

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2008

LEONARD K. BRACEY,

Appellant,

v.

Case No. 5D07-1010

STATE OF FLORIDA,

Appellee.

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Opinion filed July 11, 2008

Appeal from the Circuit Court
for Marion County,
David B. Eddy, Judge.

James S. Purdy, Public Defender, and
Allison A. Havens, Assistant Public
Defender, Daytona Beach, for Appellant.

Bill McCollum, Attorney General,
Tallahassee, and Pamela J. Koller,
Assistant Attorney General, Daytona
Beach, for Appellee.

ORFINGER, J.

In this Anders¹ appeal, appellate counsel was directed to file a supplemental brief addressing a double jeopardy issue. Having now received the supplemental briefs, we affirm in part and reverse in part.

¹ Anders v. California, 386 U.S. 738 (1967).

Leonard K. Bracey was convicted of burglary with a battery and simple battery and adjudicated guilty of both offenses. Our preliminary review of the case suggested that the simple battery was subsumed into the burglary with a battery offense. See Lyles v. State, 724 So. 2d 138 (Fla. 1st DCA 1998) (holding improper to convict defendant for both burglary with battery and simple battery where both offenses involve same battery). Convictions for both offenses, arising from the same incident, would violate Bracey's double jeopardy protection. See Mansfield v. State, 954 So. 2d 74, 77 (Fla. 4th DCA 2007). A double jeopardy violation is fundamental error, which can be raised for the first time on appeal. State v. Johnson, 483 So. 2d 420 (Fla. 1986).

The State properly concedes error, acknowledging that under the facts of this case, it was error to convict Bracey of both burglary with a battery and simple battery. See Bradley v. State, 540 So. 2d 185 (Fla. 5th DCA 1989). Accordingly, we affirm Bracey's conviction and sentence for burglary with a battery, but reverse the simple battery conviction. On remand, the trial court shall vacate that conviction.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

PALMER, C.J. and SAWAYA, J., concur.