

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

-vs-

CASE NO. 63,720

JAMES RAY ROTENBERRY,

Respondent.

FILED

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PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

James Ray Rotenberry, Respondent, was the defendant in the Circuit Court in and for Escambia County, Florida, and the appellant in the District Court of Appeal, First District. The State of Florida, Petitioner, was the prosecution and the appellee, respectively. The parties will be referred to as they appear before this Court.

The following symbol will be used in this brief followed by the appropriate page number(s) in parentheses:

"A" -- Appendix

STATEMENT OF THE CASE AND FACTS

Respondent James Ray Rotenberry was tried by a jury and convicted of trafficking, sale and possession of cocaine. Respondent was separately sentenced for the three offenses. On appeal, the convictions of Respondent were affirmed, however, the district court vacated the sentences imposed on the sale of cocaine and possession of cocaine convictions (A 1-5). The State filed a Motion for Rehearing, Motion for Clarification and/or Motion to Stay Mandate on March 30, 1983 [a copy of said motion is included with this brief as (A 6-8)]. Said motion was denied on April 21, 1983 (A 9). Notice to invoke the Court's discretionary review was filed on May 23, 1983.

Petitioner accepts the sequence of events as related in the opinion of the First District Court of Appeal. See (A 1-5).

ISSUE PRESENTED

THE DISTRICT COURT'S OPINION IN THE
PRESENT CASE EXPRESSLY AND DIRECTLY
CONFLICTS WITH STATE V. GIBSON, So.2d
(FLA.S.CT. CASE NO. 61,325, OPINION
FILED FEBRUARY 17, 1983) [8 F.L.W. 76]
AND CARPENTER V. STATE, 417 So.2d 986
(FLA. 1982).

A R G U M E N T

The trial court in the present case sentenced Respondent separately upon conviction for the offenses of trafficking, sale and possession of cocaine. The First District Court of Appeal reversed the sentences for the sale and possession convictions, holding that:

[T]he offenses of possession of cocaine in violation of Section 893.13(1)(e) and the sale of cocaine under Section 893.13(1)(a) are lesser included offenses to the charge of trafficking in cocaine in violation of Section 893.135(1)(b). Consequently, pursuant to Section 775.021(4), Rotenberry should not have been sentenced separately and the sentences for the two lesser included offense should be vacated. Only the sentence for the more serious offense--trafficking--can stand. See Bell v. State, 411 So.2d 319 (Fla. 5th DCA 1982).

Accordingly, the sentences for sale and possession of cocaine are vacated. We affirm the conviction and the sentence for trafficking in cocaine.

(A 4-5) (footnote omitted).

The opinion in the instant case is in express and

direct conflict with State v. Gibson, ___ So.2d ___ (Fla.S.Ct. Case No. 61,325, opinion filed February 17, 1983) [8 F.L.W. 76] and Carpenter v. State, 417 So.2d 986 (Fla. 1982). This Court in State v. Gibson, supra, stated:

[T]o determine whether there may be two sentences imposed or only one, the test "is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. at 304.

8 F.L.W. at 77. In Carpenter v. State, supra, this Court held that:

Blockburger requires that courts examine the offenses to ascertain whether each offense requires proof of a fact which the other does not. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.

In applying the *Blockburger* test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts as alleged in a particular information. . . .

417 So.2d at 988 (emphasis added). See also Borges v. State, 415 So.2d 1265 (Fla. 1982); State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Whalen v. United States, 445 U.S. 684 (1980); and Albernaz v. United States, 450 U.S. 333 (1981) [multiple punishments may be imposed if the Blockburger test is met].

In Borges v. State, supra, this Court recognized that

two offenses are separate if one offense requires proof of an element that the other does not. This must be resolved by looking at the statute itself--not the proof adduced at trial. The court went on to state that the power of definition for a crime resides wholly with the legislature. The district court sub judice incorrectly applied § 775.021(4) because the statutory elements were not considered in determining whether the sale and possession were lesser included offenses of the trafficking.

To sustain a conviction for trafficking in cocaine, although the State must demonstrate that the defendant sold, manufactured, delivered, brought into Florida, or possessed cocaine, the State must also prove that the quantity of cocaine involved was 28 grams or more. There is no minimum amount required to sustain a conviction for sale or possession. To sustain a conviction for sale of cocaine, the State need not prove possession nor sale of a specific minimum amount (or trafficking). Likewise, to sustain a conviction for possession of cocaine, the State is not required to prove sale nor possession of a specific minimum amount (or trafficking). Since each offense that Respondent was convicted of contains an element not required to be proved in the others, none of the offenses were lesser-included offenses. Upon conviction for violation of the three statutes (§ 893.135(b)(1), § 893.13(1)(a),

and § 893.13(1)(e)), Respondent was properly sentenced for each offense.

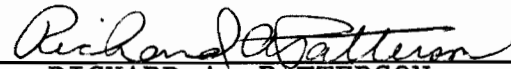
Moreover, the identical issue presented in this case is currently before this Court in Bell v. State, 411 So.2d 319 (Fla. 5th DCA 1982), review granted, Fla.S.Ct. Case No. 62,002 [October 1, 1982, F.L.W., p.i]. Petitioner would urge this Court to withhold ruling in the present case pending the resolution of Bell v. State, supra.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, Petitioner respectfully requests that this Court accept jurisdiction of the case and allow the issue presented herein to be determined on the merits.

Respectfully submitted:

JIM SMITH
Attorney General

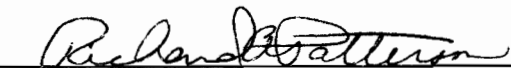

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to PAULA S. SAUNDERS, Assistant Public Defender, Second Judicial Circuit, Counsel for Respondent, by hand this 2d day of June, 1983.


RICHARD A. PATTERSON
Assistant Attorney General

OF COUNSEL.