

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

JAN 20 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

STATE OF FLORIDA,)

Petitioner,)

vs.)

RENE RAMOUS RODRIQUEZ,)

Respondent.)

5DCA CASE NO. 82-570

SUPREME COURT 64,775

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Rene Rodriquez, Respondent/Appellant (hereinafter referred to as Respondent) was charged by information with robbery pursuant to §812.13(2)(c) Fla. Stat. (1981) and with a second count of grand theft pursuant to §812.014 Fla. Stat. (1981). The robbery count charged Respondent with robbing the person of Amanda Carter and taking a cash register, United States money current, and alcoholic beverages. Significantly, the information did not allege any value as to those items that were taken from the person or custody of the victim, Amanda Carter. Count II alleged that the Respondent did knowingly obtain or use or endeavor to obtain or use a cash register which had a value of \$100 or more and which was the property of Amanda Carter as owner or custodian. Therefore, the same cash register that was the subject of the robbery charged in Count I (wherein the value was not alleged), was the same cash register that was the subject of the grand theft charge in Count II (R 27). The information was amended and refiled to reflect a change in the robbery charge by deleting, "with the intent to permanently deprive Amanda Carter of said property." The amended information, however, does not affect the issues or petition herein (R 50). A jury trial was conducted as to both these counts and the jury returned verdicts of guilty of robbery as charged in Count I and guilty of grand theft as charged in Count II (R 57-58). Judgment was entered in open court on February 24, 1982 pursuant

to the verdicts whereby the Respondent was adjudicated guilty of both robbery and grand theft (R 59). Respondent was sentenced accordingly on March 26, 1982. The court sentenced Respondent to a term of five years on Count I (i.e. the robbery) but specifically stated in its sentence that it would not sentence Respondent as to Count II, the grand theft (R 74-75, 77). A timely notice of appeal was filed by Respondent on April 23, 1982 and the case was taken up on appeal before the Fifth District Court of Appeal (R 80).

Respondent filed his Initial Brief as Appellant on July 22, 1982. The point that is in issue here and presented by Appellant was whether or not the trial court could convict Respondent on the robbery and the grand theft where the property in question was both the subject of the robbery and the grand theft charges. Respondent termed the issue as a "classic double jeopardy problem." (See Respondent's/Appellant's Initial Brief at page 11). On January 14, 1983 Petitioner (the State of Florida) as Appellee filed its Answer Brief. Oral argument was set for July 5, 1983.

The Fifth District Court of Appeal issued an opinion in this cause and filed it on December 15, 1983. The holding of the opinion affirmed the conviction and sentence for the robbery but reversed the conviction for the grand theft count. On December 15, 1983 Petitioner filed a motion for rehearing in this cause. By an order of January 10, 1984 the Fifth District Court of Appeal denied Petitioner's/Appellee's Motion for Rehearing. This petition on jurisdiction for certiorari to this Honorable Court follows.

STATEMENT OF THE FACTS

The Fifth District Court of Appeal's opinion rendered in Rodriquez v. State, ___ So.2d ___, (Fla. 5th DCA 1983) [8 FLW 2905] is quoted directly to demonstrate its holding on the issue of whether there could be a separate conviction for the grand theft:

Since there was only one taking of property in the instant case, the underlying theft was a necessarily lesser included offense of the charged robbery. Once the underlying theft conviction is used to support Rodriquez' conviction for robbery, that same theft, even in a greater degree, cannot be used for an independent, cumulative conviction and sentence -- in the absence of a clear legislative intent to the contrary. Hunter, Whalen, Albernaz.

This court previously has recognized that the underlying theft of property supporting a conviction of robbery, even though that theft may be grand theft, is a necessarily lesser included offense of the robbery. Perkins v. Williams, 424 So.2d 990 (Fla. 5th DCA 1983); Castleberry v. State, 402 So.2d 1231 (Fla. 5th DCA 1981) review denied, 412 So.2d 470 (Fla. 1982). See also McClendon v. State, 372 So.2d 1161 (Fla. 1st DCA 1979).

The Fifth District held that the grand theft was a lesser included of the robbery charge even though the value of the cash register was not a part of the information in Count I (that is the robbery charge) and the value was alleged in the grand theft count (R 50).

POINT

THERE IS EXPRESS AND DIRECT CONFLICT
BETWEEN THE CASE OF RODRIQUEZ V. STATE,
SO.2D _____, (FLA. 5TH DCA 1983)
[8 FLW 2905] AND THE CASES OF BORGES
V. STATE, 415 SO.2D 1365 (FLA. 1982),
ZIEGLER V. STATE, 385 SO.2d 1168 (FLA.
1ST DCA 1980) AND HALEY V. STATE, 315
SO.2D 525 (FLA. 2D DCA 1975).

ARGUMENT

The Fifth District Court of Appeal in Rodriguez v. State, ___ So.2d ___ (Fla. 5th DCA 1983) [8 FLW 2905] held that Respondent could not be convicted (and therefore not sentenced) for a second count of grand theft where the same property was alleged to be the subject of a robbery in the first count. This Court held in Borges v. State, 415 So.2d 1265 (Fla. 1982) under §775.021(4) Fla. Stat. (1981) a defendant could be convicted and sentenced on an armed burglary (§810.02(2) (b) Fla. Stat. (1981), possession of burglary tools (pursuant to §810.06 Fla. Stat. (1981)), possession of a firearm by a convicted felon (pursuant to §790.23 Fla. Stat. (1981)), and carrying a concealed weapon (pursuant to §790.01 Fla. Stat. (1981)). This Honorable Court held, since all these crimes require distinct elements which the other crime did not, the defendant could be convicted and sentenced on all crimes separately even though all these crimes arose out of the same criminal incident. The same holding and reasoning was reached in Ziegler v. State, 385 So.2d 1168 (Fla. 1st DCA 1980). In Ziegler, the conviction and sentence was affirmed where the

defendant possessed a short-barreled shotgun (pursuant to §790.221 Fla. Stat. (1979)) and was convicted for possession of a firearm by a convicted felon (pursuant to §790.23 Fla. Stat. (1981) based upon possession of that same shotgun.

The holding of the Fifth District in the Rodriquez case is:

...the underlying theft of property supporting a conviction of robbery, even though that theft be grand theft, is a necessarily lesser included offense of the robbery.

This holding is in express and direct conflict with the decision in Haley v. State, 315 So.2d 525 (Fla. 2d DCA 1975). In Haley the defendant was charged with robbery. The jury convicted Haley of grand larceny. The Second District acknowledged that the evidence showed more than \$100 was taken from the victim but the information did not allege specific value. The Second District held that under Brown v. State, 206 So.2d 377 (Fla. 1968) one could be convicted of a lesser included although that lesser included was not an essential element of the crime. (This is what is known as a Brown category IV lesser included). The Second District pointed out that the robbery information did not put the value of the property stolen in the accusatory pleading. Since grand theft was not a necessarily lesser included of the robbery the defendant's conviction was reversed and reduced to petit larceny, since larceny was a necessarily included element in the charge of robbery. (emphasis supplied). In Rodriquez, Count I does not allege any value and it is

submitted that there is conflict between these two cases because the Fifth District's opinion maintains that grand theft can be a lesser included of robbery even though the value is not in the accusatory pleading of the robbery count, which would be necessary under the Haley decision.

This same issue is now certified to the Supreme Court in Getz v. State, 428 So.2d 254 (Fla. 1st DCA 1982). In Getz, the question certified was whether a defendant could be given separate judgment and sentence for theft of a firearm as well as petit theft arising out of a single burglary, when the theft statute requires proof of different elements for convictions under the various subsections of the single criminal statute. Conflict certiorari was granted to both sides in Vause v. State, 424 So.2d 52 (Fla. 1st DCA 1982) where the issue was whether multiple sentences for third degree murder, shooting into an occupied vehicle, use of a firearm in a felony, and mandatory minimum for possessing of a firearm while committing a felony are proper. Again in Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1980) this Court will or very recently has looked into the issue of whether separate sentences can be imposed for both the sale and possession of the same controlled substance. Oral argument was or was set to be heard by this Honorable Court on December 8, 1983 in the case of State v. Brown, 427 So.2d 791 (Fla. 3d DCA 1983) where the issue is whether a defendant can be convicted and sentenced for the separate crimes of carrying a firearm and robbery with a firearm. Petitioner would submit that due to these express and direct conflict with

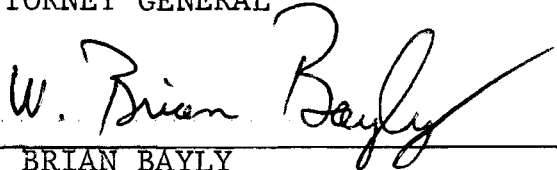
the listed cases along with the other cases that are before this Honorable Court to resolve this same issue, the Rodriguez decision should be reviewed.

CONCLUSION

Based on the argument and authorities cited herein, Petitioner respectfully prays this Honorable Court exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

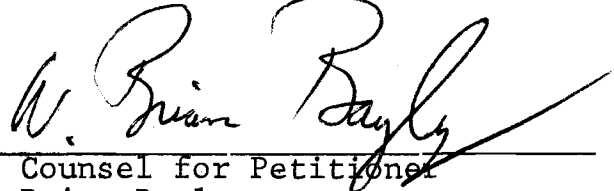


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Bruce A. Nants, Esquire, 13 South Magnolia Avenue, P.O. Box 1191, Orlando, Florida 32802, Attorney for Respondent, this 19th day of January, 1984.



Of Counsel for Petitioner
W. Brian Bayly