

FILED

JUN 22 1983

J. WHITE
SUPREME COURT
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 63,720

JAMES RAY ROTENBERRY,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
 Petitioner, :
v. : CASE NO. 63,720
JAMES RAY ROTENBERRY, :
 Respondent. :
_____ :

RESPONDENT'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court, and the appellant in the First District Court of Appeal. Petitioner was the prosecution and the appellee respectfully. The parties will be referred to as they appear before this Court.

Petitioner's Brief on Jurisdiction will be referred to as "PB" followed by the appropriate page number in parenthesis. References to petitioner's appendix will be by the symbol "A."

II STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's recitation of the case and facts with the additional clarification below.

The First District Court of Appeal affirmed appellant's convictions for trafficking, sale and possession of cocaine, but vacated the sentences on the sale and possession offenses in reliance on Bell v. State, 411 So.2d 319 (Fla. 5th DCA 1982) (A 5). In the motion for rehearing, motion for clarification, and/or motion to stay mandate, petitioner specifically requested a rehearing or stay of mandate pending disposition of Bell v. State by this Court (A 6-7). The decision in Bell v. State, ___ So.2d ___ (Fla. Case No. 62,002, opinion filed June 9, 1983) (8 FLW 199), was issued subsequent to the filing of petitioner's brief on jurisdiction.

III ARGUMENT

ISSUE PRESENTED

WHETHER THE DISTRICT COURT'S OPINION IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH STATE v. GIBSON, ___ So.2d ___ (Fla., Case No. 61,325, opinion filed February 17, 1983) (8 FLW 76) AND CARPENTER v. STATE, 417 So.2d 986 (Fla. 1982).

Respondent concedes that this Court has jurisdiction to review the decision of the District Court of Appeal, First District, pursuant to Article V, Section III(b)(3), Florida Constitution. Respondent submits that the affirmance of his convictions for sale and possession of cocaine, lesser included offenses of trafficking in cocaine, is in direct conflict with this Court's decision in Borges v. State, 415 So.2d 1265 (Fla. 1982) and Bell v. State, ___ So.2d ___ (Fla. Case No. 62,002, opinion filed June 9, 1983) (8 FLW 199).

Petitioner's brief on jurisdiction was filed prior to the decision in Bell v. State, supra, but petitioner candidly admits in his brief that the issue presented in this case is identical to that in Bell (PB 6). In Bell, this Court held that for double jeopardy purposes, lesser included offenses are tantamount to the greater offense charged if the constituent essential elements of such lesser offenses are included within the elements of such greater offense. Blockburger v. United States, 284 U.S. 299 (1932). Sale and possession of a controlled substance are necessarily lesser included offenses of trafficking, and the multiple conviction for all three offenses is barred by the double jeopardy clause. The holding of Bell v. State

is dispositive of the instant cause.

The district court below correctly held that the offenses of possession of cocaine, Section 893.13(1)(e), Florida Statutes (1981), and sale of cocaine, Section 893.13(1)(a), are lesser included offenses to the charge of trafficking in cocaine, Section 893.135(1)(b), and vacated respondent's sentences for the two lesser included offenses. Under the holding of Bell v. State, supra, respondent's convictions for both the sale and possession offenses should have been reversed. Respondent therefore concedes that this Court has jurisdiction to review the decision of the district court below and requests this Court to summarily remand the case to the district court for an order in accordance with this Court's recent opinion in Bell v. State, supra.

IV CONCLUSION

Respondent respectfully requests this Court accept jurisdiction of the case and summarily remand the case to the District Court of Appeal for entry of an order in accordance with this Court's decision in Bell v. State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Richard Patterson, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy mailed to James Ray Rotenberry, #083886, Post Office Box 699, Sneads, Florida, 32460, this 22nd day of June, 1983.

Paula S. Saunders
PAULA S. SAUNDERS
Assistant Public Defender