045

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 65,116
	)	DCA CASE NOS. 81-894
TOM ALEX O'HARA,	)	AND 82-1248
	)	
Respondent.	)	
	)	

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Respondent hereby accepts Petitioner's Statement of the Case and Facts; yet takes exception to Petitioner's stated conclusion that the Fifth District employed a single transaction test to support its reversal of Respondent's conviction for grand theft.

ARGUMENT

THIS HONORABLE COURT IS WITHOUT JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION SINCE THE INSTANT DECISION OF THE FIFTH DISTRICT COURT OF APPEAL REVEALS NO EXPRESS OR DIRECT CONFLICT WITH OTHER DECISIONS OF OTHER COURTS ON THE SAME QUESTION OF LAW INVOLVING THE SAME CONTROLLING FACTS.

In the instant case, Petitioner argues that this Court may exercise its discretionary jurisdiction. In particular, it is alleged that the decision reached by the Fifth District Court of Appeal conflicts with decisions reached by this Court in Borges v. State, 415 So.2d 1265 (Fla. 1982); and Bell v. State, 437 So.2d 1057 (Fla. 1983), due to the Fifth District's purported resurrection of the "single transaction rule".

The Fifth District in O'Hara v. State, ___ So.2d ____, 9 FLW 508 (Fla. 5th DCA Case No. 81-894 and 82-1248, opinion filed March 1, 1984) concluded, in part:

> When a person commits an act which constitutes two separate crimes such as armed robbery and possession of a firearm by a convicted felon then it is clear the legislature has meant for the two convictions. But when the legislature has proscribed the taking of money by extortion and the taking of money by theft it is obviously meant to punish for the taking. The crime for which the accused can be convicted depends upon how the taking occurred.

Thus, the salient issue addressed in O'Hara, Id., concerned the propriety of separate extortion and grand theft convictions for the taking of one sum of money from a victim where the taking was accomplished by means of a threat. Having found the "crimes" to be singular; and the respective statutory Sections of 836.05 and 812.014 to merely describe alternative acts within the Florida Legislature's more general proscription against the wrongful taking of another's property, the Fifth District concluded that the Legislature did not intend cumulative punishments for taking (by extortion) and taking (by theft). Therefore, the lower court reversed Respondent's conviction for grand theft.

The Respondent submits that the two (2) cases cited by Petitioner as being in "direct and express" conflict with the case sub judice cannot be fairly read to support the Petitioner's contention that the Blockburger test is to be mechanically applied without regard to the factor of legislative intent, and the criminal conduct sought to be proscribed.

Florida law no longer gives credence to the single transaction rule. Borges v. State, supra at 1266. Although it is the Petitioner's contention that the decision of the Fifth District is predicated on the abrogated single transaction rule, the Respondent submits (by analogy) that this is no more the situation here than in the line of cases holding that where there is only one homicide, there can only be one murder conviction. See, Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981);

Muszynski v. State, 392 So.2d 63 (Fla. 5th DCA 1981). The court below plainly bottomed its decision on the fact that one cannot be convicted of two crimes for the singular taking of a sum of money. Thus, in the context of the theft of a single car, the same logic which would render a separate conviction for grand theft inappropriate (when the accused was also charged with grand theft of a motor vehicle), applies with equal force to the crimes of extortion and grand theft -- when there was only one taking of a single sum of money. The court below noted several other pairs of offenses such as petit theft and grand theft, or robbery and grand theft which could pose double jeopardy problems when both charges stem from the single taking of a sum of money.

The Petitioner's contention that the majority opinion's emphasis on legislative intent in applying the Blockburger test somehow represents a departure from Bell v. State, supra, and its double jeopardy analysis is also without merit. Instead, Bell, makes it clear that legislative intent is vital to the determination of whether cumulative punishments may be imposed in a single trial setting, to-wit:

> The mere existence of two statutory offenses does not establish that the legislature intended each to be independently convictable and punishable when both are committed in a single course of conduct. In the present case, the legislature has codified the distinctly different statutory offenses of sale of illegal drugs and possession of illegal drugs.

> Also it has determined that another offense, trafficking in illegal drugs, is committed when either or both of the offenses of sale or possession of a certain amount of illegal drugs is effected. By including sale and possession of drugs within the trafficking statute, it is apparent that the legislature intended to facilitate trafficking prosecutions through the use of alternative methods of proof rather than attempting to provide for multiple convictions and punishments for criminal conduct which is basically unitary. 437 So.2d at 1060.

Inasmuch as the decision of the Fifth District is not predicated on the single transaction rule, in violation of Borges v. State, supra; or in conflict with Bell v. State, supra, due to the emphasis placed on legislative intent -- the Respondent respectfully submits that this Honorable Court is without jurisdiction to exercise its discretionary review power.

CONCLUSION

BASED UPON the foregoing authorities and argument, the Respondent requests this Honorable Court to decline to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served, by mail, to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and served, by mail, to Tom Alex O'Hara, Inmate No. A-018102, #62-122, Union Correctional Institute, P.O. Box 221, Raiford, Florida 32083, on this 26th day of April, 1984.

David A. Henson

DAVID A. HENSON
ASSISTANT PUBLIC DEFENDER