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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

VS. CASE NO. 67,557

DONALD WAYNE RHAMES,

RESPONDENT.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CITATIONS

OTHERS

SUMMARY OF ISSUE PRESENTED

The First District Court of Appeals determined that conspiracy is a necessarily lesser-included offense of dealing in stolen property as an organizer under §812.019(2), Florida Statutes (1983), thus finding reversible error in the trial court's denial of Respondent's pre-trial motion to dismiss the conspiracy charge against him and allowing Respondent to be convicted of both grand theft and dealing in stolen property where his conduct arose out of a common scheme or course of conduct. The State contends that the First District incorrectly applied applicable case law in reaching this decision. Respondent asserts that the First District correctly interpreted and applied available, applicable case law and that the decision of the First District Court of Appeals must therefore be affirmed.

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ISSUE

THE FIRST DISTRICT'S DECISION THAT RESPONDENT'S ADJUDICATION AND SENTENCE FOR CONSPIRACY TO COMMIT GRAND THEFT COULD NOT STAND BECAUSE IT WAS A NECESSARILY LESSER-INCLUDED OFFENSE OF DEALING IN STOLEN PROPERTY AS AN ORGANIZER DURING THE SAME CRIMINAL EPISODE CORRECTLY ANALYZED AND APPLIED APPLICABLE CASE LAW

ARGUMENT

Upon motion for rehearing in Rhames v. State, 473 So.2d 724, 728 (Fla. 1st DCA 1985), the State contended, as it does herein, that the First District misapplied certain settled precedent in vacating the Respondent's conviction for conspiracy to commit grand theft, §§ 777.04(3) and 812.014(2), Florida Statutes (1983). In denying the State's motion for rehearing, the First District specifically addressed and rejected the State's arguments restated herein. Adhering to its original opinion that the trial court should have dismissed Respondent's pre-trial motion to dismiss the conspiracy charge since it constituted a necessarily lesser-included offense to dealing in stolen property as an organizer, but recognizing the subsequent limitations of Bell v. State, 437 So.2d 1057 (Fla. 1983) by this Court in Rotenberry v. State, 468 So.2d 971, 976 (Fla. 1985), the First District noted:

> . . . the question of whether two offenses are considered the same for double jeopardy purposes requires an

> examination of the statutory elements of the offenses, and not of the accusatory pleadings or evidence offered at trial. State v. Baker, 456 So.2d 419 (Fla. 1984); see also Section 775.021 (4), Florida Statutes (1983) (Footnote omitted.)

The First District specifically rejected the State's contention, restated and reargued herein, that since conspiracy to commit grand theft requires an agreement with another who is acting unlawfully, while "dealing" in stolen property does not, it is possible to statutorily commit the two crimes separately. The First District noted correctly that the cases cited by the State to distinguish these two offenses on the basis of the element of the unlawfulness of the co-party's actions under §§ 777.04(3) and 812.019(2) are not on point. Both Blake v. State, 444 So.2d 1054, 1055 (Fla. 1st DCA 1984) and Lancaster v. State, 369 So.2d 687, 688 (Fla. 1st DCA 1979) involve the question of what constitutes "trafficking" under §812.019(1), Florida Statutes (1983). Neither case addresses the issue of what constitutes "dealing" under §812.019(2), Florida Statutes (1983).

Moreover, the relevant language of §812.019(2) unambiguously establishes, as noted by the First District in both its original opinion and its denial of the State's motion for rehearing, that the "dealing" offense proscribed by §812.019(2) cannot be committed by a person acting alone. It is phrased as follows:

> 812.019 Dealing in stolen property. -
>
> * * *
>
> (2) Any person who initiates, organizes, plans, finances, directs, manages, or supervises the theft of property and traffics in stolen property. . . .

Comparatively, §777.04 Attempts, solicitation, conspiracy, generally is phrased as follows:

> (3) Whoever agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy.

The First District correctly analyzed these statutory elements in its original opinion in stating that:

> . . . proof of the offense of dealing in stolen property necessarily requires proof of an agreement or undertaking between the defendant and another to commit a crime - in other words, proof of the constituent elements of the offense of conspiracy. Rhames v. State, 473 So.2d at 727.

Specifically, rejecting the State's argument that under these statutes the offenses of "dealing" in stolen property and conspiracy to commit a crime meet the "separateness" test, the First District commented in its denial of the State's motion for rehearing that:

> [a]s we noted in our original opinion in this case, Goddard v. State, 458 So.2d 230 (Fla. 1984), holding that a person who commits a theft and trafficks in his own stolen goods cannot be convicted of the "organizing" provisions of Section 812.019(2) clearly states the converse; that is, that Section 812.019(2) cannot

> be violated by one acting alone. Accordingly, this statute necessarily requires proof that a defendant agreed to commit that crime with another; that is, conspired to commit a crime, in "initiating, organizing, planning," etc. -in this case- the theft of property. We are constrained to avoid a result which would countenance the "labeling under different statutory sections of essentially the same crime." Bell, supra, at 1059, citing Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Rhames v. State, 473 So.2d at 729.

The State argues, on the basis of Rotenberry v. State, 468 So.2d 971 (Fla. 1985), that this statutory analysis is incorrect because it fails to test "whether it is statutorily impossible under any conceivable set of facts to commit the primary offense without also committing the secondary offense." The State contends that "conspircy [sic] to commit grand theft requires the . . . confederation concern property of at least $100.00 in value, whereas dealing in stolen property does not require that the confederation concern property of any particular minimum value." Hypothetically, the State argues further, one could "deal in stolen property as an organizer by inducing a naive pawn shop owner to sell 'penny ante' stolen goods and not be guilty to [sic] conspiracy to commit grand theft."

While it is interesting to note that even in the State's fallacious hypothetical, a "confederation" of persons, both acting unlawfully, is required to deal in stolen property, the

First District's decision was necessarily premised on a statutory analysis of the charges in this case. Neither Rotenberry v. State, supra, with its resulting limitations on Bell v. State, 437 So.2d 1057 (Fla. 1983), nor Enmund v. State, 476 So.2d 165 (Fla. 1985) and Vause v. State, 476 So.2d 165 (Fla. 1985) and Snowden v. State, 476 So.2d 191 (Fla. 1985), which cite and follow Enmund, required the First District to consider "any conceivable set of facts" proposed by the State.

Both Rotenberry v. State, supra, at 975, and Enmund v. State, supra, at 167, deal with the effect of Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), on Florida case law which followed the test of statutory construction set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and which the Florida legislature adopted in §775.021(4), Florida Statutes (1983). In Rotenberry v. State, supra, at 975, this Court stated:

> Although we were aware of the decision in Missouri v. Hunter, [cite omitted], when we decided Bell, the full ramifications of that decision were not realized until our decisions in State v. Gibson, 452 So.2d 553 (Fla. 1984) (on rehearing); State v. Baker, 452 So.2d 927 (Fla. 1984); and State v.. Baker, 456 So.2d 419 (Fla. 1984) (expressly limiting Bell to necessarily lesser included offenses). In the first two decisions, we relied on Hunter for the proposition that the double jeopardy clause does not prohibit multiple punishments where the legislative intent is clear. Where legislative intent is not clear, multiple punishments are not permitted unless the two offenses

> are separate crimes under the statutory interpretation of Blockburger v. United States, [cite omitted] as incorporated into Florida law.

As previously noted, the Blockburger test has been adopted by the Florida legislature in § 775.021(4), which provides:

> [w]hoever, in the course of one criminal transaction or episode commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. **For purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleadings or the proof adduced at trial.** (Emphasis added.)

In analyzing the question of whether conspiracy is a necessarily lesser-included offense of the "organizing" provision of §812.019(2), Florida Statutes (1983), with which Respondent herein was charged with violating, the First District did, in fact, make the appropriate inquiry, as is indicated by the court's reliance on Goddard v. State, 458 So.2d 230 (Fla. 1984). In Goddard v. State, supra, this Court discussed at length the Florida Anti-Fencing Act, as adopted by the legislature in chapter 77-342, Laws of Florida, specifically noting that:

> [t]he Act mandates that its provisions are not to be construed strictly, but rather 'in light of their purposes to achieve their remedial goals.' Fla. Stat. §812.037 (1983). Goddard v. State, supra, at 232.

In examining the legislative history and the Act as a whole, this Court further noted:

> [u]nder the statutory scheme of the Florida Anti-Fencing Act, a thief who steals property valued at more than $100, but less than $20,000, subjects himself to punishment for a third degree felony under section 812.014. An individual who sells property he knows is stolen is subject to a second-degree felony under the "trafficking" provision, section 812.019(1). The harshest penalty, a first-degree felony, is imposed under section 819.012(2) on the individual who initiates, organizes, plans, finances, directs, manages, or supervises the thefts and traffics in stolen property. Section 812.025 supplements these provisions by providing that a defendant may be charged with both theft and dealing in stolen property, but cannot be found guilty of both crimes. Goddard v. State, supra, at 233.

Citing commentary on the model theft and fencing act from which Florida's Act was adapted, this Court also noted:

> [t]he penalties are higher for a person who organizes or directs the fencing operation than for the person who merely traffics in stolen property. This diferential is in accord with the economic realities of major fencing operations. The penalties are graded according to the offender's role, but not according to the value of the property involved. Goddard v. State, supra, at 233-234.

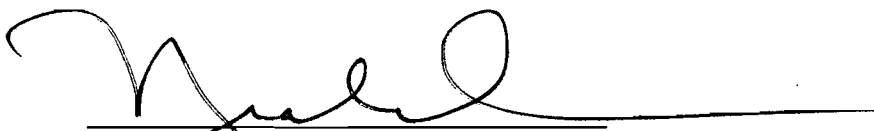
Clearly, as noted by this court, and as interpreted by the First District, it is the remedial purpose of §812.019(2) to punish the individual who organizes theft - in other words - the individual who "agrees, conspires, combines, or confederates with another" to commit theft - of property, regardless of the value of the property stolen. Thus, the First District did not erroneously concluded that the conspiracy charged against Respondent herein was a necessarily lesser-included offense of the "dealing" in stolen property as a trafficker charged against Respondent herein.

Wherefore, for the foregoing reasons, Respondent requests that this Court affirm the First District Court of Appeals decision in Rhames v. State.

CONCLUSION

WHEREFORE, for all the reasons stated herein, the Respondent, DONALD WAYNE RHAMES, respectfully submits and requests that the decision of the First District Court of Appeals below be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been forwarded via U.S. Mail to John W. Tiedmann, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, on this 13th day of March, 1986.

NEAL T. MCSHANE
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