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IN THE SUPREME COURT OF FLORIDA

JOSE MANUEL GARCIA,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 64,884

RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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STATEMENT OF THE CASE AND FACTS

Respondent supplements Petitioner's Statement of the Case as follows:

As noted, Petitioner was charged by Information with one count of armed robbery, in violation of §812.13(2)(a) Fla. Stat. (1979) and one count of possession (sic) of a firearm in commission of a felony, in violation of §790.07 Fla. Stat. (1979). Appellant was tried before a jury on December 15, 1981 and such jury returned verdicts of guilty as to each count; the jury was not instructed that possession (sic) of a firearm in a commission of a felony was a lesser included offense of armed robbery and Petitioner neither requested such instruction nor objected to its omission (R 292-313). Similarly without objection, Petitioner was adjudicated guilty of both charges in open court (R 316).

Petitioner was sentenced on March 12, 1982; no transcription of such proceeding was included in the record on appeal. Petitioner was sentenced to a term of twenty years incarceration for the armed robbery; the sentencing order contains the annotation that no sentence was imposed as to Count I, that charging a violation of §790.07 (R 334-335). Twelve days later, Petitioner filed his Notice of Appeal which sought the Fifth District Court of Appeal's review of the verdicts, judgment and sentence entered by the circuit court "wherein the said Defendant was convicted of the crime of armed robbery and sentenced to twenty years in prison." (R 336). The notice, thus, said nothing of Petitioner's

conviction of a violation of §790.07.

Petitioner raised as appellate points the alleged insufficiency of evidence as to charge of armed robbery and the allegedly erroneous admission into evidence of a handgun. In its decision, Garcia v. State, 444 So.2d 969 (Fla. 5th DCA 1983), the Fifth District Court of Appeal found such points to be without merit. The court, citing to, inter alia, Bell v. State, 262 So.2d 244 (Fla. 4th DCA 1972), cert. denied, 265 So.2d 50 (Fla. 1972), held that Petitioner had waived any double jeopardy attack upon his conviction, but nevertheless certified to this Court the instant question - Whether one can be convicted, although not sentenced, of a lesser included offense after he has been convicted of the greater crime? The court expressed its concern as to an apparent conflict between this Court's decisions, Bell v. State, 437 So.2d 1057 (Fla. 1983), State v. Gibson, __ So.2d __, Case No. 61,325 (Fla. February 17, 1983) [8 FLW 76], rehearing pending, and Hawkins v. State, 436 So.2d 44 (Fla. 1983). Pursuant to such certified question, Petitioner has sought this Court's certiorari review.

POINT

THIS COURT NEED NOT ADDRESS THE INSTANT CERTIFIED QUESTION, REGARDING THE PROPRIETY OF MULTIPLE CONVICTIONS IN LIGHT OF DOUBLE JEOPARDY, WHERE SUCH POINT WAS NOT PROPERLY PRESERVED OR PRESENTED FOR REVIEW BELOW AND WHERE THE CONVICTIONS SUB JUDICE ARE NOT VIOLATIVE OF DOUBLE JEOPARDY, IN THAT NEITHER OFFENSE IS A LESSER INCLUDED OF THE OTHER.

ARGUMENT

Although the desire of the district court below to have clarified the state of the law in regard to double jeopardy and multiple convictions is admirable, as well as understandable, the State respectfully contends that the instant case does not present the appropriate vehicle. Inasmuch as the Fifth District Court of Appeal has found Petitioner's double jeopardy concerns to have been waived, a conclusion Petitioner has done little to disturb in his Brief on the Merits, one can only ask how Petitioner would benefit personally from any ruling or opinion issued by this Court in his name. It is suggested that other more developed cases presently before this Court for review and ruling present more appropriate opportunities for address of complex double jeopardy concerns. See e.g. State v. Gibson, Case No. 61,325 (Fla. February 17, 1983) [8 FLW 76], rehearing pending; Baker v. State, 425 So.2d 36 (Fla. 5th DCA 1982), review granted, State v. Baker, Case No. 63,269, pending decision; Baker v. State, 31 So.2d 263 (Fla. 5th DCA 1983), review granted, State v. Baker, Case No. 63,807, pending

decision; Brown v. State, 427 So.2d 791 (Fla. 3d DCA 1983), review granted, State v. Brown, Case No. 63,600, pending decision; Marshall v. State, 413 So.2d 872 (Fla. 3d DCA 1982), review granted, State v. Marshall, Case No. 62,222, pending decision. Due to the lack of presentation or preservation of this point which Petitioner now wishes addressed and the anamolous posture of the double jeopardy issue in the instant case, Respondent suggests that dismissal of the instant proceeding would be warranted, the same course adopted by this Court when it finds after accepting a case that direct conflict of decisions does not in fact exist. See e.g. Brennan v. State, Case No. 62,533 (Fla. March 22, 1984) [9 FLW 99].

The conclusion that Petitioner's double jeopardy concerns were not properly presented or preserved below should not be a controversial one. As Respondent argued in its Supplemental Brief in the appeal, Petitioner did not appeal his conviction for use of a firearm, in violation of §790.07, to the appellate court for review, given the wording of his Notice of Appeal. Thus, it would seem that anything said by that court in reference to such conviction can be safely regarded as dicta. Even assuming that the conviction was properly before such court, Petitioner's counsel waived any objection he might have had to multiple convictions, by failing to protest the verdict form or speak out at the time of adjudication. In Bell v. State, 437 So.2d 1057 (Fla. 1983), this Court held that in instances where multiple convictions would be barred by double jeopardy, a trial judge must instruct the jury that only one

conviction can be returned. Respondent suggests that a trial counsel's failure to request such instruction or to object to its omission is comparable to the waiver found by this Court in Ray v. State, 403 So.2d 956 (Fla. 1981). Certainly if counsel feels that multiple convictions would offend double jeopardy, a conclusion which could, presumably, be reached in any number of cases prior to trial, it behooves him to speak out and to prevent potential error. See e.g. Castor v. State, 365 So.2d 701 (Fla. 1978). This inexplictably was not done sub judice, and the Fifth District's reliance upon prior case law finding waiver of double jeopardy objections, such as Bell v. State, 262 So.2d 244 (Fla. 4th DCA 1972) and Drakes v. State, 400 So.2d 487 (Fla. 5th DCA 1981), cert. denied, 411 So.2d 381 (Fla. 1981), was not misplaced. See also Robinson v. State, 239 So.2d 282 (Fla. 2d DCA 1970); Robinson v. Wainwright, 240 So.2d 65 (Fla. 2d DCA 1970); Robbins v. State, 413 So.2d 840 (Fla. 3d DCA 1982).

Additionally, even should the issue be regarded as one preserved, it bears no applicability to this case. Despite seemingly contrary language in State v. Gibson, as noted above still not final, use of a firearm in commission of a felony, in violation of §790.07, is not a lesser included offense of armed robbery. One must initially note that the schedule of lesser included offenses, as adopted by this Court in In the Matter of use by the Trial Courts of Standard Jury Instructions in Criminal Cases and Standard Jury Instructions in Misdemeanor

Cases, 431 So.2d 594 (Fla. 1981), does not list such relationship. It is also clear that one can commit one offense without committing the other and that each offense requires proof of an element that the other does not. Petitioner argues in his brief that his same behavior is being punished twice. This is not so. One commits armed robbery by carrying a firearm in the course of a robbery; one can violate §790.07(2) by committing or attempting to commit any felony and in so doing displaying, using, threatening, or attempting to use a firearm or carrying such concealed. Thus, different conduct is involved in both offenses, in that further acts beyond the mere carrying of the firearm are required to violate §790.07(2). A defendant can violate both statutes in the course of one criminal episode and no proscription exists against multiple convictions in such instance. This is one of those cases.

This is also, as noted above, a rather unusual case. It is one in which the defendant was convicted of two crimes but sentenced for one. It is one in which the defendant seems to have appealed only one conviction but, arguably, had both affirmed. It is one in which the defendant never raised a double jeopardy objection at trial or on appeal but where the appellate court has certified a question upon such basis to this Court. Lastly, it is a case where the answer to the certified question would seem to have little bearing upon defendant's current situation or future. Under the double jeopardy analysis most currently employed by this Court in Bell v. State, supra, and Portee v. State, Case No. 60,190 (Fla. March 15,

1984) [9 FLW 93], the convictions of Petitioner are lawful, in that "the same offense" is not being punished twice; this Court would seem to have already held in such cases that where an offense is a lesser included of the other, multiple punishments, i.e. convictions and sentences, cannot lie.

In conclusion, Respondent shares the concern of the Fifth District Court of Appeal that any apparent conflict in this Court's precedents be resolved and that the state of the law in reference to double jeopardy be clarified. The State, however, respectfully disagrees with the court below in regarding the instant case as the most suitable mechanism for such clarification. Whereas nothing in the instant brief should be regarded as opposition per se to this Court's addressing the matter of multiple convictions and double jeopardy, those cases in which such issue has been more fully briefed, argued and developed, see e.g. Gibson, Baker, etc., are ripe for such action by this Court. To the extent necessary and permissible, Respondent adopts the arguments of the State in State v. Baker, Case No. 63,269, pending decision, as to the merits of any double jeopardy argument and reiterates its suggestion that the instant proceeding be dismissed.

CONCLUSION

For the above stated reasons, Respondent advocates dismissal of the instant proceeding; in the alternative, Respondent urges that the result below be approved.

Respectfully submitted,

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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 Edward R. Kirkland, Esquire, 126 East Jefferson Street, Orlando, Florida 32801, this 29th day of March, 1984.

Of Counsel for Respondent
Richard B. Martell