; and we reverse the sentence for kidnapping and remand for resentencing as to that offense.

Hall, at 253; **Cook v. State**, 813 So.2d 1010, 1101-02 (Fla. 1st DCA 2002) stating that Section 775.021(4)(b), Florida Statutes (1999) provides for separate conviction and sentence for each criminal offense committed in the course of one criminal episode or transaction, **unless** the offenses required identical elements of proof, the offenses are degrees of the same offense, or the offenses are lesser included offenses the elements of which are subsumed by the greater offense, citing to **Grubbs v. State**, 769 So.2d 503 (Fla. 5th DCA 2000), holding that, in the conviction and sentencing for criminal offenses committed in the course of a criminal episode, it is the intent of the legislature that there be a separate conviction and sentence for each criminal offense, unless one of the offenses is a

degree of the other, or necessarily included lesser offense subsumed in the other, and both offenses are identical:

> In the instant proceeding, Appellant was convicted for the identical offense, aggravated battery, on two separate Counts arising from the same criminal episode.

Id., at 1012; **Pruett v. State,** 731 So.2d 113 (Fla. 1st DCA 1999), where the jury convicted him of simple battery as the lesser include offense of felony murder and battery on a person 65 years of age or older. The two convictions were factually based on one and the same single factual event. The First District Court of Appeal reversed the conviction for simple battery holding that double jeopardy principles prohibited the conviction because both of the offenses, the simple battery and the battery on a person 65 years of age and older arose from the same facts and therefore the defendant could not be convicted of both.

In **State v. Tuttle,** 177 So.3d 1246 (Fla. 2015), this Court held that double jeopardy prohibits conviction for two crimes where all the elements of one crime are subsumed within the elements of the second crime. **Tuttle** arose from the home invasion of the residence of Stuebinger by two armed individuals. Stuebinger was ultimately shot and killed during the incident, and Tutle was

identified as one of the intruders. The state charged Tuttle with second-degree murder with a firearm, first-degree great bodily harm, and first-degree burglary while armed. The jury found Tuttle guilty of manslaughter with a firearm, attempted home invasion robbery with a firearm and armed burglary. Prior to sentencing the state informed the trial court that dual convictions for attempted home invasion robbery and armed burglary presented a double jeopardy concern, and on review by this Court the state did not contest that dual convictions for both charges would result in a double jeopardy violation. **Id.**, footnote 1. In deciding **Tuttle** and which conviction should be set aside, this Court explained double jeopardy as follows:

> A defendant is placed in double jeopardy where based upon the same conduct the defendant is convicted of two offenses, each of which does not require proof of a different element. **Blockburger v. United States**, 285 U.S. 299. . . (1932); see [section] 775.021(4), Fla. Stat. (2006)(codifying the **Blockburger** elements test where the Legislature does not clearly provide for separate offenses). The Legislature has stated its intent to convict and sentence for such offense defined as separate under the **Blockburger** test, with three exceptions: offenses requiring identical elements of proof, offenses which are degrees of the same offense as provided by statute, and lesser offenses which have elements wholly subsumed by the greater offense. [Section] 775.021(4) (b). When an appellate court determines that dual convictions are

> impermissible, the appellate court should reverse the lesser offense conviction and affirm the greater. **See State v. Barton**, 523 so.2d 152,153 (Fla. 1988) (stating that when "one of two convictions must fall, we hold that the conviction of the lesser crime should be set aside").

Citing to **Pizzo v. State** 945 So2d 1203, 1206 (Fla. 2006).

In this case, the acts occurred during the same criminal episode as described by **Hayes**, **supra,** and the battery was subsumed within the greater offense of aggravated battery. However, below the First District Court of Appeal relied on its opinions of **Mercer v. State**, 219 So.3d 936 (Fla. 1st DCA 2017) (two acts committed by different persons albeit with different criminal intent during the event), and **Partch v. State**, 43 So.3d 758 (Fla.1st DCA 2010) (reversing and finding double jeopardy prohibited convictions for sexual battery and battery on an incapacitated person because the court could not even find a separate act), and concluded that

> Because there was evidence from which the jury could find [Petitioner] guilty of aggravated battery based on the release and order for the dog attack and battery for the shove, the dual convictions do not violate double jeopardy. Accordingly, we affirm the judgment and sentence.

Id., at 946.

First, the test to determine whether double jeopardy bars the conviction and sentence for the particular offenses, it is NOT whether there was sufficient evidence from which the jury could find a person guilty of the offenses subject to the double jeopardy analysis, since the jury is never instructed on the law of double jeopardy to begin with. Rather, the double jeopardy challenges are legal in nature and must be analyzed and decided by the courts regardless of whether the jury could find sufficient evidence to convict of the two offenses. Petitioner argues the correct analysis by the courts must be first, determine whether the two offenses occurred during the same criminal episode as to have been offenses committed during one continuous criminal episode with one criminal intent; and second, determine if the offenses fall within the exceptions the Legislature enacted in Section 775.021(4)(b), Florida Statutes, i.e., whether one of the offenses is subsumed by the greater offense regardless of whether the offenses have different elements of proof or were distinct acts committed during the same criminal episode. Clearly, that was the intent of the Legislature when it enacted Section 775.021(4) (b), and created the exceptions

that it be multiple convictions and punishments if a person commits several criminal offenses during a single criminal episode.

Indeed, in **Hayes v. State**, 803 So.2d 695 (Fla. 2001) this Court established the standard to be followed to determine whether acts are distinct within the purview of double jeopardy. **Hayes** stated that first, the courts in reviewing and determining whether the acts in question occurred during the same criminal episode, the reviewing court must

> In reaching a determination of the double jeopardy issue in a case involving a single victim . . . courts should look to whether there was a separation of time, place, or circumstances between [the initial offense] and the subsequent [offense] as those factors are objective criteria utilized to determine whether there are distinct and independent criminal acts or whether there was one continuous criminal act with a single criminal intent. In making this determination of whether there is a separation of time, place, or circumstances given rise to distinct and independent acts, the courts should consider the location of the items taken, the lapse of time between takings, the number of owners of the items taken, and whether intervening events occurred between the takings.

Id., at 704.

Clearly, based upon **Hayes**, the acts in this case 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. Here, and as testified by State Witness Sergeant Lance Bird, while inside the Petitioner's home to serve an arrest warrant on his wife, Petitioner was asked to step outside by Sergeant Bird. When Petitioner did not step outside, Sergeant Bird pushed the Petitioner to see if he could put him outside. Petitioner reacted by immediately shoving Sergeant Bird, and Bird reacted by grabbing the Petitioner by his shirt, at which time Petitioner reacted by stating "dog up, dog up" and the dog bit the sergeant on the leg. (T,79,88) Thus, pursuant to Sergeant Bird's testimony there was never a different victim involved. There was never a different location involved. There were never any intervening acts involved. There was never a meaningful lapse of time between the acts of the parties and of Petitioner. Petitioner, therefore, insists the acts were a continuous criminal episode and the appellate below court erred when it found to the contrary, and it erred when it found that its appropriate job on appeal was to determine if the convictions could be justified because the jury found Petitioner guilty of both offenses.

Moreover, not only were the acts committed constituted a continuous criminal episode as demonstrated above, but pursuant to the exceptions contained in Section 775.021(4)(b)3., Florida Statutes, the lesser crime, the battery on a law enforcement, was subsumed in the greater offense, the aggravated battery of a law enforcement. The First District Court erred not only in finding that the acts were separate, but it erred when it failed to determine if the offenses did not violate double jeopardy because they fell within one of the exceptions provided by the Legislature when it enacted Section 775.021(4) (b) 3., Florida Statutes, because the battery on a law enforcement, the elements of which, became subsumed within the greater offense of aggravated battery on a law enforcement officer.

As a consequence, this Court must quash the decision below, and remand with directions that Petitioner's conviction and sentence for battery on law enforcement be set aside, and that he be ordered resentenced for the aggravated battery on a law enforcement officer.

CONCLUSION

Based upon the foregoing arguments and legal authorities, Petitioner respectfully requests that this Court quash the decision of the First District Court of Appeal, and remand with directions that Petitioner's conviction and sentence for Battery on a Law Enforcement be set aside, and the case remanded to the trial court for resentencing as to the Aggravated Battery on a Law Enforcement Officer.

CERTIFICATES

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on David L. W. Welch, Assistant Attorney General, at crimapptlh@myfloridalegal.com, on February 16, 2022.

Respectfully submitted,

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