OA 2-3-88

IN THE SUPREME COURT OF FLORIDA

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DEC 8 1987
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STATE OF FLORIDA,

Petitioner,

vs.

STANLEY JAMES BARTON,

Respondent.

CASE NO. 70,738

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented by the State in its Petitioner's Brief on the Merits.

SUMMARY OF THE ARGUMENT

Respondent argues that the Fifth District Court of Appeal was correct in ruling that one of two convictions, for attempted manslaughter and aggravated battery, must be reversed when the convictions are the result of a single act on the part of Respondent. This is true, whether one applies the intent analysis used by the District Court in its Barton opinion or this court's analysis in Carawan v. State, 12 FLW 445 (Fla. September 3, 1987). Respondent also argues that the Fifth District Court of Appeal properly reversed the higher-degree conviction in this case.

POINT

THE COURT OF APPEAL WAS CORRECT IN RULING THAT THE TWO CONVICTIONS IN THIS CASE WERE MUTUALLY EXCLUSIVE, AND REVERSING RESPONDENT'S CONVICTION FOR AGGRAVATED BATTERY.

ARGUMENT

In the Petitioner's Brief on the Merits two points are being argued. The first is that both of Respondent's convictions, for attempted manslaughter and aggravated battery should have been affirmed by the Fifth District Court of Appeal. The second argument is that the Court of Appeal reversed the wrong conviction.

Petitioner first argues that Barton v. State, 507 So.2d 638 (Fla. 5th DCA 1987), is not an opinion based on double jeopardy principles. The Court of Appeal seems to have recognized this in the Barton opinion by writing:

> "However, the instant case does not truly involve double jeopardy, but, rather, mutually exclusive convictions."

Respondent disagrees, however, with Petitioner's assertion that the issue in this case is sufficiency of the evidence. The issue is just what the Appeal Court wrote that it was, mutually exclusive convictions.

Petitioner argues that the Barton analysis is in error, based on the law concerning inconsistent verdicts and the theory of jury pardon. First, the situation in this case is different from that in McKee v. State, 450 So.2d 563 (Fla. 3d DCA 1984).

In McKee, the defendant argued that since he was found not guilty of attempted second-degree murder, he could not be found guilty of possession of a firearm during the commission of that felony. In this case is the opposite. Instead of having a conviction which is reliant on a crime which Respondent was acquitted of, there are two convictions which, logically and legally, are mutually exclusive. This is not a case in which Respondent sought to have his cake and eat it too at trial. Respondent argued throughout his trial that both of the charges this case is concerned with could not be allowed to stand. Respondent is not complaining after being found guilty of a lesser-included offense. The lesser in this case involved the same element of intent to kill as did the original charge. The Respondent here did not receive, as did the defendant in McKee, "the benefits of the jury considering and weighing the evidence against the defendant on each count ...". There can be no such benefit if, as here, there should never have been two counts in the first place.

The same basic reasoning applies to Petitioner's argument that the decision in Barton is undercut by the concept of jury pardon. It is true that this court recognized the jury pardon in State v. Abreau, 363 So.2d 1063 (Fla. 1978). Even if one concludes that the jury in this case exercised its pardon power by finding Respondent guilty of attempted manslaughter instead of attempted first-degree murder, Petitioner's reasoning does not hold up. The basis for the Barton decision was the difference in the intent elements between homicide and battery.

This difference exists between any homicide or attempted homicide charge and any battery charge. The fact that Respondent was found guilty of a lesser-attempted homicide crime than he was charged with, has no effect whatsoever on the District Court's rationale. The District Court's reasoning would be dispositive regardless of which homicide and which battery charge a defendant was convicted of.

Respondent now turns to the effect of this court's decision in Carawan v. State, 12 FLW 445 (Fla. September 3, 1987), on the case at bar. Significantly, Carawan was convicted of the same two charges as was Respondent, attempted manslaughter and aggravated battery. This court, basing its decision on statutory construction and the so called "rule of lenity", Florida Statutes, Section 775.02(1) (1985), held that since aggravated battery and attempted manslaughter are essentially the same evil, when the two charges arise from a single underlying act, the legislature could not have intended multiple punishments. While Carawan is more firmly based in legal principles than is the more logically based decision of the Court of Appeal, it is still controlling in this case. Respondent would argue that the reasoning of the District Court provides a perfectly valid basis for reversing one of Respondent's convictions. If this court disagrees, however, one of the convictions must nonetheless be reversed under this court's decision in Carawan. Petitioner argues that this court misapplied the "rule of lenity" in its Carawan opinion. Respondent merely asks this court to follow its own well-reasoned decision in Carawan.

The final argument made by Petitioner in its brief on the merits is that this case presents nothing more than a sufficiency of the evidence issue. Petitioner frames this issue as follows "Did one act of cutting the victim's throat constitute an aggravated battery or attempted manslaughter or both under the evidence" (Petitioner's Brief on the Merits, page 17). Respondent respectfully disagrees with this characterization of the question this appeal deals with. More properly, the issue as the District Court realized, was: Could one act of cutting the victim's throat result in convictions for both aggravated battery and attempted manslaughter under the law. This is not a question to be resolved by looking at the evidence. It is a question to be resolved in the way the District Court did in this case and this court did in *Carawan*, by looking at the law and applying logic to an interpretation of that law.

This being the case, Respondent does not feel it is incumbent upon him to argue with Petitioner's assertion that the facts support both convictions in this case. Respondent will state however, that a single act can not be explained by two contradictory intents. There is no merit to Petitioner's argument that stabbing someone in any part of the body is aggravated battery, while stabbing someone in the throat is both aggravated battery and attempted homicide. Because this case does not present a evidentiary issue, lack of such an objection at trial does nothing toward weakening or defeating this appeal.

Respondent finally comes to what may be the most difficult issue in this case, specifically, given that both

convictions can not stand, which one should be reversed. The District Court reversed the aggravated battery, which was the higher-degree convictions, on the basis of Allison v. Mayo, 29 So.2d 750 (Fla. 1947). Admittedly, the connection between Allison and the case at bar is not an obvious one. Allison was a general verdict case in which the defendant was found guilty of two "repugnant" crimes. This court held that the two convictions could not be sustained, and on the basis of arguments made by the petitioner, held that the sentence imposed could not be greater than that available for the lesser-crime, and ordered the petitioner released pursuant to habeas corpus. While Allison dealt with a general verdict, it has not been overruled or limited in the years since the decision was rendered. As noted by the Petitioner, Barton cites two other cases from this court in which a higher conviction was struck as a result of double jeopardy or inconsistent verdicts. There cases are Mahaun v. State, 377 So.2d 1158 (Fla. 1979), and Redondo v. State, 403 So.2d 954 (Fla. 1981). Petitioner argues that these cases do not apply to the case at bar, but that Pitts v. State, 452 So.2d 542 (Fla. 1983), does. Pitts is easily distinguished from this case. Pitts acknowledged that a conviction may be reversed on the basis of inconsistent verdicts. This court did not reverse one of the convictions in Pitts because the jury instructions in that case made it clear that an acquittal on an aggravated battery did not preclude a conviction for possession of a firearm in the commission of a felony. In instructing the jury on the firearm charge, the trial judge in the Pitts case made it clear that appellant

could be convicted of the firearm charge if he displayed the gun while attempting to commit an aggravated battery. Thus, while the jury found Pitts not guilty of aggravated battery, the guilty verdict was not inconsistent because the jury may have found that Pitts attempted to commit an aggravated battery.

The Pitts reasoning does not apply to this case. As the District Court pointed out the jury verdict in this case did indicate an acquittal because if appellant had the intent to kill he could not be guilty of aggravated battery. The battery elements of intent to harm or cause bodily injury are mutually exclusive of the attempted manslaughter element of intent to kill.

It is true that this court and other Florida courts in double jeopardy cases, have often reversed a lower degree conviction and affirmed a higher. No decision sets forth this practice as a hard and fast rule. In Carawan, this court left it to the trial judge to determine which conviction should be reversed. The Fifth District Court of Appeal in an as yet unreported decision, Blankenship v. State, (Fla. 5th DCA, Case No. 86-832, December 3, 1987), split three to three on whether to affirm the higher conviction or leave the decision to the trial court as in Carawan. The unusual aspect of Blankenship was that the appellant received a longer sentence on the lower-degree crime. The Blankenship opinion is helpful only as a source of case law on this issue.

Finally, on the issue of which conviction to reverse, Respondent will mention a factual matter. It must be born in

mind that Respondent is not conceding that the issue of whether a conviction should be reversed is an evidentiary one. Two trial witnesses heard Respondent say, on two occasions after stabbing the victim, that he intended to kill the victim. This lends some validity to the District Court's decision on which conviction to strike. Respondent asks this court to affirm the decision of the District Court, both in striking one conviction, and in striking the higher of the two.

CONCLUSION

BASED UPON the argument made and authority cited herein, Respondent asks this Honorable Court to affirm the decision of the Fifth District Court of Appeal 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 Rober Butterworth, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, in his basket at the Fifth District Court of Appeal; 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 December, 1987.

Kenneth Witts

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