

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64, 368

THE STATE OF FLORIDA,

Petitioner,

vs.

JULES BOIVIN,

Respondent.

FILED

OCT 19 1983

SID J. WHITE
CLERK OF SUPREME COURT
Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner was the prosecution at the trial court level and the appellee on appeal. Respondent was the defendant at the trial level and the appellant in the Third District Court of Appeal. Parties will be referred to in this brief as they appear before this Court. The symbol "A" followed by a number will constitute a page reference to the appendix being filed by Petitioner along with this brief. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent shot at a man and his son who went to Respondent's trailer to apologize for bumping into the trailer. (A. 1,2). The shot injured the son. Respondent stated that he had to shoot because "they were going to bury him .¹" (A. 2).

Following a jury trial as to charges stemming from the above-noted factual incidents, Respondent was found guilty and convicted of attempted murder, aggravated battery and possession of a firearm during the commission of a felony. (A. 1, 2). He was sentenced by the Honorable Bill G. Chappell,

¹
The victim had been discharged from military service with a 100% disability and a history of mental problems. (A. 2,4).

Circuit Judge, Monroe County, to serve fifteen-year concurrent sentences pursuant to the convictions. (A. 1).

Respondent appealed from the entry of the convictions and sentences to the District Court of Appeal of Florida, Third District. In an opinion filed on September 6, 1983, the majority of the Third District panel determined that under the circumstances of the case, the aggravated battery predicated upon the shooting with a rifle is a lesser included offense of the attempted murder, which was also based upon the shooting with a rifle; and that possession of a firearm during the commission of any felony also predicated upon the shooting with a rifle is a lesser included offense of the aggravated battery. The court went on to hold as follows:

. . . [W]e vacate the convictions and sentences for aggravated battery and for possession of a firearm during the commission of a felony. Bell v. State, No. 62,002 (Fla. June 9, 1983)[8 FLW 199]; State v. Gibson, No. 61,235 (Fla. February 17, 1983)[8 FLW 76]. But See Hawkins v. State, No. 61,936 (Fla. July 14, 1983)[8 FLW 245]. In all other respects the conviction and sentence for attempted murder are affirmed.

Affirmed as modified.

(A. 2).

Judge Nesbitt dissented from the majority opinion on the grounds that the district court was bound to follow this Court's latest pronouncement in Hawkins v. State, So.2d (Fla. 1983)[8 F.L.W. 245]. He noted that in Hawkins, supra,

this Court held that the defendant could not be separately sentenced for a lesser included offense, but allowed the conviction to remain intact. In accordance with that decision, Judge Nesbitt stated that he would affirm the convictions for the lesser included offenses of aggravated battery and possession of a firearm during the commission of a felony, and only vacate the sentences. (A. 3).

On July 15, 1983, Petitioner filed a Notice Invoking the Discretionary Jurisdiction of this Court. This brief is being filed pursuant to said Notice.

QUESTIONS PRESENTED

I

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN CONFLICT WITH THIS COURT'S DECISION IN HAWKINS V. STATE, ___ So.2d ___ (Fla. 1983) (CASE NO. 61,936; OPINION FILED JULY 14, 1983) [8 F.L.W. 245]?

II

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN CONFLICT WITH THIS COURT'S DECISION IN BORGES V. STATE, 415 So.2d 1265 (Fla. 1982) and STATE V. CARPENTER, 417 So.2d 986 (Fla. 1982)?

ARGUMENT

I

THE OPINION OF THE THIRD DISTRICT
COURT OF APPEAL IN THIS CASE IS IN
CONFLICT WITH THIS COURT'S DECISION
IN HAWKINS V. STATE, ___ So.2d ___
(Fla. 1983) (CASE NO. 61,936; OPINION
FILED JULY 14, 1983) [8 F.L.W. 245].

This Court is urged to accept jurisdiction in the instant cause pursuant to the provisions of Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure as the Third District's opinion expressly and directly conflicts with this Court's decision in Hawkins v. State, ___ So.2d___ (Fla. 1983) (Case No. 61,936; Opinion filed July 14, 1983) [8 F.L.W. 245]. In Hawkins, supra, the defendant was convicted of two counts of first-degree felony murder, one count of robbery and two counts of burglary. This Court vacated the sentence for robbery finding that the robbery was the underlying felony specified by the jury as justifying the conviction for the first-degree murder, yet upheld the robbery conviction.

In this case, Respondent was charged with attempted murder, aggravated battery and possession of a firearm. The majority held that the aggravated battery predicated upon the shooting with a rifle was a lesser included offense of the attempted murder and that possession of a firearm during the commission of any felony also predicated upon the

shooting with a rifle is a lesser included offense of the aggravated battery. (A. 2). The Court went on to vacate the convictions and sentences for aggravated battery and possession of a firearm during the commission of a felony. (A. 2). As Judge Nesbitt noted in his dissent, this holding is obviously contrary to this Court's holding in Hawkins v. State, supra. This Court is therefore urged to accept jurisdiction to resolve this conflict.

II

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CAUSE IS IN CONFLICT WITH THIS COURT'S DECISIONS IN BORGES V. STATE, 415 So.2d 1265 (Fla. 1982) AND STATE V. CARPENTER, 417 So.2d 986 (Fla. 1982).

In Borges v. State, 415 So.2d 1265 (Fla. 1982), this Court affirmed separate convictions and sentences imposed pursuant to convictions for burglary while armed with a dangerous weapon, possession of tools with intent to use them to commit burglary or trespass, possession of a firearm by a person convicted of a felony and carrying a concealed firearm. This Court rejected the defendant's argument that under the facts of his case, he was subjected to improper multiple convictions and sentences based upon the provision in §775.021(4), Florida Statutes which excludes separate sentences for lesser included offenses. This Court followed the test enumerated Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1962) that if each offense requires proof of an element that the other does not, the offenses are discrete and one is not included in the other and held that separate convictions and sentences were proper in light of the elements of the offenses involved.

In State v. Carpenter, 417 So.2d 986 (Fla. 1982), this Court in affirming separate convictions and sentences for battery upon a law enforcement officer and offering and doing

violence to the officer, noted that in applying the Blockburger test the Courts should look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts alleged in a particular information.

In the cause sub judice, it is clear that the court's determination that both aggravated battery and possession of a firearm during the commission of a felony were lesser included offenses of the attempted first-degree murder, was based upon an interpretation of the actual evidence presented at the trial and the facts alleged in the information. (A. 1-3). Thus, it is apparent that the Court's decision in the instant cause conflicts with the standards enumerated in this Court's decisions in Borges, supra, and Carpenter, supra.

CONCLUSION

Based upon the foregoing argument and authorities, Petitioner respectfully submits that this Court should accept jurisdiction due to conflict of decisions pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was served by mail upon BRUCE A. ROSENTHAL, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 17th day of October, 1983.

Calianne P. Lantz

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