IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,766

MAJOR VANCE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON DISCRETIONARY REVIEW

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12th Street
Miami, Florida 33125

Beth C. Weitzner
Assistant Public Defender

Counsel for Petitioner

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INTRODUCTION

The petitioner, Major Vance, was the appellant in the District Court of Appeal of Florida, Third District, and the defendant in the trial court. The respondent, the State of Florida, was the appellee in the District Court of Appeal and the prosecution in the trial court.

The symbol "A" will be utilized to designate the appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

An information charged petitioner with two counts of aggravated assault. (A. 1). As to both counts, the jury returned verdicts finding petitioner guilty of the misdemeanor of improper exhibition of a weapon under Section 790.10, Florida Statutes (1981). (A. 1). Petitioner was adjudicated guilty of two violations of this statutory misdemeanor and received two, consecutive one-year probation terms. (A. 1). The trial court further imposed a special one year jail condition, and ordered that petitioner be denied gain time eligibility and that he receive no credit for his pre-trial incarceration. (A. 2).

In his timely appeal to the District Court of Appeal of Florida, Third District, petitioner asserted that the two separate convictions and sentences for improper exhibition of a weapon were impermissible because the single act of exhibiting a firearm in the presence of two persons, as was reflected by the trial evidence, comprised but one misdemeanor offense under

Section 790.10, Florida Statutes (1981). (A. 2). Petitioner relied for this assertion upon the First District's decision in Solomon v. State, 442 So.2d 1030 (Fla. 1st DCA 1983), which held that the imposition of multiple convictions under Section 790.10 constitutes fundamental error where a single act of exhibition of a firearm occurs in the presence of more than one person. (A. 2).

The Third District Court of Appeal rendered its decision affirming petitioner's convictions and sentences on August 1, 1984. (A. 1-3, 4, 5). The Third District ruled that because petitioner had requested that the jury be instructed on improper exhibition of a weapon as a lesser offense of both charges, petitioner was estopped from challenging his multiple misdemeanor convictions and sentences. (A. 2).

In so ruling, the Third District expressly recognized that its employment of an estoppel rationale directly conflicted with the First District's holding in Solomon v. State, 442 So.2d 1030 (Fla. 1st DCA 1983), that the imposition of dual convictions and sentences pursuant to Section 790.10, Florida Statutes (1981) constitutes fundamental error:

> We recognize that by holding that the defendant is estopped from claiming any error in the dual convictions, we have necessarily determined that the error asserted by the defendant is not fundamental so as to excuse the defendant's failure to request the appropriate instruction. Insofar as Solomon finds the error of separate convictions under Section 790.10 fundamental, we disagree with that part of the Solomon decision.

(A. 2, n. 1)

A notice seeking invocation of the discretionary review jurisdiction of this Court was filed on August 16, 1984. This brief on jurisdiction follows.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL UPHOLDING PETITIONER'S DUAL CONVICTIONS AND SENTENCES FOR IMPROPER EXHIBITION OF A WEAPON, WHERE THE EVIDENCE ESTABLISHED A SINGLE ACT OF EXHIBITING A WEAPON IN THE PRESENCE OF TWO PERSONS, IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN SOLOMON V. STATE, 442 SO.2D 1030 (FLA. 1ST DCA 1983), AND THE DECISION OF THIS COURT IN GRAGG V. STATE, 429 SO.2D 1204 (FLA. 1983).

In Solomon v. State, 442 So.2d 1030 (Fla. 1st DCA 1983), the First District Court of Appeal held that the legislature, in enacting Section 790.10, Florida Statutes (1981) entitled "Improper exhibition of dangerous weapons or firearms",[1] did not intend the imposition of multiple misdemeanor penalties where the evidence reflects a single act of exhibition of a weapon before more than one person. The First District ruled that under such circumstances, the legislature intended the imposition of only one misdemeanor penalty.

In Solomon, supra, the defendant was charged with two counts of aggravated assault. As to both counts, the jury returned separate verdicts finding him guilty of improper exhibition of a weapon and the trial court adjudicated him guilty of two misdemeanors. The First District, based upon its construction of

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[1] 790.10 Improper exhibition of dangerous weapons or firearms. - If any person having or carrying any dirk, sword, sword cane, firearm, electric weapon or device, or other weapon shall, in the presence of one or more persons, exhibit the same in a rude, careless, angry, or threatening manner, not in necessary self-defense, the person so offending shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 790.10 and the trial evidence establishing a single act of exhibition of a firearm before two persons, held that Solomon's dual misdemeanor convictions contravened the legislative intent of Section 790.10 against multiple convictions. The First District held that the imposition of multiple convictions comprised "fundamental error" and, accordingly, reversed one of the convictions. Solomon, supra, at 1031.

In the case at bar, petitioner was likewise charged with two counts of aggravated assault and as to both counts the jury likewise returned guilty verdicts of improper exhibition of a weapon. Petitioner received multiple convictions and punishments for this statutory misdemeanor.

Based on the evidence at trial establishing a single exhibition of a weapon before two individuals, and relying on Solomon's holding, petitioner asserted on appeal to the Third District that his dual convictions and sentences under Section 790.10, Florida Statutes (1981), were impermissible. The Third District rejected this position on the basis that petitioner, by requesting the lesser offense instructions, was estopped from challenging the multiple convictions. The Third District expressly recognized that its employment of an estoppel rationale to affirm petitioner's multiple convictions conflicted with the First District's explicit holding in Solomon v. State, supra, that the imposition of multiple convictions comprised fundamental error. In the decision sought to be reviewed, the Third District declared:

> We recognize that by holding that the defendant is estopped from claiming any error

> in the dual convictions, we have necessarily determined that the error asserted by the defendant is not fundamental so as to excuse the defendant's failure to request the appropriate instruction. Insofar as Solomon finds the error of separate convictions under Section 790.10 fundamental, we disagree with that part of the Solomon decision.

(A. 2, n. 1).

Accordingly, the Third District expressly rejected the First District's fundamental error holding in Solomon and, as a consequence, the Third District reached a result directly contrary to that reached by the First District on the same operative facts.

In addition to the express decisional conflict with Solomon v. State, supra, the Third District's decision also directly conflicts with this Court's decision in Gragg v. State, 429 So.2d 1204 (Fla. 1983). In its decision the Third District upheld petitioner's multiple convictions and sentences on the premise that petitioner, by requesting improper exhibition of a firearm as lesser included offenses of the two aggravated assault counts, received the benefit of a jury pardon and was estopped from challenging the impropriety of his dual convictions and sentences:

> . . . the defendant is estopped from challenging on appeal the dual convictions because at trial he requested that the jury be instructed that it could find him guilty of the lesser-included offense of improper exhibition on each of the charged counts of aggravated assault. The defendant, much to his benefit, got precisely what he asked for.[2]

[2] Had the jury been instructed that if it found the defendant guilty of improper exhibition of a dangerous weapon as a lesser-included offense of each count, its dual verdicts would have to be nullified, it may not have chosen to pardon the defendant of both aggravated assault charges.

(A. 2).

This application of jury pardon and estoppel principles by the Third District directly conflicts with this Court's holdings in Gragg v. State, supra.

In Gragg, the defendant had been charged with aggravated assault, aggravated battery, and possession of a firearm by a convicted felon. Prior to trial, Gragg successfully moved for severance of the possession of a firearm by a convicted felon offense. At his trial for aggravated assault and aggravated battery, the jury returned verdicts of guilty of the lesser included offenses of simple assault and simple battery. Thereafter Gragg moved to dismiss the possession of a firearm by a convicted felon charge on collateral estoppel grounds. The trial court granted his motion but the Fourth District reversed. This Court quashed the Fourth District's decision and held that double jeopardy prohibited prosecution on the possession of a firearm by a convicted felon charge. In reaching its decision in Gragg, this Court expressly rejected the application of jury pardon and estoppel concepts.

First, while this Court acknowledged that there was record support for the view that the jury had in fact pardoned Gragg for the charged crimes of aggravated assault and aggravated battery, this Court declared that courts are prohibited from speculating as to whether a jury, in acquitting a defendant of a higher offense, did so as an exercise of its pardon power:

> Hence there does seem to be some evidence to support the view that the jury exercised its pardon power.
>
> However, we do not find such evidence relevant to the question of whether collateral

> estoppel should apply. Collateral estoppel does not depend on whether there is any evidence to support the view that the jury may have exercised its pardon power. Practically every jury verdict of acquittal is suceptible to such an interpretation. A jury's verdict may possibly be based upon a defendant's demeanor or other matters not reflected by the record. For this reason courts should not speculate on whether the jury has reached its verdict through compassion or compromise. In determining whether collateral estoppel applies, a court should limit its inquiry to whether there was a factual basis, rather than an emotional basis, upon which the jury's verdict could have rested.

Id. at 1206-07.

Thus, in Gragg this Court held that courts may not resort to jury pardon in abstaining from double jeopardy claims which involve a jury's acquittal of a higher offense. In direct conflict with Gragg, the Third District in the decision sought to be reviewed, resorted to the concept of jury pardon regarding the jury's acquittal of petitioner of the two aggravated assault charges, and thereby abstained from reaching petitioner's double jeopardy claim concerning his multiple punishments for the same offense.

Second, in Gragg this Court also rejected the Fourth District's conclusion that the defendant was estopped from invoking his double jeopardy claim because he had moved to sever the possession of a firearm by a convicted felon count from the aggravated assault and battery counts. This Court reasoned that the estoppel doctrine was inapplicable because Gragg's right to seek severance of the possession of a firearm by a convicted felon count could not be made contingent upon his relinquishment of "his right against double jeopardy". Id. at 1208. This Court declared that an estoppel ruling would unfairly require Gragg to

waive his right to assert double jeopardy in order to exercise his right to secure a fair trial.

In the decision sought to be reviewed, the Third District declared that petitioner was estopped from asserting his right to be free from multiple punishments for the same offense because petitioner had requested lesser offense instructions. Petitioner, by exercising his right to have the jury instructed on lesser included offenses, was simply implementing his right to secure a fair trial. His request for lesser offense instructions, like Gragg's motion for severance, merely responded to the multi-count information drafted and filed by the state and therefore cannot serve to estop him from invoking his double jeopardy claim. Accordingly, the Third District's ruling that petitioner was estopped from asserting his right to be free from multiple punishments for the same offense because he had exercised his right to request lesser included offense instructions, a right basic to the guarantee of a fair trial, directly conflicts with this Court's holding in Gragg.

CONCLUSION

The Third District's express rejection of the First District's holding in Solomon v. State, supra, that it is fundamental error to impose multiple penalties for the misdemeanor of improper exhibition of a weapon where a single act of exhibition occurs in the presence of more than one person, poses direct decisional conflict. Likewise, the Third District's resort to jury pardon and estoppel to defeat petitioner's assertion of his right to be free from multiple penalties for the same offense directly contravenes this Court's holdings in Gragg

v. State, supra. The jurisdictional basis for this Court's discretionary review is therefore manifest. Exercise of that jurisdiction by this Court to resolve the decisional conflict and to promote its uniformity is clearly warranted.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

BY: Beth C. Weitzner
Beth C. Weitzner
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 Northwest Second Avenue, Miami, Florida this 22nd day of August, 1984.

Beth C. Weitzner
Beth C. Weitzner
Assistant Public Defender