IN THE SUPREME COURT OF FLORIDA

GRANDERSON DAVIS, JR.,

Petitioner,

vs. CASE NO. 65,121

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the First District Court of Appeal and the defendant in the Circuit Court of Leon County. Respondent was the Appellee in the First District Court of Appeal and the prosecuting authority in the Circuit Court.

ARGUMENT

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE FIRST DISTRICT'S OPINION DOES NOT CONFLICT WITH STATE V. GETZ, 435 So.2d 789 (Fla. 1983), OR ANY OTHER CASE DECIDED BY THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL.

Petitioner was charged with the offense of first degree grand theft of property worth more than $20,000, which is an offense that constitutes a second degree felony. On appeal, Petitioner contended that since the property he was charged with stealing was an automobile, he should have been charged with second degree grand theft which is a third degree felony. See §812.014, Fla. Stat. The substance of Petitioner's argument was his belief that since the theft statute specifically listed automobiles as a separate subsection, the prosecutor was limited to charging theft under the motor vehicle subsection regardless of the vehicle's value.

Petitioner's contention has been squarely rejected by this Court on numerous occasions. For example, in Soverino v. State, 356 So.2d 269, 272 (Fla. 1978), which was relied upon by both the State and the First District, the Court recognized that it was "not unusual for a course of criminal conduct to violate laws that overlap yet vary in their penalties." The Court went on to recognize that the prosecutor is imbued with absolute discretion to decide under which statute to charge--"Traditionally, the legislature has left to the prosecutor's discretion which violations to prosecute and hence which range of penalties to

visit upon the offender." Id. See also State v. Young, 371 So.2d 1029 (Fla. 1979); Cilento v. State, 377 So.2d 663, 666 (Fla. 1979); Cleveland v. State, 417 So.2d 653, 654 (Fla. 1982).

Petitioner's reliance on State v. Getz, 435 So.2d 789 (Fla. 1983), to establish conflict is misplaced. Although the Court in Getz recognized that theft of a firearm was an offense distinct from theft of property worth less than $100, the Court never held that one who steals a firearm must be charged under §812.014(2)(b) (second degree grand theft) regardless of the firearm's value. While a prosecutor would be free under Soverino, supra, and Cleveland, supra, to charge someone accused of stealing a valuable firearm with the offense of second degree grand theft, a prosecutor would also be free to charge first degree grand theft if the firearm were worth $20,000 or more.

Accordingly, because the Court never held in Getz, supra, that a defendant charged with stealing a firearm must be charged with second degree grand theft regardless of the firearm's value, the lower court's decision is not in conflict. Certiorari should be denied.

CONCLUSION

Certiorari should be denied because the lower court's opinion does not conflict with an opinion of this Court or an opinion of another District Court of Appeal.

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 hand to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 2nd day of May, 1984.

Lawrence A. Kaden
LAWRENCE A. KADEN

OF COUNSEL