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AUG 3 1985
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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE HALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,355

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, In and For Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and Appellee in the lower courts. In the brief, the parties will be referred to as they appear before this Court. The symbol "R" will denote record on appeal.

STATEMENT OF CASE AND FACTS

Petitioner was charged and convicted of armed robbery and possession of a firearm while engaged in a criminal offense. Count I alleged that Petitioner committed robbery " ... and in the course thereof, there was carried a firearm or other deadly weapon, to wit: a handgun, said firearm or other deadly weapon being in the possession of Robert Lee Hall...." Count I cited Sections 812.13(1), 812.13(2)(a) and 775.087(2), Florida Statutes. Count II alleged that Petitioner " ... did then and there unlawfully display, use, threaten to use, or attempt to use a firearm, or carry a concealed firearm, to wit: a handgun, while committing or attempting to commit a felony, to wit: robbery ... ." Count II cited Sections 790.07(2) and 812.13, Florida Statutes (R 177, 179-180).

On appeal to the Fourth District Court of Appeal, Petitioner argued that he was improperly convicted on Count II because it was a lesser included offense of Count I. The District Court of Appeal rejected this argument and affirmed. However, the court confessed to "a sense of uneasiness with this result", and certified to this court as a question of great public importance the following (copy of opinion attached as appendix to this brief):

> IN THE WAKE OF STATE v. GIBSON, 452 So.2d 553 (FLA. 1984), MAY AN OFFENSE PROSCRIBED BY SECTION 790.07(2), FLORIDA STATUTES, EVER BE CONSIDERED A LESSER INCLUDED OFFENSE OF THE PROSCRIPTION OF SECTION 812.13(1) AND (2), FLORIDA STATUTES?

Jurisdiction of this Court was invoked by Notice of Discretionary Jurisdiction filed July 12, 1985.

SUMMARY OF ARGUMENT

In State v. Gibson, this Court held that Section 790.07(2), Florida Statutes, proscribes two distinct offenses: (1) use, display, etc., of a firearm in a felony, and (2) carrying a concealed firearm in a felony. This Court further held that offense (1) is not a lesser included offense of armed robbery with a firearm. The instant case, in contrast, involves offense (2) as well as (1), since both were alleged in the information. Offense (2) is in fact a lesser included offense of armed robbery, since both statutes use the word "carry". Because one of the alternative allegations in the firearm count in the instant case was a lesser of the robbery count, the firearm count was a lesser included offense of the robbery count, and a separate conviction and sentence should not have been allowed.

ARGUMENT

IN THE WAKE OF STATE v. GIBSON, 452 So.2d 553 (FLA. 1984), MAY AN OFFENSE PROSCRIBED BY SECTION 790.07(2), FLORIDA STATUTES, EVER BE CONSIDERED A LESSER INCLUDED OFFENSE OF THE PROSCRIPTION OF SECTION 812.13(1) AND (2), FLORIDA STATUTES?

ANSWER: YES.

The answer to the question certified by the Fourth District Court of Appeal is yes. Moreover, the instant case presents the situation where carrying a firearm in the commission of a felony is indeed a lesser included offense of armed robbery. Here, Count I alleged that Petitioner committed robbery " ... and in the course thereof, there was carried a firearm or other deadly weapon, to wit: a handgun, said firearm or other deadly weapon being in the possession of Robert Lee Hall ...." Count II alleged that Petitioner " ... did then and there unlawfully display, use, threaten to use, or attempt to use a firearm, or carry a concealed firearm, to wit: a handgun, while committing or attempting to commit a felony, to wit: Robbery ...." (R 177). Because of the way that Count II was alleged, it was a lesser included offense of Count I. A separate conviction and sentence for a lesser included offense is prohibited. Section 775.021(4), Florida Statutes (1983); State v. Gibson, 452 So.2d 553, 557 (Fla. 1984).

In Gibson, supra, this Court dealt with the same two statutes in question in the instant case, and also set forth the analytical method by which it is to be determined whether one

offense is a lesser included offense of another. The analytical method consists of applying the "Blockburger test" to the elements of the two crimes in question as set forth in the applicable statutes. See, Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The inquiry involves neither the actual allegations in the charging instrument nor the factual elements of evidentiary proof presented at trial; reference is to be made only to the statutes. Gibson, 452 So.2d at 556. See also, State v. Baker, 456 so.2d 419, 420 (Fla. 1984). The Blockberger test, as adapted by this Court in Gibson, to be applied to the statutory elements may be stated a follows: if one offense has at least one statutory element that the other does not, then it is a separate crime and not a lesser included offense. If, on the other hand, all elements of one offense are subsumed by the elements of the other, then it is a lesser included offense and separate convictions and sentences are prohibited. 452 So.2d at 556.

This Court in Gibson dealt only with one of the two offenses defined in section 790.07(2), the firearm in a felony statute. In footnote 1, this Court stated that the statute proscribes two distinct offenses: (1) Use, display, or attempt or threaten to use a firearm while committing a felony, and (2) Carrying a concealed firearm while committing a felony. It was further noted in the same footnote that the only offense at issue in Gibson was (1) Use, display, etc. This Court also stated in footnote 5 that the distinction between the two offenses defined

by the statute might make a difference under the Blockburger rule. The instant case presents the situation wherein the distinction does indeed make a crucial difference.

In contrast to Gibson, which involves only the first of the two offenses in the statute, the instant case involves both use, display, etc., and (2) carrying a concealed firearm while committing a felony. In contrast to Gibson, in the instant case both offenses were alleged in the alternative in Count II of the information (R 177). Therefore, the Blockburger analysis must be applied to both parts of the statute, not just the one part in Gibson which this Court held not to be a lesser included offense of armed robbery.

Applying the Blockburger test to the statutory elements involved in the instant case, it is apparent that Count II indeed charged a lesser included offense of Count I. The relevant portion of Section 812.13(2(a), the statute charged in Count I, states " ... in the course of committing the robbery the offender carried a firearm or other deadly weapon ... " (emphasis added). The second statutory alternative in Section 790.07(2), the alternative alleged in the instant case in Count II but not alleged in Gibson, states:" ... while committing or attempting to commit any felony ... displays, uses, threatens or attempts to use any weapon ... or carries a concealed weapon ... " (emphasis added). It is apparent on the face of the statutes themselves that "carries a concealed weapon" is the same as "carried a firearm or other deadly weapon". Only the most strained semantic

sophistry could lead to a conclusion that the two statutory provisions, both of which clearly use the word carry, are not equivalent.

In Gibson this court found that "carried a firearm or other deadly weapon" was not the same as "use, display," etc. It is evident, however, when analyzing the second alternative of the statute left untouched by this court in Gibson, that carrying a concealed weapon is the same element as carrying a firearm or other deadly weapon. It is true that under the armed robbery statute the weapon carried does not necessarily have to be concealed as it does under the firearm in a felony statute. However, a concealed firearm would certainly satisfy the robbery statute, and therefore this element in the firearm in a felony statute makes the latter offense a lesser of armed robbery.

Thus, one of two statutory alternatives for use of a firearm in a felony pled in the instant case, the one not dealt with in Gibson, was a lesser included offense of the armed robbery also charged. Even though the other alternative charged, the one held by Gibson not to be a lesser included offense, was also charged here, the presence of the alternative allegation means that the entire count must be considered a lesser included offense of Count I. Under the charging language, the jury was equally empowered find Petitioner guilty of the statutory alternative which was a lesser included offense as it was to find him guilty of the alternative which was not, and the verdict itself provides no clue as to which choice, if any, was ever made (R 180).

In contrast to Gibson, in the instant case this Court must hold that the second offense delineated in Section 790.07(2) is a lesser included offense of armed robbery, and further answer the District Court of Appeal's certified question in the affirmative. The legislature's expressed intent in Section 775.021(4), Florida Statutes, (1983), is that there shall be no double conviction or sentence for lesser included offenses. The Blockburger test establishes that the offense in question in the instant case is indeed a lesser included offense. Moreover, since it has been established that one of the offenses involved here is a lesser included offense of the other, the constitutional double jeopardy clause also proscribes multiple convictions and sentences. Bell v. State, 437 So.2d 1057, 1060 (Fla. 1983); Article 1, Section 9, Florida Constitution; Fifth and Fourteenth Amendments, United States Constitution.

This court must answer the certified question in the affirmative, vacate the decision of the Fourth District Court of Appeal, and remand with directions for Petitioner's conviction and sentence on Count II to be stricken.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and remand this cause with directions to vacate the conviction and sentence on Count II of the information.

Respectfully submitted,

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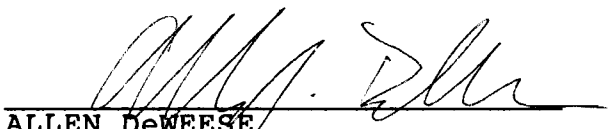

ALLEN DeWEESE
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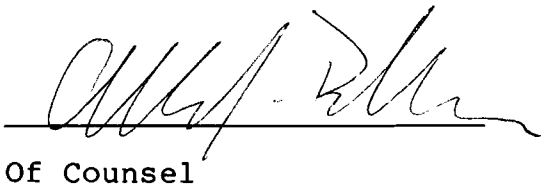
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Georgina Jimenez-Orosa, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, by courier, this 6th day of August, 1985.



Of Counsel