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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 64,629

WILLIE WATTS,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent, WILLIE WATTS, was the defendant in the trial court, and the appellant in the District Court of Appeal, First District. Petitioner, the State of Florida, was the prosecuting authority and appellee in the court below.

References to petitioner's brief on the merits will be by use of the symbol "PB", followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts as being a reasonably accurate portrayal of what occurred below. However, respondent makes the following addition.

The evidence presented at trial indicated that respondent was found simultaneously in possession of the two prison-made knives.

III QUESTION PRESENTED

WHETHER A PRISONER IN SIMULTANEOUS POSSESSION OF TWO WEAPONS MAY BE CONVICTED AND CONCURRENTLY SENTENCED FOR TWO SEPARATE OFFENSES AS DEFINED IN SECTION 944.47(1)(c), FLORIDA STATUTES. [RESTATED BY RESPONDENT]

IV ARGUMENT

A PRISONER IN SIMULTANEOUS POSSESSION OF TWO WEAPONS MAY NOT BE CONVICTED AND CONCURRENTLY SENTENCED FOR TWO SEPARATE OFFENSES AS DEFINED IN SECTION 944.47(1)(c), FLORIDA STATUTES.

Petitioner correctly notes the issue herein as framed by the First District in Watts v. State, 440 So.2d 505, 507 (Fla. 1st DCA 1983) [PB-3]. However, petitioner argues that the district court's "chronological spatial relationship" approach is nothing more than an attempt to resurrect the repudiated and abrogated single transaction rule (PB-3). As petitioner's theory goes, the proper question is whether the legislature meant to treat the simultaneous unlawful possession of two or more of a particular object as separate crimes (PB-3). For the reasons that follow, respondent contends that, regardless of whether the issue is as framed by the First District or as framed by petitioner, the issue is merely one of statutory interpretation.

> Our present task is to determine whether this single statute makes one offense or two out of the defendant's simultaneous possession, shown by coterminous proof, of two contraband knives. The appropriate question is not whether the legislature may constitutionally require the imposition of two judgments, but whether the legislature has done so. [emphasis added].

Watts, 440 So.2d at 506.

The statute under which respondent was charged reads:

> 944.47 Introduction, removal or possession of certain articles unlawful; penalty.—
>
> * * *

> (c) It is unlawful for any inmate of any state correctional institution or any person while upon the grounds of any state correctional institution to be in actual or constructive possession of any article or thing declared by this section to be contraband, except as authorized by the officer in charge of such correctional institution. [emphasis added].

Section 944.47(1)(c), Florida Statutes (1981). The following articles are declared to be contraband for the purposes of this section:

> 1. Any written or recorded communication or any currency or coin given or transmitted, or intended to be given or transmitted, to any inmate of any state correctional institution.
> 2. Any article of food or clothing given or transmitted, or intended to be given or transmitted, to any inmate of any state correctional institution.
> 3. Any intoxicating beverage or beverage which causes or may cause an intoxicating effect.
> 4. Any narcotic, hypnotic, or excitative drug or any drug of whatever kind or nature including, but not limited to, a nasal inhalator of any variety, a sleeping pill, a barbiturate of any variety, and a controlled substance as defined in s. 893.02(3).
> 5. Any firearm or weapon of any kind or any explosive substance. [emphasis added]

Section 944.47(1)(a)1-5, Florida Statutes (1981). As written, the unlawful simultaneous possession of two or more weapons during the same time and space is not subject to separate prosecution (and punishment) under this statute as to each weapon so possessed. Undoubtedly, the legislature did not intend to allow for separate prosecutions for the possession of two or more weapons since it did not clearly provide such in the statute. If the Florida legislature had desired to

create a separate offense on the basis of each firearm or weapon possessed, this could have been easily written into the statute.

Given the lack of facial intent indicating that the circumstances in question permit multiple convictions, Section 775.021(1), Florida Statutes (1981), clearly requires that such ambiguity be resolved in respondent's favor:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Furthermore, this principle was very succinctly set forth by this Court in Ex parte Amos, 93 Fla. 5, 112 So. 289 (Fla. 1927):

> The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms.

This rule was reiterated in State v. Wershow, 343 So.2d 605 (Fla. 1977), and in Earnest v. State, 351 So.2d 957 (Fla. 1977). Therefore, where the Florida Legislature does not establish the allowable unit of prosecution with clarity, the ambiguity must be resolved in the accused's favor.

There have been many cases in the federal and state courts addressing the issue of the allowable unit of prosecution

in the context of a criminal statute. In Bell v. United States, 349 U.S. 81 (1955), the Supreme Court tangled with provisions of the Mann Act making it illegal to transport "any woman or girl" interstate for illicit purposes. [Emphasis added]. There, the petitioner had been convicted on two counts, each based on the transportation of a different woman across state lines in the same vehicle during the same trip for immoral purposes. The Court reversed the holding below which imposed consecutive terms of imprisonment for two violations. Deeming the relevant provisions of the Act ambiguous with respect to Congress' intent regarding the permissible unit of prosecution, and applying the rule of lenity the Court held:

> [I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses....

Id. at 84. See also Ladner v. United States, 358 U.S. 169 (1958) (the single discharge of a shotgun, even though directed at and wounding two officers, constituted only a single violation of the statute).

In the United States Courts of Appeals it is well-established that the simultaneous, undifferentiated possession of multiple firearms constitutes only one offense under 18 U.S.C. App. §1202(a)(1).[1] In United States v. Kinsley, 518

[1] 18 U.S.C. App. §1202(a)(1) provides in relevant part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony....

* * *

F.2d 665 (8th Cir. 1975), the Eighth Circuit undertook a thorough analysis of Section 1202(a). Applying the rule of lenity, the court held that Section 1202(a) was ambiguous because it "defines the object of the offense as 'any firearm'", rather than as "a firearm". Id. at 668. As the court reasoned:

> "...[A]ny" may be said to fully encompass (i.e., not necessarily exclude any part of) plural activity, and thus fails to unambiguously define the unit of prosecution in singular terms.

Id. at 667.

The Kinsley court then examined the legislative history of Section 1202(a) and concluded that: "[t]he allowable unit of prosecution under the statute is simply not addressed" in the legislative history. Id. at 669. The court also examined the overall statutory scheme in search of clarification of the ambiguity. It acknowledged that the relatively short maximum term of imprisonment under Section 1202(a) — two years — might indicate "a congressional scheme providing for successively more severe punishment as the number of weapons possessed increases". Id. at 670. However, the Eighth Circuit refused to infer from the length of the prison term alone that each firearm, simultaneously possessed, constitutes a separate unit of prosecution. Therefore, finding that the statutory language

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1(cont'd)

> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

contained an ambiguity which neither the legislative history nor the overall statutory scheme resolved, the court resolved the ambiguity in favor of defendant Kinsley and held that the simultaneous possession of two or more firearms constitutes a single offense under Section 1202(a).

Every circuit that has addressed the question of whether the simultaneous possession of multiple firearms constitutes but a single offense under Section 1202(a) has answered that it does. See United States v. Marino, 682 F.2d 449 (3rd Cir. 1982) (language of statute, defining as a criminal offense the receipt, possession, or transportation in commerce by a previously convicted felon of "any firearm", does not allow the government to treat each of several firearms simultaneously possessed as a separate unit of prosecution); United States v. Wiga, 662 F.2d 1325 (9th Cir. 1981) (only one offense is charged under terms of §1202(a)(1) regardless of the number of firearms involved, absent a showing that the firearms were stored or acquired at different times and places); United States v. Bullock, 615 F.2d 1082 (5th Cir. 1980) (Section 1202(a)(1) allows the government to treat each of several firearms not simultaneously received or possessed as separate units of prosecution; United States v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976) (only one offense is charged under the terms of Section 1202(a)(1) regardless of the number of firearms involved, absent a showing that the firearms were stored or acquired at different times or places); United States v. Calhoun,

510 F.2d 861 (7th Cir. 1975) (absent a showing that two firearms were stored or acquired at different times or places, there is only one offense under Section 1202(a), not two). These decisions established the proposition that Congress did not intend to make the firearms themselves the allowable units of prosecution, unless they were received at different times or stored in different places.

Moreover, a similar statute, 18 U.S.C. §922, has been interpreted the same way as 18 U.S.C. App. §1202(a)(1). See United States v. Powers, 572 F.2d 146 (8th Cir. 1978) (defendant could not be convicted on three counts for simultaneous receipt of three firearms transported in interstate commerce under Section 922, which provides that it shall be unlawful for a convicted felon to receive "any" firearm); accord, United States v. Oliver, 683 F.2d 224 (7th Cir. 1982); United States v. Hodges, 628 F.2d 350 (5th Cir. 1980); United States v. Mason, 611 So.2d 49 (4th Cir. 1979). However, 26 U.S.C. §5861(d) is drawn in terms of "a firearm" and suffers from no ambiguity. See Sanders v. United States, 441 F.2d 412 (10th Cir. 1971)(use of article "a" in Section 5861(d) unambiguously made each firearm a unit of prosecution); accord, United States v. Alverson, 666 F.2d 341 (9th Cir. 1982).

This Court has discussed the issue of the allowable unit of prosecution in the various criminal statutes of the State of Florida. In Hearn v. State, 55 So.2d 559 (Fla. 1951),

in addressing the theft statute, this Court endorsed the common law majority rule that only one larceny is committed where several articles are stolen from the same place, at the same time, under the same circumstances, and with the same intent. The defendants in Hearn had simultaneously stolen nine cows and two calves belonging to separate owners. They were tried and convicted twice for the larceny of the animals: The first time for larceny of a cow belonging to one owner, and the second time for larceny of the eight cows and two calves belonging to the other owner. This Court reversed the second conviction on double jeopardy grounds. Cf. Hall v. State, 66 So.2d 863 (Fla. 1953) (separate convictions affirmed where the taking of cow on the same day involved the invasion of separate pastures even though the same motor truck was used); Brown v. State, 430 So.2d 446 (Fla. 1983) (although money belonged to a single owner, a conviction of two counts of robbery was proper where taking was from separate cash registers and was taken by force, violence, assault or putting in fear from two separate employees and events were separated in time).

Most recently, in Grappin v. State, __So.2d__ (Fla.S.Ct. Case No. 63,450, opinion filed May 10, 1984) [9 FLW 177], this Court discussed the issue of the allowable unit of prosecution under the 1979 theft statute. There, the defendant was charged in a five-count information with five thefts by

stealing five firearms during the same transaction. The state appealed an order dismissing the information, which was reversed by the Second District. That court distinguished Hearn v. State, supra, because it antedated the enactment of the theft statute. Rather, the court's decision was based on the article which prefaced the respective item of property in Section 812.014(2)(b)-(7), Florida Statutes (1979).[2]

This Court agreed with the District Court and approved its decision.

> We find that the use of the article "a" in reference to "a firearm" in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution. The construction which this Court and the district court place on this statute is consistent with federal court decisions construing similar federal statutes. Federal courts have held that the term "any firearm" is ambiguous with respect to the unit of prosecution and that several firearms taken at the same time must be treated as a single offense with multiple convictions and punishments being precluded. See United States v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976), cert.denied, 431 U.S. 965 (1977); United

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[2] 812.014 Theft.-
(1) ....
(2)(a)
(b) It is grand theft of the second degree and a felony of the third degree, punishable as provided in ss.775.082, 775.083, and 775.084, if the property stolen is:
1. Valued at $100 or more, but less than $20,000.
2. A will, codicil, or other testamentary instrument.
3. A firearm.
4. A motor vehicle.
5. Any member of the genus Box (cattle) or the genus Equus (horse), or any hybrid of the specified genera.
6. Any fire extinguisher.
7. Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit.

> States v. Kinsley, 518 F.2d 665 (8th Cir. 1975). On the other hand, the phrase "to receive or possess a firearm" has been held to express a legislative intent to allow separate prosecutions for each firearm. In United States v. Alverson, 666 F.2d 341, 347 (9th Cir. 1982), the court stated:
>
> > Use of the article "a" stands in marked contrast to other language in other weapons statutes that have been interpreted to preclude prosecution for each object of the offense. Compare United States v. Brown, 623 F.2d at 58 (use of "any") with Sanders v. United States, 441 F.2d at 414-15 (use of "a").

9 FLW at 978. Thus, multiple thefts of firearms which occur in a single episode are to be considered separate crimes under the theft statute.

Applying the rationale of Grappin v. State, supra, and the federal cases cited therein to the instant facts, it is unquestionable that respondent could not be legally prosecuted and punished for simultaneous possession of two homemade knives. The record clearly reveals that respondent removed two homemade knives from a pair of gloves inside his cell at Union Correctional Institution. The possession of these knives occurred at the same time and place and under the same circumstances. Both knives were taken from appellant and given to Officer E. Adams.

A common sense reading of Section 944.47(1)(c), Florida Statutes, demonstrates that the legislature did not intend for the simultaneous unlawful possession of more than one weapon to be subject to a separate judgment and sentence as to

each weapon taken. Section 944.47(1)(c) prefaces the item of property by the article any: "...any article or thing declared by this section to be contraband". Further, the items of contraband listed in the statute are prefaced by any: "[a]ny firearm or weapon of any kind...". The legislature's use of the article any is not clear indication of its intent to subject a defendant to prosecution and punishment for simultaneous possession of weapons. "Any" may be said to fully encompass plural activity, and thus fails to unambiguously define the unit of prosecution in singular terms. United States v. Kinsley, supra. As in Kinsley, the legislative history of Section 944.47(1)(c) does not provide any clarification of the ambiguity of the statutory language. Nor, considering the overall statutory scheme, can it be inferred from the length of the prison term alone - five years - that each weapon, simultaneously possessed, constitutes a separate unit of prosecution. Since criminal legislation must provide fair warning and since the legislature and not the courts should define criminal activity, this issue must be resolved in favor of respondent. United States v. Bass, 404 U.S. 336 (1971).

Rather than rely on the legislature's choice of "a" or "any", the First District chose to follow the Fifth District's "chronological and spatial relationships" approach in Castleberry v. State, 402 So.2d 1231 (Fla. 5th DCA 1981), in determining whether a multifaceted offense is a single

prosecution unit. Under this approach, a multifaceted offense is a single prosecution unit if simultaneous in time and space, or a multiple prosecution unit if not simultaneous. The District Court's chronological and spatial relationships approach is not an attempt to resurrect the single transaction rule. The court expressly noted:

> Nor is the question how many sentences may be imposed upon two lawful judgments in consequence of the Florida Legislature having rescinded, save for lesser included offenses, the single transaction rule. That judicial rule previously allowed sentencing for only the most serious of adjudicated offenses committed in a single transaction. Section 775.021 (4), Florida Statutes (1981), has now abrogated the single transaction rule, and requires separate sentences upon properly adjudicated offenses within "one criminal transaction or episode" if the judgments are based on "two or more criminal statutes". [citations and footnote omitted]

Watts, 440 So.2d at 506. Further, the court readily acknowledged that utilizing this chronological and spatial relationships approach did not simplify the question of allowable units of prosecution. Id. at 511. Thus, the court concluded that distinguishing single from multiple units of prosecution is a matter for the legislative, not for courts. Then, applying the rules of lenity and statutory construction of criminal statutes, the court correctly held that respondent Watts was subject to a single prosecution.

Respondent submits, that based upon the above discussion

and analysis, whether the "chronological and spatial relationships approach "is utilized, or the a/any test of Grappin v. State, supra, he could not be legally prosecuted and punished for simultaneous possession of two homemade knives. It is elementary that if a judge's order, judgment or decree is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason, or an erroneous ground, the order, judgment or decree will be affirmed. Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963). Thus, even if this Court rejects the chronological and spatial relationships approach, the district court's order reversing respondent's judgment on one count of the possession must be affirmed.

V CONCLUSION

WHEREFORE, based upon the foregoing argument, reasoning and citation of authority, respondent respectfully requests that this Honorable Court affirm the decision of the First District Court of Appeal, which reversed respondent's adjudication and sentence of possession of contraband - Count II - of the information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished by mail to Mr. Gary L. Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Petitioner, and a copy has been mailed to respondent, Mr. Willie Watts, #071508, Post Office Box 747, Starke, Florida, 32091, this 18th day of September, 1984.

Charlene V. Edwards

CHARLENE V. EDWARDS