

IN THE SUPREME COURT OF FLORIDA

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MAY 2 1986

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By _____
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ROBERT LEE HALL,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 67,355

RESPONDENT'S SUPPLEMENTAL
REPLY BRIEF

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ARGUMENT IN REPLY

Petitioner suggests that since 1983 when the amended §775.021(4) Florida Statutes, came into effect, this Court has misinterpreted the legislative intent and disregarded the word "requires" in the Statute to determine whether there are two offenses or only one where the same act or transaction constitutes a violation of two distinct statutory provisions.

Respondent would respectfully point out that the instant case is before this Court solely on the Certified question from the Fourth District:

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 OF A LESSER INCLUDED
OFFENSE OF THE PROSCRIPTION OF
SECTION 812.13(1) AND (2), FLORIDA
STATUTES?

In his Supplemental Brief, Petitioner argues the instant case would be this Court's first opportunity to apply the "new" statute. A reading of this Court's opinion in State v. Gibson, 452 So.2d 553 (Fla. 1984) reveals the fallacy in Petitioner's arguments. In Gibson, supra at 556, this Court stated:

In Borges v. State, we adopted
the test announced in Blockburger
v. United States, 284 U.S. 299, 52
S.Ct. 180, 76 L.Ed. 306(1932), for
determining whether two statutory

offenses, when ostensibly violated by a single act of the accused, are intended to be separately prosecuted and punished. There it was said that the "applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304, 52 S.Ct. at 182. Applying this test to the statutory elements of the two offenses in question in the present case, we conclude that, because each offense has at least one statutory element that the other does not, the offenses are separate crimes even when based on the same act or factual event. Therefore, under the Blockburger test, the two offenses were intended by the legislature to be separately prosecuted and punished.

[Emphasis Added.]

The Blockburger test (including the word "requires") has been incorporated into the Florida Statutes in §775.021(4), which in pertinent part reads:

For the purpose of this subsection, offenses are separate if each offense requires proof of an element that the other does not...

Further, §775.021(4) Florida Statute came into effect as revised by Ch. 83-156, Laws of Florida, in June of 1983. Thus, this is not a "new" statute, and certainly the instant case is not the first opportunity this Court has had to focus on the revised version of §775.021(4). See

State v. Baker, 456 So.2d 419, 422 n.7 (Fla. 1984) where, on July 12, 1984, this Court recognizes that the "Legislature amended §775.021(4) in 1983 to adopt the Blockburger test." Therefore, it is axiomatic that this Court has been aware of the amendment to §775.021(4) since it became effective in 1983, and whether under the Blockburger test or §775.021(4) Fla.Stat. (1983), this Court considered the word "requires" when it determined that:

[U]se or display of a firearm in committing a felony is not a lesser included offense of robbery while armed but, rather, was intended by the legislature as a separate offense to be separately prosecuted and punished...

Gibson, supra at 557.

The Gibson opinion using the Blockburger test (as codified in §775.021(4) Fla.Stat. (1983), which includes the word "requires") to determine whether use of a firearm during the commission of a felony is a lesser included offense of robbery under §812.13 Florida Statutes has been reaffirmed in State v. Brown, 455 So.2d 356 (Fla. 1984); and more recently still in Garcia v. State, 476 So.2d 170 (Fla. 1985). The same Blockburger analysis was used by this Court in State v. Baker, 456 So.2d 419 (Fla. 1984) where it was held use of a firearm during the commission of a felony is not a lesser included offense of first-degree

premeditated murder. To the same effect is State v. Marshall, 455 So.2d 355 (Fla. 1984). Gibson, supra, and Baker, supra, were recently reaffirmed once more in State v. Boivin, 11 FLW 123 (Fla.No. 64,368 March 27, 1986) where it was held aggravated battery and possession of a firearm under §790.07 are not necessarily lesser included offenses of attempted first-degree murder.

This Court on June 14, 1984, issued its opinion in Gibson holding:

The offense of robbery while armed contains, in addition to its other constituent statutory elements, the element that the accused carried a firearm or other deadly weapon. The elements of the crime do not include displaying the weapon or using it in perpetrating the robbery. The offense of display or use of a firearm while committing a felony contains as one of its constituent statutory elements that the offender displayed, used, or attempted or threatened to use a firearm during the commission of a felony. It is clear that each of these offenses contains at least one constituent statutory element that the other does not. Contrary to our conclusion in the opinion of February 17, 1983, we now determine that use or display of a firearm in committing a felony is not a lesser included offense of robbery while armed but, rather, was intended by the legislature as a separate offense to be separately prosecuted and punished even where based on a single act or closely connected group of acts. §775.021(4), Fla.Stat.(1977).

[Footnote omitted. Emphasis added.]
Id. at 556, 557.

In State v. Baker, 452 So.2d 927, 929 (Fla. 1984) this Court held:

In virtually every case of armed robbery, the deadly weapon carried by the perpetrator is the means by which he induces "force, violence, assault, or putting in fear," one of the elements of any robbery, armed or unarmed. However, the statutory element which enhances punishment for armed robbery is not the use of the deadly weapon, but the mere fact that a deadly weapon was carried by the perpetrator. The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense.

[Emphasis added.]

Under this rationale, it is clear that in the case sub judice, the State had to prove that Petitioner took the property from the gas station operator by force and that he carried a firearm during the robbery. The State, however, did not have to prove that Petitioner displayed the firearm or that he used or threatened to use a firearm. As the Court stated in Baker, 452 So.2d at 929, an individual can carry a firearm without displaying it to his victim. Conversely, the State did not have to prove that the accused committed a robbery in order to convict him under Section 790.07(2). They could prove he committed an aggravated assault or any other felony. Perhaps the best evidence that the display of a firearm is not a lesser included offense to robbery while carrying a firearm is that the former is not listed as a lesser included offense--

necessarily or otherwise--under this Court's schedule of lesser included offense. See: Florida Standard Jury Instructions in Criminal Cases (1981) at P. 266.

This Court in Gibson held:

The relevent paragraph of section 790.07, paragraph (2), proscribes two distinct offenses, which are: (1) use, display, or attempt or threat to use a firearm while committing a felony and (2) carrying a concealed firearm while committing a felony.

Id. at 554, n.1,4. It is important to note that Gibson was issued by this Court June 14, 1984; and Petitioner herein was charged by information filed November 16, 1983 (R 177), or seven (7) months prior to the issuance of Gibson by this Court. Thus, it was impossible for the State to anticipate the Gibson decision and charge Petitioner with only "use, display, or attempt to use a firearm," and leave out the remaining language of §790.07(2) which up to this Court's decision in Gibson was believed to proscribe only one offense. Respondent, therefore, submits that this case comes to this Court in the exact same posture as Gibson (See 452 So.2d n.s. 1,4,5), and thus just as in Gibson, one must only look to the record to determine that Petitioner was charged and convicted of "use and display of the firearm."

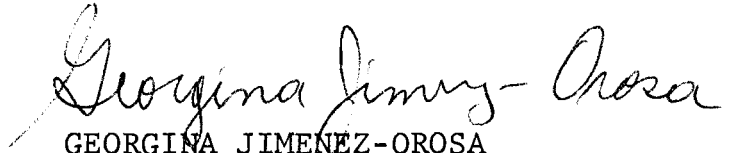
Petitioner has failed to establish how §775.021(4) in effect since June 1983 can be categorized as a "new" statute. Respondent has shown this Court has been aware

and used the "statute's plain language" to arrive at the decision in Gibson, supra; Baker, supra; Brown, supra; Garcia, supra; and Boivin, supra.

Petitioner has not presented any new arguments to this Court, and has failed to show that Gibson was erroneously decided. Respondent respectfully requests this Honorable Court to approve the decision of the Fourth District Court AFFIRMING the convictions and sentences imposed on Petitioner by the trial court under both Counts I and II of the information.

Respectfully submitted,

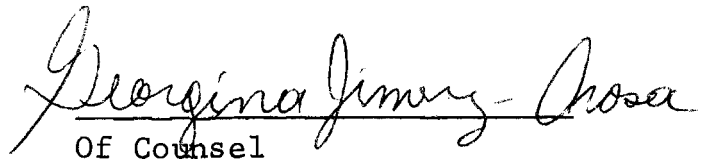
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Supplemental Reply Brief has been sent by courier to: ALLEN DeWEESE, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 30th day of April, 1986.



Of Counsel