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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

CASE NO. 67-557 *JM*

STATE OF FLORIDA,

PETITIONER,

VS.

DONALD WAYNE RHAMES,

RESPONDENT.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATE OF FLORIDA,

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CASE NO 67,557

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and the appellee below in Rhames v. State, 473 So.2d 724 (Fla. 1st DCA 1985), review granted (Fla. 1986), Case No. 67,557, and the petitioner here, will be referred to as "the State." Donald Wayne Rhames, the criminal defendant and the appellant below, and the respondent here, will be referred to as "respondent."

Pursuant to Fla.R.App.P. 9.220, a conformed copy of the decision under review is attached to this brief as an appendix.

References to the three-volume record on appeal will be designated "(R:)."

All emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case reaches this Court upon its February 5 acceptance of certiorari jurisdiction under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P 9.030(a)(2)(A)(iv) to resolve an express and direct conflict with its decision of Rotenberry v. State, 468 So.2d 971 (Fla. 1985) on the legal question of when separate adjudications and sentences may be authorized for distinct offenses committed during a single criminal episode. Those matters essential to a resolution of this narrow legal issue are related in the opinion of the First District in Rhames v. State, which the State adopts as its statement of the case and facts.¹

¹ The State would note for the record that, in the interests of justice, cf Fla.R.Ap.P. 9.140(f), it has elected to waive its Tillman v. State, 471 So.2d 32 (Fla. 1985) right to challenge here the First District's decision that respondent's adjudication and sentence for dealing in stolen property as a trafficker (Count VII, Case No. 84-17) precluded his adjudications and sentences for the five grand thefts he committed during the same criminal episode (Counts I-V, Case No. 84-17) under §812.025, Fla.Stat. as interpreted in Goddard v. State, 458 So.2d 230 (Fla. 1984), despite respondent's admitted failure to contemporaneously object to jury instructions authorizing dual sets of convictions for these existing offenses (R 312; 54-55; 48-50; 318; 65; 69), Rhames v. State, 473 So.2d 724,727-728, which arguably should have constituted an irrevocable procedural default of respondent's right to pursue this claim under Ray v. State, 403 So.2d 956 (Fla. 1981).

The State would anticipatorily submit that Tillman v. State does not authorize respondent to raise here the tape recording transcript and sufficiency of the evidence issues resolved adversely to him by the First District. See Berezorsky v. State, 350 So.2d 80 (Fla. 1977), Sobel v. State, 437 So.2d 144 (Fla. 1983) and Barket v. State, 356 So.2d 263 (Fla. 1978), cert. denied, 439 U.S. 848 (1978), wherein this Court interpreted its

(Continued next page)

SUMMARY OF ARGUMENT

The First District determined that conspiracy to commit grand theft was a necessarily lesser included offense of dealing in stolen property as an organizer, thus precluding a separate adjudication and sentence therefore because the conduct which led to these charges occurred during the same criminal episode, contrary to this Court's decision in Rotenberry v. State and other subsequent decisions. The decision of the First District must therefore be reversed in part with directions that the judgment and sentence imposed by the trial court for conspiracy to commit grand theft be reinstated.

Footnote continued

power to resolve issues other than those upon which its jurisdiction was predicated quite narrowly. For this Court to consider a respondent's claims which were only brought before it because a petitioner successfully exercised its prerogative to obtain certiorari review would be to potentially and unconscionably penalize a petitioner for exercising its legal rights. If respondent wanted this Court to review his tape recording transcript and sufficiency of the evidence issues, he should have filed his own petition for writ of certiorari.

ISSUE

THE FIRST DISTRICT'S DECISION THAT
RESPONDENT'S ADJUDICATION AND SENTENCE
FOR CONSPIRACY TO COMMIT GRAND THEFT
COULD NOT STAND BECAUSE SUCH WAS A
NECESSARILY LESSER INCLUDED OFFENSE OF
DEALING IN STOLEN PROPERTY AS AN
ORGANIZER DURING THE SAME CRIMINAL
EPISODE, IS CONTRARY TO NUMEROUS
DECISIONS OF THIS COURT

ARGUMENT

In Rhames v. State, the First District relied upon this Court's decision of Bell v. State, 437 So.2d 1057 (Fla. 1983) to hold that respondent's adjudication and sentence for conspiracy to commit grand theft in violation of §777.04 and §812.014(2)(b)(1), Fla.Stat. (Count VI, Case No. 84-17) could not stand because such was a necessarily lesser included offense of the charge of dealing in stolen property as an organizer during the same criminal episode in violation of §812.019(2), Fla.Stat., under which respondent was convicted of and adjudicated and sentenced for the lesser included offense of dealing in stolen property as a trafficker in violation of §812.019(1), Fla.Stat. (Count VII, Case No. 84-17).² Although the First District

2. These statutes read as follows:

777.04 Attempts, solicitation, conspiracy, generally.--

(3) Whoever agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy and shall, when no express provision is made by law for the punishment of such conspiracy, be punished as provided in subsection (4).

(Continued next page)

correctly noted that this Court's decision of Rotenberry v. State had limited Bell v. State and required that the test for determining whether one offense is a necessarily lesser included offense of another for purposes precluding separate adjudications and sentences for contemporaneous conduct is "whether it is statutorily impossible under any conceivable set of facts to commit the primary offense without also committing the secondary offense", Rhames v. State, 473 So.2d 724,728, see also §775.021(4), Fla.Stat., it incorrectly applied this test, see also State v. Enmund, 476 So.2d 165 (Fla. 1981), Vause v. State,

(4) Whoever commits the offense of criminal attempt, criminal solicitation or criminal conspiracy shall be punished as follows...

(d) If the offense attempted, solicited, or conspired to is a felony of the third degree, the person convicted is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

812.014 Theft.--

(1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriately the property to his own use or to the use of any person not entitled thereto...

(2)(b) It is grand theft of the second degree and a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084, if the property stolen is:

1. Valued at \$100 or more, but less than \$20,000.

812.019 Dealing in stolen property.--

(1) Any person who traffics in, or endeavors to traffic in, property that he knows or should have known was stolen shall be guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

(2) Any person who initiates, organizes, plans, finances, directs manages, or supervises the theft of property and traffics in such stolen property shall be guilty of a felony of the first degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

476 So.2d 141 (Fla. 1985), and State v. Snowden, 476 So.2d 191 (Fla. 1985). Clearly, it is statutorily possible to deal in stolen property as an organizer without conspiring to commit grand theft, for two reasons.

First, conspiracy to commit grand theft requires confederation with another who is also acting unlawfully, see e.g. Parker v. State, 276 So.2d 98 (Fla. 4th DCA 1973) and King v. State, 104 So.2d 730 (Fla. 1957), while dealing in stolen property requires only confederation with another who may or may not be acting unlawfully, see e.g. Blake v. State, 444 So.2d 1050 (Fla. 1st DCA 1984) and Lancaster v. State, 369 So.2d 687 (Fla. 1st DCA 1979). Secondly, conspiracy to commit grand theft requires that the aforementioned 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.

In other words, one could hypothetically 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 conspiracy to commit grand theft. The First District failed to appreciate this fact.

The First District also failed to appreciate that the fact that respondent was ultimately adjudicated for dealing in stolen property as a mere trafficker rather than as an organizer as

charged-which lesser offense even the appellate court itself admitted indisputably does not require confederation with another also acting illicitly, unlike conspiracy to commit grand theft - would render a separate adjudication and sentence for the latter offense proper under the rule of Rotenberry, Rhames v.State, 473 So.2d 724,727. Under the First District's view, respondent's disapproved adjudication and sentence for conspiracy to commit grand theft would have been proper had he been charged with dealing in stolen property as a trafficker rather than as an organizer. Certainly nothing could be more illogical.

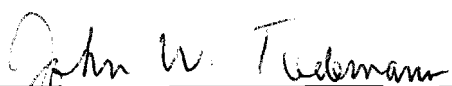
For the foregoing reasons, this Court must reverse Rhames v. State in part with directions that respondent's adjudication and sentence for conspiracy to commit grand theft be reinstated.

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that the decision of the First District below must be REVERSED in part with directions that respondent's adjudication and sentence for conspiracy to commit grand theft be REINSTATED.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

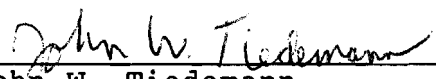


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner has been forwarded to Mr. Robert G. Kerrigan, KERRIGAN, ESTESS and RANKIN, 400 East Government Street, P.O. Box 12009, Pensacola, FL 32589, on this 17th day of February, 1986.



John W. Tiedemann
Assistant Attorney General