04-10-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,766

MAJOR VANCE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Major Vance, was the defendant in the trial court and the appellant in the district court of appeal. Respondent, the State of Florida was the prosecution in the trial court and the appellee in the district court of appeal. In this brief, the parties will be referred to as they stood in the trial court. The symbols "T." and "R." shall designate the transcript of proceedings and the remainder of the record on appeal, respectively.

STATEMENT OF THE CASE AND FACTS

On October 7, 1982, an information was filed charging the defendant with two counts of aggravated assault. (R. 1-2A). The defendant entered pleas of not guilty. (R. 3).

On September 22-23, 1983, a jury trial was held before the Honorable Henry Oppenborn, Judge of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. (T. 1-115).

Catherine Jackson testified that on July 13, 1982, she hired the defendant, Mr. Vance, to perform yard work at her house. (T. 34). The job was to involve the spreading of a load of top soil and a general clean up of the yard. (T. 34, 44). On July 13th, Jackson gave Mr. Vance ninety-five dollars for the soil he was to deliver and the labor to be performed. (T. 34). Three days later, Mr. Vance transported, what Jackson termed, "black muck" and placed it in the front of the yard. (T. 34, 35). Jackson,

who was not at home that day, claimed that her daughter gave Mr. Vance a check for forty dollars. (T. 35, 37). Jackson did not know how long Mr. Vance had worked at her house that day. (T. 37).

Approximately one week later Mr. Vance returned to Jackson's house. (T. 44). While he was there, Jackson's daughter telephoned Jackson, who was again not at home, and Jackson and Mr. Vance conversed over the telephone. (T. 44). During this conversation, Jackson ordered Mr. Vance to remove the "muck" because it was not the "soil" to which she had agreed, and told him to return her money. (T. 34, 44).

Jackson was intending to file a civil suit against Mr. Vance. (T. 38). On July 22nd, she, accompanied by her nephew, Michael Flemming, proceeded to the trailer lot where Mr. Vance lived. (T. 38, 47). Jackson claimed that they went there to ascertain Mr. Vance's trailer number because she needed it for "process serving" in the civil suit. (T. 38). Flemming divulged that Jackson had requested him to accompany her to Mr. Vance's house so she could get the money back from Mr. Vance. (T. 47).

The manager of the trailer lot advised Jackson and Flemming of the location of Mr. Vance's trailer. (T. 39). Jackson and Flemming then proceeded to Mr. Vance's trailer and knocked on the door. (T. 39, 47, 56). When Mr. Vance came to the door, Jackson told him that she wanted her money back. (T. 39, 43, 47). According to Jackson, Mr. Vance replied that he would return the money that afternoon. (T. 39). According to Flemming, Mr. Vance stated that he did not have any money and that he was not going

to give her any. (T. 47). Jackson testified that she then told Mr. Vance that she would have to have the money right "then", that she was on her way to file a civil suit against him, and that if he failed to give her the money at that time she would institute the suit. (T. 39). During this exchange, Mr. Vance was standing inside the doorway of his trailer. (T. 39, 40, 48, 52). Jackson and Flemming were standing next to one another a few feet outside the trailer door. (T. 40, 43, 48, 52).

At this time, Mr. Vance, while remaining inside his doorway, lifted up his shirt, removed a small handgun, and pointed it at both Jackson and Flemming. (T. 40, 42, 48, 49, 56). Mr. Vance stated: "You think you are better than anybody else. You are no different than anyone else. Get away from here and don't ever come back again". (T. 42, 48, 57). Following this, Jackson and Flemming drove from the trailer lot. (T. 53, 57). They claimed that they saw Mr. Vance enter his truck and also leave. (T. 41, 53). Jackson and Flemming asserted that they were in fear when Mr. Vance exhibited the gun. (T. 40, 41, 49).

Beverly Mobley, a defense witness, testified that she was inside Mr. Vance's trailer on the date of the incident. (T. 60-61). Mobley overheard Jackson demand the return of money and assert her intent of suing Mr. Vance. (T. 61). Mobley also heard Mr. Vance respond that he could not give her the money and that he had performed the work. (T. 61). Mobley did not hear any of the parties mention the presence of a gun throughout the verbal exchange outside. (T. 66). Mobley did not see Mr. Vance with a gun before he proceeded out of the trailer. (T. 61, 62). She

related that when he exited the trailer he closed the door behind him. (T. 63, 65). After the verbal dispute, Mr. Vance proceeded back inside his trailer, ate dinner, and subsequently returned to work. (T. 64).

At the close of the state's case and at the conclusion of all of the evidence, defense counsel unsuccessfully moved for a judgment of acquittal as to the aggravated assault charges; defense counsel advanced that the entirety of the circumstances failed to sufficiently establish an intentional threat by the defendant to do violence. (T. 57-59, 68).

At the charge conference, the trial court determined that improper exhibition of a dangerous weapon qualified as a lesser offense and stated that the pleadings and the evidence were consistent with that offense; defense counsel concurred with the court's determination and requested an instruction on that offense. (T. 70).

During closing argument, defense counsel urged that Mr. Vance's sole remark to Jackson and Flemming that they leave his premises, unaccompanied by any statement by him that he would shoot or otherwise harm them, presented a reasonable doubt as to whether Jackson and Flemming had a well-founded fear of imminent violence, and as to whether an unlawful and intentional threat of violence had been made. (T. 87-89).

The court instructed the jury on the two charged offenses of aggravated assault and, as lesser offenses, improper exhibition of a dangerous weapon and simple assault. (T. 91-95). The court also instructed the jury that if it returned with guilty verdicts

of aggravated assault with only a deadly weapon, i.e. no firearm, the defendant could be eligible for probation. (T. 99, 101). The jury subsequently returned verdicts finding the defendant guilty of the misdemeanor of improper exhibition of a dangerous weapon under Section 790.10, Florida Statutes (1981). (T. 106-107; R. 32, 33). Mr. Vance was adjudicated guilty of two violations of this statutory misdemeanor and received two consecutive one-year probation terms. (R. 38, 40-41). The trial court further imposed a special one year jail condition, and ordered that Mr. Vance be denied gain time eligibility and that he receive no credit for his pre-trial incarceration. (R. 41).

In his timely appeal to the District Court of Appeal of Florida, Third District, the defendant 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). Vance v. State, 452 So.2d 994, 995 (Fla. 3d DCA 1984). The defendant 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. Vance, supra at 995.

The Third District Court of Appeal rendered its decision affirming the defendant's convictions and sentences on August 1,

1984. The Third District ruled that because the defendant had requested that the jury be instructed on improper exhibition of a weapon as a lesser offense of both charges, the defendant was estopped from challenging his multiple misdemeanor convictions and sentences. Vance v. State, supra, at 995-96.

In so ruling, the Third District expressly recognized that its employment of an estoppel rationale 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. Vance, supra, 995-96, n. 1.

A notice seeking invocation of the discretionary review jurisdiction of this Court was timely filed on August 16, 1984; on January 9, 1985, this Court entered an order granting review.

SUMMARY OF ARGUMENT

At issue is whether the defendant's dual convictions and sentences for the single offense of "Improper exhibition of dangerous weapons or firearms", a misdemeanor proscribed by Section 790.10, Florida Statutes (1981), contravened both the legislative intent expressed in that statute that only one misdemeanor penalty be imposed and, concomittantly, the constitutional prohibition against multiple punishments for the same offense.

The plain and unambiguous language of Section 790.10 reflects a clear legislative intent that a single act of exhibition of a dangerous weapon comprises only one offense, regardless of the number of persons in whose presence the weapon is exhibited. The First District expressly recognized this in Solomon v. State, 442 So.2d 1030 (Fla. 1st DCA 1983), by holding that the imposition of dual convictions and sentences for improper exhibition as lesser included offenses, following his jury trial on two counts of aggravated assault, comprised "fundamental error". Solomon, supra, at 1031. In the present case, as in Solomon, the evidence at trial also established a single exhibition of a weapon in the presence of two persons. In light of the legislative intent and the evidence adduced, only one misdemeanor penalty was statutorily authorized. In accordance with Solomon, supra, the imposition of dual convictions and sentences constituted fundamental error.

In its decision in this case, the Third District expressly disagreed with Solomon that the imposition of multiple penalties

comprised fundamental error, and by invoking concepts of jury pardon and estoppel, the district court abstained from ruling upon the double jeopardy claim.

The Third District ruled that because the defendant had requested improper exhibition as a lesser offense of the two aggravated assault counts, he received the benefit of a jury pardon and was thereby estopped from challenging the impropriety of the statutorily unauthorized multiple penalties. The district court's speculative assumption of jury pardon is directly refuted by the trial record which established an ample rational factual basis for the jury's rejection of aggravated assault and its finding of guilty of improper exhibition. Moreover, the district court's unfounded presumption of jury pardon was legally impermissible and directly contrary to this Court's pronouncements in Gragg v. State, 429 So.2d 1204 (Fla. 1983).

Finally, the district court's estoppel ruling was erroneous since the defendant's request for the instruction as a lesser offense of each aggravated assault count was entirely proper. Had the jury found that only one of the two alleged aggravated assault victims sustained fear of imminent violence, a guilty verdict of one count of aggravated assault would have been lawfully consistent with a guilty verdict of the lesser offense as to the second count. Only after the jury returned its verdicts finding the defendant guilty of the lesser offense as to both counts did the legal issue of merger of offenses for penalty purposes arise. At that juncture, judicial compliance with the express legislative mandate of Section 790.10, that only one

conviction and sentence be imposed, was required. The district court's estoppel ruling contravened this Court's holding in Gragg, supra, that the defendant, by exercising his right to request proper lesser offenses, could not be deemed to have forfeited his fundamental right not to be doubly punished for the same offense. Reversal of the defendant's unauthorized second conviction and sentence is therefore required.

QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN IMPOSING DUAL CONVICTIONS AND SENTENCES FOR THE OFFENSE OF IMPROPER EXHIBITION OF A DANGEROUS WEAPON UNDER SECTION 790.10, FLORIDA STATUTES (1981), WHERE THE EVIDENCE ESTABLISHED ONE SINGLE ACT OF EXHIBITION, IN CONTRAVENTION OF THE CLEAR LEGISLATIVE INTENT EXPRESSED IN THAT STATUTE, AND FEDERAL AND STATE DOUBLE JEOPARDY CLAUSES?

ARGUMENT

THE LOWER COURT ERRED IN IMPOSING DUAL CONVICTIONS AND SENTENCES FOR THE OFFENSE OF IMPROPER EXHIBITION OF A DANGEROUS WEAPON UNDER SECTION 790.10, FLORIDA STATUTES (1981), WHERE THE EVIDENCE ESTABLISHED ONE SINGLE ACT OF EXHIBITION, IN CONTRAVENTION OF THE CLEAR LEGISLATIVE INTENT EXPRESSED IN THAT STATUTE, AND FEDERAL AND STATE DOUBLE JEOPARDY CLAUSES.

The Double Jeopardy Clause "forbids the state to seek and the courts to impose more than one punishment for a single commission of a legislatively defined offense". Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982). However, since the "power to define criminal offenses and to prescribe the punishments . . . resides wholly with the legislature . . . the question whether punishments imposed . . . are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized". Borges, supra, at 1267, quoting from Whalen v. United States, 445 U.S. 684, 688, 689 (1980). In short, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed". Albernaz v. United States, 450 U.S. 333, 344 (1981); Missouri v. Hunter, __U.S.__, 103 S.Ct. 673, 679 (1983).

In this case, the defendant was doubly convicted and sentenced for the single offense of "Improper exhibition of dangerous weapons or firearms", a misdemeanor proscribed by Section 790.10, Florida Statutes (1981). The evidence at trial however established but a single act of exhibition of a firearm in the presence of two persons. Accordingly, the issue of

whether the defendant's multiple convictions and sentences contravened the double jeopardy prohibition necessarily devolves upon an examination of the language of the statutory offense for a determination of legislative intent.

A. Section 790.10, Florida Statutes (1981) - Legislative Intent

The very language of a statute is the clearest indication of legislative intent. Grappin v. State, 450 So.2d 480 (Fla. 1984); State v. Watts, 10 F.L.W. 55 (Fla. Jan. 15, 1985); Albernaz v. United States, 450 U.S. 333, 336 (1981).

Section 790.10, Florida Statutes (1981), states:

> 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. (Emphasis added).

This statute's plain and unambiguous language - in the presence of one or more persons - clearly evidences a legislative intent to proscribe only one misdemeanor offense for the single act of exhibiting a dangerous weapon, regardless of the number of individuals in whose presence the weapon is exhibited. Indeed the clarity of this statutory language was recognized by the First District Court of Appeal in Solomon v. State, 442 So.2d 1030 (Fla. 1st DCA 1983).

In Solomon, supra, exactly as in the instant case, the defendant was charged with two counts of aggravated assault and

was convicted, following his jury trial, of two counts of improper exhibition of a dangerous weapon, as lesser offenses. The evidence in Solomon disclosed that the defendant had approached the driver's side of a car, removed a pistol from his pocket, and pointed it at the car's two occupants, the defendant's ex-wife and her male companion. In construing Section 790.10, Florida Statutes (1981), under which Solomon was dually convicted, the First District concluded that the statutory phrase "in the presence of one or more persons" was "indicative of a legislative intent that a single act of exhibition in the presence of more than one person should not result in multiple convictions". Solomon, supra, at 1032. Applying this construction to the evidence, the First District held that Solomon's conviction on more than one count of improper exhibition comprised fundamental error. Id., at 1031.

Likewise, in the present case, the evidence reflected that the defendant committed a single act of exhibition of a gun in the presence of two persons. (T. 40, 42, 48). Because the clear language of Section 790.10 establishes a legislative intent that only one misdemeanor conviction be imposed under these facts, the defendant's dual convictions and sentences directly contravene the double jeopardy prohibition against multiple punishments for a single commission of a legislatively defined offense. Borges v. State, 415 So.2d 1265 (Fla. 1982); Bell v. State, 437 So.2d 1057 (Fla. 1983).

B. District Court's Erroneous Application Of Jury Pardon And Estoppel

(1) Jury Pardon

The Third District Court of Appeal affirmed the defendant's multiple convictions and sentences on the thesis that the defendant, by requesting improper exhibition of a firearm as a lesser included offense of each of the two aggravated assault counts, received the benefit of a jury pardon and was thereby estopped from challenging the impropriety of his multiple convictions and sentences. Vance v. State, 452 So.2d 994, 995-96, n. 2 (Fla. 3d DCA 1984). The Third District's resort to jury pardon in abstaining from the defendant's fundamental double jeopardy claim was erroneous as a matter of fact and law. A careful reading of the trial record demonstrates a rational factual basis for the jury's finding of guilt as to the lesser offense of improper exhibition and, as well, refutes the district court's speculative assumption of jury pardon.

First, pursuant to the trial judge's repeated instructions, the jury was fully informed that the offense of aggravated assault required, inter alia, "an intentional, unlawful threat by word or act to do violence" and "doing some act which creates a well-founded fear . . . that such violence is imminent". §784.011(1), Fla. Stat. (1981). (T. 17-19, 91-92). The jury was also fully instructed that the misdemeanor of improper exhibition required that the exhibition of the firearm occur "in a rude, careless, angry, or threatening manner". See 790.10, Fla. Stat.

(1981). (T. 93). The obvious elemental distinctions between these felony and misdemeanor statutes are the existence in the former of a well-founded fear of imminent violence and the existence of an "intentional . . . threat to do violence".

Based on the evidence, the jury as the trier of fact and credibility, had ample rational basis to conclude the absence of these elements. The evidence established that the defendant's display of the gun, which was brief and fleeting, occurred after the two alleged victims, who had come to his home, demanded money from him and threatened to sue him. (T. 39-40, 42-43, 47-48, 53). The defendant, remaining within the doorway of his home, simply told the individuals to leave his property. (T. 39-40, 42, 48). The defendant neither fired nor cocked the gun, nor did he ever voice any kind of threat of physical harm to the alleged victims. Accordingly, the jury's verdicts, finding that the defendant was not culpable of aggravated assault but solely guilty of displaying a firearm in a rude, angry or careless fashion, rested upon a rational factual basis. Indeed, defense counsel, in his closing argument and based on the proof adduced, focused directly upon the insufficiency of the evidence to establish beyond a reasonable doubt either that the defendant had threatened to do violence to the alleged victims or that they had a well-founded fear that violence was imminent. (T. 87-89).

Therefore, the record clearly demonstrates a rational factual basis for the jury's refusal to find the defendant guilty of aggravated assault. Furthermore, the record also demonstrates that the jury had been provided with an avenue with which to

exercise its pardon power if it had so desired. After the trial judge advised the jury that the defendant was subject to a three-year minimum prison term if he were found guilty of aggravated assault with a firearm, the judge, on two separate occasions, expressly informed the jury that if it found the defendant guilty of aggravated assault with only a deadly weapon, i.e. not a firearm, the defendant could receive probation with no prison term. (T. 99, 101). Thus, although the judge furnished them with a path to jury pardon, the jurors declined to follow it. Accordingly, the district court's speculation of jury pardon has no support in the record.

The district court's resort to jury pardon in abstaining from the defendant's double jeopardy claim was not simply factually unsupported, but was legally erroneous as well.

In Gragg v. State, 429 So.2d 1204 (Fla. 1983), 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 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 state's argument that the jury had exercised its pardon power in convicting the defendant of the lesser offenses of simple assault and simple battery. This Court acknowledged that evidence in the record existed to support the view that the jury in fact pardoned the defendant for the charged crimes of aggravated assault and aggravated battery. However, 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 susceptible 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. (Emphasis added).

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 this case the issue, involving the prohibition against multiple punishments for the same offense, also directly implicates the Double Jeopardy Clause. Accordingly, under Gragg, the district court's

speculative and unfounded assessment of the jury's acquittal of the defendant of the two aggravated assault offenses as an exercise of its pardon power was legally inappropriate.

(2) Estoppel

In its decision, the Third District also erroneously concluded that the defendant, by requesting two lesser offense instructions on improper exhibition of a firearm, was estopped from challenging his multiple convictions and sentences for that offense.

This Court's decision in Gragg v. State, supra, also highlights this error in the district court's ruling.

In Gragg, the Fourth District had concluded that the defendant was estopped from invoking the doctrine of collateral estoppel because he had moved to sever the possession of a firearm by a convicted felon count from the aggravated assault and aggravated battery counts. This Court rejected the district court's application of the estoppel doctrine on the basis that 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 criticized the Fourth District's estoppel ruling because it unfairly required Gragg to waive his right to assert double jeopardy in order to exercise his right to secure a fair trial.

Likewise, the defendant in the present case was entitled to exercise his right to have the jury instructed on the lesser

included offense of improper exhibition of a firearm. See Keeble v. United States, 412 U.S. 205 (1973); State v. Bruns, 429 So.2d 307 (Fla. 1983).[1] As the trial judge expressly determined, this lesser offense was "consistent" with the evidence and was embraced in the charging document. (T. 70). See "Schedule of Lesser Included Offenses", "Aggravated Assault", Fla. Std. Jury Instr. (Crim.). Moreover, the defendant's request for each lesser offense merely responded to the two-count information drafted and filed by the state. A lesser offense instruction for each count was proper since the return of a verdict of guilty on the major crime of aggravated assault for one count would not be legally inconsistent with a verdict finding him guilty of the lesser included offense on the other count. The jury could have found that only one of the two alleged victims was in fear of imminent violence. Such a finding would have lawfully authorized the jury to return a guilty verdict of aggravated assault as to the count pertaining to that victim and, finding no apprehension of violence suffered by the second alleged victim, to return a guilty verdict of improper exhibition as a lesser offense of the second count of aggravated assault.

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1 Whether the evidence is susceptible of inference by the jury that the defendant is guilty of a lesser offense than that charged is a critical evidentiary matter exclusively within the province of the jury. (citations omitted). Fundamental trial fairness requires that a defendant being tried for robbery should be permitted to have an instruction on a lesser-included offense upon timely request. State v. Bruns, supra, 309-10. (Emphasis added).

Thus, only after the jury returned its verdicts finding the defendant culpable of both lesser offenses did the legal question of merger of offenses arise. At that point, the legislative proscription of Section 790.10, Florida Statutes, against cumulative punishments where a single firearm exhibition occurs before "one or more persons", mandated judicial merger of offenses for conviction and penalty purposes.[2] See e. g.,

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[2] This fact underscores the erroneous reliance by the district court below on defense counsel's failure to request a jury instruction 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". Vance, supra, at 996, n. 2. The district court reasoned that had this instruction been given, the jury "may not have chosen to pardon the defendant of both aggravated assault charges". Ibid.

First, the instruction was irrelevant since the issue of the propriety of multiple convictions and sentences constituted a legal question, the resolution of which was required to be made subsequent to the return of the jury's verdicts. See Redondo v. State, 403 So.2d 954 (Fla. 1981), Ayrado v. State, 431 So.2d 320 (Fla. 3d DCA 1983) (legal question of whether conviction invalid as a result of inconsistent verdicts is to be resolved post-verdict.); Troedel v. State, supra, Bell v. State, 437 So.2d 1057 (Fla. 1983), Aiello v. State, 390 So.2d 1205 (Fla. 4th DCA 1980), Muszynski v. State, 392 So.2d 63 (Fla. 5th DCA 1981), Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981), McGee v. State, 438 So.2d 127 (Fla. 1st DCA 1983) (issue of multiple convictions and sentences as violative of double jeopardy is legal question to be resolved post-verdict.) Manifestly, in all of the above-cited cases, the jury was not apprised of the potential consequences of the legal rulings regarding the propriety of convictions and sentences. Indeed in Ayrado v. State, 431 So.2d 320 (Fla. 3d DCA 1983), the Third District expressly ruled, directly contrary to its statement in the decision below, that a defendant's failure to either object to an instruction that each crime be considered separately and that a finding as to one count should not affect a finding as to another count, or to the verdict prior to the jury's discharge, did not preclude his successful challenge on appeal to the inconsistent verdicts reached.

Finally, and as set forth infra, the district court's rationale that if the instruction had been given, the jury "may not have chosen to pardon the defendant" constituted a presumption factually belied by the trial record and legally

(Cont.)

Troedel v. State, 9 F.L.W. 511 (Fla. Dec. 6, 1984) (dual convictions for burglary with an assault and burglary while armed "constitutes fundamental error" where only one unlawful entry and, hence, only one crime. "The [trial] court should have merged counts [of burglary] not only for sentencing purposes but also for purposes of rendering a final judgment of conviction".); Callaghan v. State, 10 F.L.W. 8 (Fla. 4th DCA Dec. 19, 1984) (defendant charged with two counts of attempted murder and jury returned two guilty verdicts of lesser included offense of shooting in a dwelling; held: "Even though Callaghan was found guilty on both counts of the lesser included offense of shooting in a dwelling, there can be only one adjudication of conviction . . . having been found guilty of only firing one shot in a dwelling, Callaghan could have been convicted of only one violation of section 790.19".); Short v. State, 423 So.2d 562 (Fla. 2d DCA 1982) ("Even though the jury found the appellant guilty of two counts of aggravated battery, one under Section 784.045(1)(a) and the other under Section 784.045(1)(b). . . the appellant only committed one battery, and accordingly, the court should have adjudicated and sentenced him on only one count.").

Because the defendant's request for the lesser offense instruction was proper, the instant case is clearly distinguishable from the situation where a defendant requests an improper lesser offense instruction and thereafter complains of the error which he has affirmatively induced. See e.g. McPhee v.

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prohibited as conjectural. Gragg, supra.

State, 254 So.2d 406 (Fla. 1st DCA 1971); Smith v. State, 344 So.2d 905 (Fla. 3d DCA 1977). Furthermore, this Court has held that the doctrine of estoppel is inapplicable under some circumstances even where the defendant does request an improper lesser offense instruction. In Achin v. State, 436 So.2d 30 (Fla. 1983), this Court ruled that a conviction for a technically non-existent crime comprised fundamental error, expressly rejecting application of the estoppel doctrine even though the defendant had deliberately induced the trial court to give the non-existent offense instruction. This Court viewed the conviction of the technically non-existent offense as a fundamental defect since "the state may only punish one who has committed an offense" and "[o]nly by legislative authority may a criminal offense be defined". State v. Sykes, 434 So.2d 325, 328 (Fla. 1983). In the present case, as in Achin, the defendant's convictions and sentences for improper exhibition comprised fundamental error since the evidence established only one commission of this statutory offense. In effect, the second conviction and sentence imposed for this single offense, in contravention of the clear legislative intent, constituted punishment for a non-existent crime.[3]

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[3] As this Court recently declared in Troedel v. State, 9 F.L.W. 511 (Fla. Dec. 6, 1984):

> Appellant's challenges to his convictions and sentences do not include the argument that he was improperly convicted of two separate counts of burglary when there was in fact only one commission of this statutory offense. However, we reach the issue anyway because we believe that a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error . . . There

(Cont.)

In sum, judicial compliance with the express legislative intent under Section 790.10, Florida Statues (1981), that only one misdemeanor penalty be imposed for the single exhibition of the firearm, was required. The concept of jury pardon was neither legally nor factually applicable and the concept of estoppel had no application since the defendant, by asserting his right to request proper lesser offenses, could not be deemed to have forfeited his right to be free from multiple punishments for the same offense. In accordance with Solomon v. State, 442 So.2d 1030 (Fla. 1st DCA 1983), reversal of the statutorily unauthorized second misdemeanor conviction and sentence under Section 790.10 is clearly required.

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was no evidence of more than one such unlawful entry. The court should have merged counts four and five not only for sentencing purposes but also for purposes of rendering a single judgment of conviction.

CONCLUSION

BASED upon the foregoing cases, authorities and policies cited herein, petitioner respectfully requests this Court to reverse and vacate the second conviction and sentence imposed for improper exhibition of a weapon.

Respectfully submitted,

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BY: Beth C. Weitzner
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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 31st day of January, 1985.

Beth C. Weitzner

Beth C. Weitzner
Assistant Public Defender