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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 64,629

WILLIE WATTS,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Willie Watts, Respondent, was the defendant in the Circuit Court in and for Union 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:

"R" -- Record on Appeal

STATEMENT OF THE CASE AND FACTS

The facts are not disputed. Respondent was charged by information in two separate counts of unlawful possession of two knives of different length and width contrary to §944.47, Florida Statutes on January 28, 1982. (R 1-2). Respondent entered a plea of not guilty and a jury trial resulted in guilty verdicts on each count. (R 11, 13). Respondent was sentenced to five years imprisonment on each count to run concurrently. (R 29).

Appeal was taken to the First District Court of Appeal. (R 15). The First District affirmed Respondent's conviction on Count I that reversed the judgment on Count II.

Petition for writ of certiorari was filed and jurisdiction was granted on June 29, 1984.

ISSUE ON APPEAL

WHETHER A PRISONER IN POSSESSION OF TWO WEAPONS MAY BE CONVICTED AND CONCURRENTLY SENTENCED FOR TWO SEPARATE OFFENSES AS DEFINED IN ONE STATUTE.

The court below stated the question is whether the substantive statute §944.471(c) must be interpreted as making Watts' simultaneous possession of two contraband knives two units of prosecution despite the absence of time or space differences in his possession or in his proof, that in common understanding would distinguish his possession of one knife from his possession of the other. Watts v. State, 440 So.2d 505, 507, (Fla. 1st DCA 1983)(emphasis supplied). Petitioner submits that the district court's "chronological spatial relationship" approach is nothing more than an attempt to resurrect the single transaction rule which has been legislatively and judicially repudiated in Florida.

The proper question should have been whether the legislature meant to treat the simultaneous unlawful possession of two or more of a particular object as separate crimes. This Court's opinion in Palmer v. State, 438 So.2d 1 (Fla. 1983) and Grappin v. State, ___ So.2d ___ (Fla. 1984), 9 F.L.W. 177 answer this inquiry in the affirmative.

The court below relied on Hill v. State, 293 So.2d 79 (Fla. 3d DCA 1974) and Castelberry v. State, 402 So.2d 1231(Fla. 5th DCA 1981) which relied on Hearn v. State, 55 So.2d 559 (Fla. 1951). In Hill, the court held that "the

simultaneous robbery of two victims in a supermarket holdup should be treated as a single offense." Id. at 80.

However, the court below was without benefit of this Court's decision in Palmer, supra which negates any lingering viability of Hill. Palmer held that "we do not prohibit the imposition of multiple concurrent three-year minimum mandatory sentences upon conviction of separate offenses included under subsection 775.087(2)." Id. at 4 Palmer involved the simultaneous placing in fear of at least 13 members of a wake during the robbery of a funeral home.

In Castelberry, the court held that:

> Whether an item is taken as part of one theft or robbery, or two, necessarily depends upon chronological and spatial relationship. If a defendant thrusts a pistol into a victim's ribs and says, 'Give me your watch, your wallet, and your tie!' and the victim complies, only one statutory violation, one robbery, has been committed. See Hearn v. State, 55 So.2d at 560.

Id. at 1232.

The court was right to limit his holding to the facts of Castelberry because the theft of the particular items cited in their example, to-wit: watch, wallet and tie, are not singled out for specific treatment in §812, Florida Statutes (1983). It is obvious that a different result would obtain had the prospective thief in the above hypothetical thrust a gun into a victim's rib and said give me your pistol and calculator. See State v. Getz, 435 So.2d 789 (Fla. 1983). Similarly, had the thief demanded

and received all five of his victim's firearms during the course of one stick-up, this Court would agree that five separate convictions and concurrent sentences under §812.014 (2)(b)(3) should stand. See Grappin v. State, ___ So.2d ___ (Fla. 1984), 9 F.L.W. 177.

In Grappin, the State filed a five count information alleging five separate acts of second degree grand larceny. The defendant moved to dismiss on grounds that he could only be charged with one larceny offense given the theft involved the taking of five firearms which were owned by the same individual from the same place at the same time. The trial court granted the motion to dismiss in reliance on Hearn, supra, that where the theft of several items is one continuous act, the offense is a single theft. Grappin, supra, at 177.

This Court affirmed the State's authority to charge and obtain multiple convictions and sentences without considering the chronological and spatial relationships. Appellate review must be riveted to construction of the applicable statutory authority. The court below characterized this avenue of scrutiny as the a/any test of Grappin[1] and rejected the test in favor of Castelberry, supra.

Section 944.47(1)(a)(5)(c), Florida Statutes makes it unlawful for any inmate while on any prison grounds to be in actual or constructive possession of any article or

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[1]State v. Grappin, 427 So.2d 760 (Fla. 2d DCA 1983).

thing declared by this section to be contraband, to-wit: any firearm or weapon. (Emphasis supplied). One knife is obviously any weapon and possession of any such article or thing is unlawful. However, any firearm is also any weapon. The possession of a firearm and weapon would imply two violations even though firearms and weapons clearly fall under the penumbra of "any article or thing" under the a/any test of Grappin.

Petitioner submits that the better construction of any weapon when read in conjunction with any article or thing and subsection 775.021(4), Florida Statutes (1979) would be that the unit of prosecution is one article or thing. Otherwise, a prisoner in unlawful possession of ten firearms, ten knives, ten blasting caps, and 10 sticks of dynamite may only be sentenced for one offense because the legislature so declared any article or thing, the unit of prosecution instead of an article or thing. Subsection 775.021(4), Florida Statutes (1979) has been construed by this court to allow for separate convictions and punishments for multiple offenses where one offense is not a necessarily lesser included offense, based on its statutory element. State v. Baker, ___ So.2d ___ (Fla. 1984), 9 F.L.W. 209.

This case correctly interpreted the legislative intent. See: 775.021(4), Florida Statutes (1983).

Possession of Knife A and possession of Knife B are not necessarily lesser included offenses based on the statutory elements of subsection 944.47(1)(a)(5)(c). The

State charged and proved possession of separate knives. Petitioner submits that the test of Palmer, Baker, and Grappin support Respondent's multiple convictions and sentences.

CONCLUSION

The court below erred in applying the chronological spatial relationship approach to the instant case. Respondent's separate convictions and concurrent sentences should be affirmed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded Charlene V. Edwards, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 27 day of August, 1984.

GARY L. PRINTY