DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

CALVIN EARL SUGGS, JR.,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D08-2913

[October 12, 2011]

ON MOTION FOR REHEARING EN BANC

PER CURIAM.

The motion for rehearing en banc is hereby denied.

STEVENSON and GERBER, JJ., concur.
WARNER, J., concurs specially.

WARNER, J., concurring specially.

I concur in the denial of the request for rehearing en banc by the appellant. He suggests that the majority decision in this case conflicts with *Cruz v. State*, 956 So. 2d 1279, 1282 n.4 (Fla. 4th DCA 2007), where in a footnote we said, quoting *State v. Mitchell*, 719 So. 2d 1245, 1248 (Fla. 1st DCA 1998):

> The *Grappin/Watts* test is drawn from two decisions, *Grappin v. State*, 450 So.2d 480 (Fla.1984), and *State v. Watts*, 462 So.2d 813 (Fla.1985), and stands
>
> > for the proposition that when a question arises regarding the unit of prosecution intended by the legislature in a particular criminal statute, use of the article 'a' will result in the conclusion that the legislature clearly intended that the commission of multiple proscribed acts in the course of a single episode be prosecuted as discrete offenses; whereas

> use of the article 'any' will result in the conclusion that the statute is ambiguous as to legislative intent and, as a result, in application of the rule of lenity to prohibit more than one application.

Cruz, however, is factually distinguishable and did not consider *Bautista v. State*, 863 So. 2d 1180 (Fla. 2003), upon which the majority relies.

I think the majority opinion conflicts with *Grappin* and *Bautista*. But it is not the purpose of en banc proceedings to resolve conflicts between our cases and cases from the supreme court. That is for the supreme court under its discretionary jurisdiction, should it determine that a true conflict exists. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv). This case, however, reveals how *Bautista* has muddied the waters of statutory interpretation on the unit of prosecution, after *Grappin* had developed a clear and understandable rule which both the courts and the legislature could follow.

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Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Okeechobee County; Sherwood Bauer, Jr., Judge; L.T. Case No. 04-367CF.

Calvin Earl Suggs, Jr., Clermont, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee, and Daniel P. Hyndman, Assistant Attorney General, West Palm Beach, for appellee.