

IN THE SUPREME COURT OF FLORIDA

DAVID WILLIAM TRAPPMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC21-1479
DCA NO. 1D19-1883

ON DISCRETIONARY REVIEW
OF THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL RESPONSE OF RESPONDENT

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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 Trappman, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PJB" will designate Petitioner's Amended Jurisdictional Brief. That symbol is followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF ISSUES

Whether Petitioner's convictions for aggravated battery and simple battery violate double jeopardy where one was predicated on the act of siccing a dog on a police officer while the other was predicated on the act of shoving the officer.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts as reasonably reflecting the record, subject to the supplementation and corrections contained in the State's argument below.

SUMMARY OF ARGUMENT

The operative facts, as contained within the "four comers" of the First District Court of Appeal (First DCA) decision reveals no express and direct conflict with any District Court of appeal or the Supreme Court on the same question of law. Although the First District certified conflict with the Second District, this Court should decline jurisdiction. In the Second District case, Olivard, the court examined the two convictions in question as stemming from the same criminal episode. The Second District vacated Olivard's lesser conviction after applying the *Blockburger* test.

In Trappman, the First District found that the evidence was sufficient to conclude Petitioner had been convicted based on two distinct acts withing the same criminal episode. The First District analyzed the facts under the Court's case law that has come out since Olivard was decided, including decisions from this Court clarifying that it is not enough for a court to consider whether two offenses were committed during the same criminal "episode"; courts must also consider whether those two offenses were the product of "distinct acts." The First District held that Petitioner's case did not violate double jeopardy before reaching the *Blockburger* test.

ARGUMENT

WHETHER PETITIONER HAS SHOWN AN APPROPRIATE BASIS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION? (RESTATED)

1. Standard of Review

The applicable standard of review for claims of direct and express conflict is *de novo* subject to the following criteria.

2. Jurisdictional Criteria

Petitioner cites Article V, § 3(b)(3) of the Florida Constitution as the grounds for this Court's jurisdiction. (PJB. 4). Article V, § 3(b)(3), Fla. Const. provides: "The supreme court may review any decision of a District Court of Appeal that... expressly construes a provision of the State or Federal Constitution ... or that expressly and directly conflicts with a decision of another District Court of appeal or of the supreme court on the same question of law." Though the First District certified a conflict, thereby giving this Court jurisdiction under Article V, § 3(b)(4) of the Florida Constitution, that jurisdiction is discretionary. The Court should deny review because, as explained below, there is no actual conflict that warrants the expenditure of this Court's resources.

The First DCA's decision in Trappman

In Trappman v. State, 325 So.3d 944 (Fla. 1st DCA 2021), the First District denied Petitioner's double jeopardy claim. Petitioner appealed his convictions for aggravated battery of a law enforcement officer, battery of a law enforcement officer, and resisting arrest. He argued that his conviction and sentencing on both battery charges violate double jeopardy.

The First District applied the three steps of the double jeopardy analysis: "(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.'" Id. (citing Mercer v. State, 219 So. 3d 936, 937-38 (Fla. 1st DCA 2017)). The District Court accepted Petitioner's argument that the convictions arose out of the same criminal episode. However, the First District stated that there was sufficient evidence of two distinct acts from which the jury could have convicted Petitioner of both offenses. Because there was sufficient evidence of two distinct acts, it was

not necessary to examine whether they would survive a same elements test under the *Blockburger* analysis.

The Second DCA's decision in Olivard

The Second District laid out the facts of Olivard v. State, 831 So. 2d 823 (Fla. 4th DCA 2002), as follows:

After a brief discussion with the victim, Lyonel Thanis, wherein Thanis criticized appellant for failing to give his roommate a ride home from work, appellant approached Thanis from behind with a bicycle pump and began to hit him on his right shoulder. Thanis stood up and appellant jumped at him, causing the two to fall on a nearby bed. The two struggled and appellant bit Thanis' ear off.

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 found guilty of simple battery for hitting Thanis with the bicycle pump.

Id. at 824.

The Second District used the *Blockburger* test because it considered Olivard's convictions for different offenses as arising from the "same criminal episode." Olivard, 831 So. 2d at 824. In determining whether the offenses were committed during the same episode, the Second District considered "1) whether separate victims [we]re involved; 2) whether the crimes occurred in separate locations; and 3) whether there has been a temporal break between

the incidents.” Id. The Second District held that Olivard committed a battery and an aggravated battery against the same victim, in the same location, within seconds of each offense. The court stated that “only one conviction may stand” because hitting the victim with the bicycle pump and biting the victim “were within the course of one continuous episode attacking [the victim].” Id. The Second District found that the dual convictions violated double jeopardy and vacated the conviction for the lesser battery offense. Id. It apparently did not analyze whether the hitting with the bicycle pump and biting constituted separate acts.

Why Trappman Does Not Conflict with Olivard

The First District's opinion in Trappman does not expressly and directly conflict with the Second District's decision in Olivard as cited by Petitioner and certified by the First District. A true conflict arises when the conflict between decisions is "express and direct" and "appear[s] within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord, Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition).

In Olivard, the Second District held that the separate convictions arose

from a single criminal episode and analyzed the facts under the *Blockburger* test. Since Olivard was decided, however, this Court has clarified 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.’” State v. Drawdy, 136 So. 3d 1209, 1213 (Fla. 2014) (citing State v. Paul, 934 So. 2d 1167, 1172 n. 3 (Fla. 2006)). In other words, Olivard failed to conduct the “distinct acts” analysis required by this Court’s subsequent decisions, and thus is not persuasive authority in light of those later developments. Based on this Court’s decision in Drawdy, it is likely that Olivard would have been decided differently if the Second District looked at distinct acts within one criminal episode as opposed to only a single criminal episode.

For substantially the same reasons, there is likewise no conflict with Rivera v. State, 286 So. 3d 930 (Fla. 5th DCA 2019). In that case, which was decided after Drawdy, the Fifth District analyzed only whether the stabbing and hitting occurred during the “same criminal transaction,” Id. at 932-33, not whether the stabbing and hitting were “distinct acts.” The district court therefore performed only part of the double jeopardy analysis and did not

address the “distinct acts” analysis at issue here.¹

It makes sense that a court must consider not only whether the offenses occurred in the same criminal transaction but also whether distinct acts were committed because, at least where a defendant commits different types of unwanted touching during a criminal episode—including where the defendant switches from using one weapon to another—the defendant has formed a new criminal intent sufficient to justify a new conviction for battery. A person commits battery when he or she “[a]ctually and intentionally touches or strikes another person against the will of the other,” § 784.03(1)(a)1., Fla. Stat., and that statutory language appears to contemplate the commission of a new battery with each new intentionally touching. Here, for example, the defendant began by shoving the officer, then formed a new intent to commit battery by siccing his dog on the officer. Whether that conduct evinced separate intents was a jury question, and there was ample evidence from which to deduce that the use of the dog was

¹ The other cases cited by Petitioner: Pizzo v. State, 945 So. 2d 1203 (Fla. 2003), Munoz v. State, 212 So. 3d 1146 (Fla. 5th DCA 2017), and Rosado v. State, 129 So. 3d 1104 (Fla. 5th DCA 2013), either examined different offenses not at issue here or were concessions of error by the State and did not discuss the controlling facts.

a separate crime.

Because there is no true conflict, this Court should decline to review the decision below.

CONCLUSION

Because the certified conflict in this case has already been resolved by this Court's decisions, the State respectfully requests that this Honorable Court decline to exercise jurisdiction.

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-Filing Portal on November 29, 2021 and was serviced the same day via the E-Filing 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 1680 words, pursuant to Florida Rule of Appellate Procedure 9.045(e).

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