

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

JUL 8 1987

CLERK, SUPREME COURT

By _____

CASE NO. 78,758
Deputy Clerk

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 STANLEY JAMES BARTON,)
)
 Respondent.)
 _____)

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and Facts as presented by the State in Petitioner's Brief on Jurisdiction filed in this case.

SUMMARY OF THE ARGUMENTS

POINT I

THERE IS NO CONFLICT BETWEEN BARTON V. STATE, 12 FLW 1065 (FLA. 5TH DCA APRIL 10, 1987) AND THE DECISIONS OF THIS COURT IN MILLS V. STATE, 476 SO.2D 172 (FLA. 1985), AND STATE V. BOIVIN, 487 SO.2D 2037 (FLA. 1986).

ARGUMENT

The Fifth District Court of Appeal decision in Barton v. State, 12 FLW 1065 (Fla. 5th DCA April 10, 1987), is not a "revolutionary" decision that will have "severe and far reaching ramifications on the entire criminal justice system", as the Petitioner argues. Neither Mills v. State, 476 So.2d 172 (Fla. 1985) nor State v. Boivin, 487 So.2d 1037 (Fla. 1986), hold that when one of two convictions is reversed, it must be the conviction for the lesser offense. In both Boivin and Mills it was the lower degree conviction which was vacated, but this Court did not hold that such a resolution is required.

In other cases involving inconsistent verdicts this Court has vacated the higher degree conviction, Mahaun v. State, 377 So.2d 1158 (Fla. 1979), Redondo v. State, 403 So.2d 954 (Fla. 1981).

POINT II

THE DECISION IN BARTON, SUPRA, IS NOT IN CONFLICT WITH COLEY V. STATE, 391 SO.2D 725 (FLA. 1ST DCA 1980); G.M. V. STATE, 410 SO.2D 659 (FLA. 3D DCA 1982), OR ROYAL V. STATE, 490 SO.2D 484 (FLA. 1986).

ARGUMENT

The argument made by the Petitioner is that the "doctrine of implied acquittal as announced in Barton" conflicts with case law and Florida Statutes, Sections 812.025 and 924.34 (1985). Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1981), held that Florida Statutes, Section 812.025 applied only to theft and dealing in stolen property, and does not deal with burglary or any other crime. The Fifth District Court of Appeal did not rely on Section 812.025 in reaching its decision in Barton, supra. That statute is a theft statute dealing with two specific crimes, neither of which is involved in the case at bar. Since Barton does not deal with the application of Section 812.025, it does not conflict with the Fifth District Court of Appeal decision in Coley.

G.M. v. State, 410 So.2d 659 (Fla. 3d DCA 1982), is a fourteen line opinion which only holds that Section 812.025 applies to juvenile delinquency proceedings. This holding can not be interpreted as conflicting with the opinion in Barton.

Petitioner argues that because Barton "does not review the evidence but ... looks only to the verdicts", Barton is in conflict with Royal v. State, 490 So.2d 44 (Fla. 1986). Royal

and Florida Statutes, Section 924.34 stand for the proposition that when evidence does not prove an offense which a defendant is found guilty of, but does prove a lesser offense, the appellate court shall reverse the judgment and direct a judgment for the lesser offense. Neither Royal nor the statute hold that conviction for the higher offense may be reversed only in sufficiency of the evidence cases.

POINT III

BARTON, SUPRA, DOES NOT CONFLICT WITH GOODWIN V. STATE, 26 SO.2D 898 (FLA. 1946), AND PITTS V. STATE, 425 SO.2D 542 (FLA. 1983).

ARGUMENT

As the District Court held in its opinion, the element of intent to kill, necessary for a conviction of attempted homicide, negates the implied element of aggravated battery of absence of intent to kill. Thus, the two verdicts were legally inconsistent. Goodwin v. State, 26 So.2d 898 (Fla. 1946), held that "Fundamentally, the law has never condemned a verdict for inconsistency". Since Goodwin, however, verdicts have been reversed for inconsistency several times, Mahaun v. State, 377 So.2d 1158 (Fla. 1979), Redondo v. State, 403 So.2d 954 (Fla. 1981), Wooton v. State, 404 So.2d 1072 (Fla. 3d DCA 1981), Gonzalez v. State, 449 So.2d 882 (Fla. 3d DCA 1984). Even Pitts v. State, 425 So.2d 542 (Fla. 1983), recognizes that a conviction may be reversed for inconsistency. The District Court's opinion in Barton does not conflict with Pitts. This Court held in Pitts that the verdicts were not inconsistent because the jury instructions made it clear that acquittal on aggravated battery did not preclude guilt of possession of a firearm in commission of a felony, thus an attempted aggravated battery was sufficient. Thus the jury did not acquit the defendant of the attempted felony. In this case, contrary to the Petitioner's assertion, the jury verdicts did indicate acquittal of an element of

aggravated battery. This element was, as the District Court pointed out, lack of intent to kill.

CONCLUSION

BASED UPON the argument made and authorities cited herein, Respondent asks this Honorable Court to decline to accept jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Stanley James Barton, Inmate No. A-879837, Box 848, Cross City Correctional Institute, Post Office Box 1500, Cross City, Florida, 32628, on this 7th day of July, 1987.

Kenneth Witts
KENNETH WITTS
ASSISTANT PUBLIC DEFENDER