W 00A.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 63,720

JAMES RAY ROTENBERRY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

RICHARD A. PATTERSON
ASSISTANT ATTORNEY GENERAL

THE CAPITOL, 1502
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR PETITIONER

TOPICAL INDEX

AUTHORITIES CITED

Cases

Statutes

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 63,720

JAMES RAY ROTENBERRY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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 1-3). 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 4-6)]. Said motion was denied on April 21, 1983. Notice to invoke the Court's discretionary review was filed on May 23, 1983. Briefs on jurisdiction were subsequently filed and on October 25, 1983, this Court accepted jurisdiction of this case.

Petitioner accepts the sequence of events as related in the opinion of the First District Court of Appeal. See (A 1-3).

ISSUE PRESENTED

THE FIRST DISTRICT ERRED IN VACATING APPELLANT'S SENTENCES FOR SALE AND POSSESSION OF COCAINE.

ARGUMENT

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 (Rotenberry v. State, 429 So.2d 378 (Fla. 1st DCA 1983)) 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)(3) 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.

429 So.2d at 380 (A 3) (footnote ommitted).

Petitioner sought to invoke the discretionary review of this Court alleging direct and express conflict between the instant decision and the cases of State v. Gibson, ___ So.2d___ (Fla.S.Ct. Case No. 61,325, Opinion filed February 17, 1983)

[8 F.L.W. 76], rehearing pending; 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).

The recent enactment into law of an amended Section 775.021(4), Florida Statute [1], renders it unnecessary to revisit all of the recent Florida Supreme Court cases addressing the issue of when may a criminal defendant who has been charged and convicted for committing multiple criminal violations in the course of a criminal transaction receive separate sentences for each conviction. See, e.g., State v. Hegstrom, 401

[1] Effective June 22, 1983, §775.021(4) reads:

So.2d 1343 (Fla. 1981); Borges v. State, 415 So.2d 1265 (Fla. 1982); State v. Cantrell, 417 So.2d 260 (Fla. 1982); State v. Carpenter, supra; State v. Gibson, supra; Smith v. State, 430 So.2d 448 (Fla. 1983); Bell v. State, ___So.2d___ (Fla. S.Ct. Case No. 62,002, Opinion filed June 9, 1983) [8 F.L.W. 199], rehearing denied October 11, 1983; and State v. Getz, 435 So.2d 789 (Fla. 1983). Here, it need be noted only that the more recent and hence controlling aforecited cases collectively establish in principle, although some unfortunately misapply in practice, that neither obsolete "single transaction" principles, nor double jeopardy principles, nor the unamended §775.021(4)[2] prevent a criminal defendant from receiving separate sentences upon conviction for commission of multiple criminal violations in the course of a criminal transaction

---

775.021 Rules of construction.--
(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

2

The unamended §775.021(4) reads:

775.021 Rules of construction.--
(4) 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.

unless it is statutorily impossible to violate one statute without violating one or more of the others. Whether it would have been impossible for the defendant to have committed one offense without having committed one or more of the others, as the offenses were charged, is irrelevant. Whether it would have been impossible for the defendant to have committed one offense without having committed one or more of the others, under the proof adduced at trial, is also irrelevant. All the Court need ask is whether it is statutorily impossible to violate one statute without violating one or more of the others. See particularly Borges v. State, State v. Cantrell, State v. Carpenter, and State v. Getz.

In the instant case, it is statutorily possible to "traffick in cocaine" in violation of §893.135(1)(b)1., Fla. Stat., without committing a possession or sale. A conviction for trafficking can be sustained if one aids and abets the manufacture, bringing into the state, or delivery (without compensation) of the substance, without proof of actual or constructive possession, although proof of knowledge would be required. Further, there is no minimum amount required to sustain a conviction for sale or possession. Thus, neither sale nor possession are necessary (category one) lesser-included offenses of trafficking. Sale and possession should be listed as category two lesser-included offenses of trafficking.

It is also statutorily possible to sustain a conviction for sale of cocaine without proving possession or trafficking, and to sustain a conviction for possession of cocaine without proving sale or trafficking. The First District's conclusion

that sale and possession are necessary lesser-included offenses of trafficking is erroneous since each offense that Respondent was convicted of contains an element not required to be proven in the others. Upon conviction for violations of the three statutes (Section 893.135(1)(b) 1., 893.13(1)(a), and 893.13 (1)(e)), Respondent was properly sentenced for each offense.

Petitioner realizes that Bell v. State, supra, is inapposite. Petitioner would submit that the test utilized in Bell was incorrect. This Court looked beyond the statutory elements to the proof adduced at trial in determining the propriety of the separate convictions for trafficking, sale and possession.

Even assuming that Respondent could not be separately sentenced upon conviction for trafficking, sale and possession, Petitioner submits that the sentence for either sale or possession, in addition to trafficking, is proper.

In sum, the First District erred in holding that Respondent could not receive separate sentences upon his convictions for trafficking in cocaine, sale of cocaine, and possession of cocaine, since it is statutorily possible to commit each of these offenses without committing either of the others. This Court must therefore quash this disposition with directions that the separate sentences imposed by the trial court be reinstated.

CONCLUSION

WHEREFORE, Petitioner submits that the indicated sentencing disposition of the First District must be quashed with directions that the separate sentences imposed by the trial court be reinstated.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

RICHARD A. PATTERSON
Assistant Attorney General

The Capitol, 1502
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to PAULA S. SAUNDERS, Post Office Box 671, Tallahassee, Florida 32302 and JAMES RAY ROTENBERRY, #083886, Post Office Box 699, Sneads, Florida 32460, this 4th day of November, 1983.

RICHARD A. PATTERSON

OF COUNSEL