IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS-

WILLIE F. VAUSE,

RESPONDENT.

CASE NO. 63,258

1st DCA No. AB-460

PETITIONER'S JURISDICTIONAL BRIEF

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PETITIONER'S JURISDICTIONAL BRIEF

PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and appellee below in Vause v. State, ___ So.2d ___ (Fla.1st DCA 1982), 7 F.L.W. 2595, and the petitioner here, will be referred to as "the State." Willie F. Vause, the criminal defendant and appellant below and the respondent here, will be referred to as "Vause."

Pursuant to Fla.R.App.P. 9.120(d), a conformed copy of the decision of the First District over which review is sought is included as an appendix to this brief.

STATMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the jurisdictional question may be summarized as follows:

Vause was convicted in the trial court of third degree murder, shooting into an occupied vehicle, and using a firearm in the commission of a felony. He received separate sentences on all three counts. On appeal, the First District, on December 8, 1982, affirmed Vause's convictions on each count. However, the First District reversed Vause's sentence for shooting into an occupied vehicle on the basis that this crime was "an element" of his conviction of third degree murder, and reversed Vause's sentence for using a firearm in the commission of a felony on the basis that this crime was a "necessarily included" offense of shooting into an occupied vehicle. The State moved for rehearing, arguing that the reversal of these sentences was contrary to recent decisions of this Court, but said motion was denied on January 12, 1983. On January 24, the First District granted the State's motion for stay of mandate pending the outcome of the instant proceeding. Notice to invoke this Court's discretionary jurisdiction was timely filed on February 11.

The State accepts the sequence of events as related in the decision of the First District in Vause v. State, supra.

STATEMENT OF JURISDICTION

The discretionary jurisdiction of this Court is invoked under Article V, Section 3(b)(3) of the Florida Constitution, and Fla.R.App.P. 9.030(a)(2)(A)(iv), on the basis that the decision below expressly and directly conflicts with a decision of this Court on the same question of law.

ISSUES PRESENTED

ISSUE I

THE DISTRICT COURT'S DECISION THAT A SEPARATE SENTENCE FOR VAUSE'S CONVICTION FOR SHOOTING INTO AN OCCUPIED VEHICLE COULD NOT LIE BECAUSE SAID CRIME WAS "AN ELEMENT" OF HIS CONVICTION FOR THIRD DEGREE MURDER IS BASED UPON AN INTERPRETATION OF STATE V. HEGSTROM, 401 So.2d 1343 (FLA. 1981) WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN STATE V. CARPENTER, 417 So.2d 986 (FLA.1982) ON THE SAME QUESTION OF LAW.

ISSUE II

THE DISTRICT COURT'S DECISION THAT A SEPARATE SENTENCE FOR USING A FIREARM IN THE COMMISSION OF A FELONY COULD NOT LIE BECAUSE SAID CRIME WAS A "NECESSARILY INCLUDED" OFFENSE OF HIS CONVICTION FOR SHOOTING INTO AN OCCUPIED VEHICLE IS BASED UPON AN INTERPRETATION OF STATE V. HEGSTROM, 401 So.2d 1343 (FLA.1981) WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN STATE V. CARPENTER, 417 So.2d 986 (FLA.1982) ON THE SAME QUESTION OF LAW.

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ARGUMENT

As noted, the court below affirmed Vause's conviction of shooting into an occupied vehicle in violation of §790.19, Fla. Stat. (1979)[1], but reversed his sentence for this crime on the basis that said crime was "an element" of his conviction of third degree murder in violation of §782.04(4), Fla.Stat. (1979)[2], citing to State v. Hegstrom, 401 So.2d 1343 (Fla.1981) and its interpre-

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1 Section 790.19 provides: Whoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public or private building, occupied or unoccupied, or public or private bus or any train, locomotive, railway car, caboose, cable railway car, street railway car, monorail car, or vehicle of any kind which is being used or occupied by any person, or any boat, vessel, ship or barge lying in or plying the waters of this state, or aircraft flying through the airspace of this state shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2 Section 782.04(4) provides: The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery,

tation of §775.021(4), Fla.Stat. (1979)[3]. The State v. Hegstrom holding was twofold. First, relying upon Blockberger v. United States, 284 U.S. 299 (1932), this Court held that the constitutional protection against double jeopardy did not prohibit the entry of separate convictions and sentences for separate criminal offenses committed during the course of a single transaction if each offense required proof of an element which the other offense did not. Second, this Court held that §775.021(4) did not prohibit the entry of separate convictions and sentences for separate criminal offenses committed during the course of a single transaction unless, by the plain language of the statute, one offense was a "lesser included offense" of the other. In reversing Vause's sentence for shooting into an occupied vehicle because said crime was "an element" of his conviction for third degree murder, the decision below seemingly relied only upon the second half of the State v. Hegstrom holding. Although the State is cognizant of the admonition in the Committee Notes to Fla.R.App.P. 9.120(d) that in a jurisdictional brief "[i]t is not appropriate to argue the merits of

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burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3 Section 775.021(4) provides: Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue", the State feels it is necessary for the purpose of illustrating conflict to point out that the second half of the State v. Hegstrom holding simply should not have been applied in the decision below insofar as shooting into an occupied vehicle cannot under any circumstances be a lesser included offense of third degree murder. Both crimes constitute second degree felonies, and shooting into an occupied vehicle is not listed as either a "Category 1" or a "Category 2" lesser included offense of third degree murder in the Schedule of Lesser Included Offenses appended to the Florida Standard Jury Instructions in Criminal Cases (1981), p. 259. The decision below thus effectively construes §775.021(4) to proscribe dual sentences for separate criminal offenses committed in the course of a single transaction not only where one offense is a lesser included offense of the other, but where, under the circumstances of an individual case, one offense forms an element of another offense of the same magnitude. That such a result conflicts not only with this Court's subsequent decision of State v. Carpenter, 417 So.2d 986 (Fla.1982), as well as with the first half of the State v. Hegstrom holding itself, is obvious. In Borges v. State, 415 So.2d 1265 (Fla.1982), this Court affirmed the petitioner's convictions of and sentences for armed burglary, possession of burglary tools, possession of a firearm by a convicted felon, and carrying a concealed firearm, finding that such a disposition was proper under §775.021(4) and was not barred by obsolete "single transaction" principles, by double jeopardy

principles, or by the fact that two of the sentences were for crimes which constituted lesser included offenses of the two other crimes under the facts of the individual case. The Court indicated that only if proof of a "lesser" offense would under all circumstances be required to obtain a conviction for a greater offense would a separate sentence for the lesser offense be barred. In State v. Carperter, the court extended this rule to bar separate sentences for two crimes of the same magnitude only if proof of one crime could not under all circumstances be had without proving the other crime as well. Insofar as in the instant case proof of a third degree murder can be had without proving a shooting into an occupied vehicle and vice versa[4], the decision below expressly and directly conflicts with this Court's decision of State v. Carpenter on the same question of law. This Court, in the exercise of its discretion, should therefore grant certiorari review of the decision below.

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4 For example, one may commit a third degree murder by killing someone in the course of committing a drug trafficking felony in violation of Chapter 893, Fla.Stat., rather than by shooting into an occupied vehicle; and one may shoot into an occupied vehicle, and miss, and thus not commit a third degree murder.

ISSUE II

THE DISTRICT COURT'S DECISION THAT A SEPARATE SENTENCE FOR USING A FIREARM IN THE COMMISSION OF A FELONY COULD NOT LIE BECAUSE SAID CRIME WAS A "NECESSARILY INCLUDED" OFFENSE OF HIS CONVICTION FOR SHOOTING INTO AN OCCUPIED VEHICLE IS BASED UPON AN INTERPRETATION OF STATE V. HEGSTROM, 401 So.2d 1343 (FLA.1981) WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN STATE V. CARPENTER, 417 So.2d 986 (FLA.1982) ON THE SAME QUESTION OF LAW.

ARGUMENT

As noted, the court below affirmed Vause's conviction of using a firearm in the commission of a felony in violation of §790.07(2), Fla.Stat. (1979)[5], but reversed his sentence for this crime on the basis that said crime was a "necessarily included" offense of shooting into an occupied vehicle in violation of §790.19, citing to State v. Hegstrom and §775.021(4), Fla.Stat. Using a firearm in the commission of a felony is, like shooting into an occupied vehicle, a second degree felony. Insofar as it is statutorily possible to use a firearm in the commission of a felony without violating §790.19 and vice versa[6], the decision

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5 Section 790.07(2) provides: Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084.

6 For example, one may use a firearm while committing a kidnapping in violation of Chapter 787, Fla.Stat., rather than while shooting violating §790.19, and one may violate §790.19 by throwing a stone into an occupied vehicle, and thus not use a firearm in the commission of a felony.

below, for reasons already stated, expressly and directly conflicts with this Court's decision of State v. Carpenter on the same question of law. On this basis, too, the Court should grant certiorari review of the decision below.

CONCLUSION

WHEREFORE, the State requests that this Court exercise its conflict certiorari jurisdiction and review the indicated sentencing dispositions in the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been forwarded to Mr. Philip J. Padovano, Post Office Box 873, Tallahassee, FL 32302, via U. S. Mail, this 16th day of February 1983.

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Assistant Attorney General