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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PEITIONER,

VS.

DONALD WAYNE RHAMES,

RESPONDENT.

CASE NO. 67,557

REPLY BRIEF OF PETITIONER ON THE MERITS

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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. 65,557, and the petitioner here, will again be referred to as "the State." Donald Wayne Rhames, the criminal defendant and the appellant below, and the respondent here, will again be referred to as "respondent."

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

No references to the three-volume record on appeal will be necessary.

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

STATEMENT OF THE CASE AND FACTS

With respondent's tacit concurrence, the State again adopts the opinion of the First District in Rhames v. State, the decision under review, as its statement of the case and facts. For the record, the State would dispute the factual inference contained at p. 1 of "Respondent's Answer Brief On the Merits" that it first raised the instant defense to respondent's separate adjudication and sentence for conspiracy to commit grand theft upon motion for rehearing in the First District. Respondent has apparently been misled by inaccurate langauge in the lower court's initial opinion to the effect that the State did "not contest" the purported fact that this offense was a "lesser included offense" of the charged offense of dealing in stolen property as an organizer, Rhames v. State, 473 So.2d 724, 727, thus precluding a separate disposition therefor. An objective reivew of p. 11 of the "Brief of Appellee" filed in the appellate court will reveal that the State defended respondent's separate adjudication for conspiracy to commit grand theft from the start, which explains why the First District felt compelled to reject the State's defense on the merits upon rehearing rather than rejecting this defense as untimely raised.

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 adjudiction 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, 468 So.2d 971 (Fla. 1985), 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.

ISSUE

THE FIRST DISTRICT'S DECISION THAT REESPONDENT'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

When may a criminal defendant be separately charged with, and convicted, adjudicated and sentenced for, committing multiple criminal violations during a single criminal transaction? In Rotenberry v. State, 468 So.2d 971, 975-976, this Court, in the course of affirming that defendant's separate sentences for trafficking, selling, and possessing the same cocaine, interpreted two decisions of the United States Supreme Court to establish that:

> [T]he double jeopardy clause [of the Fifth Amendment to the Constitution of the United States] does not prohibit multiple punishments where the legislative intent [to punish separately] is clear...Missouri v. Hunter, 459 U.S. 359 (1983)...Where legislative intent is not clear, multiple punishments are not permitted unless the two offenses are separate crimes under the statutory interpretation test of Blockburger v. United States, 284 U.S. 299 (1932) as incorporated into Florida law...[by] §775.021(4), Fla.Stat. (1983).

Thus in either case, the test for determining whether one offense is a necessarily lesser included offense of another for purposes of precluding a separate punishment therefore is simply "whether each require[s] proof of an element the other does not," id., 468 So.2d 971, 976. Respondent's protestations to the contrary notwithstanding, the most logical way to apply this test is to ascertain whether it is possible to commit the alleged "lesser" offense without invariably also committing the predicate "greater" offense under any conceivable hypothetical. As the State established in its initial brief, it is statutorily possible to deal in stolen property as either an organizer, as respondent was charged, or as a trafficker, as he was convicted, without conspiring to commit grand theft, both because the conspiracy requires an unlawful confederation with another while either form of dealing in stolen property does not, and also because the conspiracy requires that this confederation concern property of at least $100.00 in value, while either form of dealing does not. Respondent does not dispute the latter point of distinction at all, and disputes the former only to the extent of arguing without citation to case law that dealing in stolen property as an organizer allegedly requires illicit confederation with another even though dealing in stolen property as a trafficker does not, completely ignoring that the fact that he was only adjudicated for trafficking renders an analysis of the elements of organizing entirely academic.

Respondent's argument that the decision of the First District in Rhames is not inconsistent with this Court's decision in Rotenberry is not well founded; this Court granted the State's petition for writ of certiorari here obviously because it agreed the two decisions were in conflict. The only remaining question is whether this Honorable Court will stick with the objective, easily-applied and legally correct statutory possibility test of Rotenberry and its progeny, see e.g. Vause v. State, 476 So.2d 141 (Fla. 1985), State v. Enmund, 476 So.2d 165 (Fla. 1985), and State v. Snowden, 476 So.2d 191 (Fla. 1985), as mandated by the aforecited decisions of the United States Supreme Court, Missouri v. Hunter, 459 U.S. 359 (1983) and Blockburger v. United States, 284 U.S. 299 (1932), see also Albernaz v. United States, 450 U.S. 333 (1981) (separate sentences for conspiracy to import and conspiracy to distribute narcotics held proper) and Garrett v. United States, 471 U.S. ____, 85 L.Ed.2d 764 (1985), or announce yet another subjective, tediously-applied and legally erroneous test which it will later be forced to repudiate, see e.g. State v. Pinder, 375 So.2d 836 (Fla. 1979), State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), and Bell v. State, 437 So.2d 1052 (Fla. 1985).

Unfortunately, this Court has unwisely followed the latter course in its recent decisions of Houser v. State, 474 So.2d 1193 (Fla. 1985) and Mills v. State, 476 So.2d 172 (Fla. 1985); see also State v. Gordon, 478 So.2d 1063 (Fla. 1985) and State v.

Brown, 476 So.2d 660 (Fla. 1985); compare Gotthardt v. State, 475 So.2d 281 (Fla. 5th DCA 1985). The State would note with trepidation that Houser and Mills are plainly inconsistent with Rotenberry in their collective holdings that, where the specific intent of the legislature vis-a-vis the particular statutes involved is unstated, the question of whether separate sentences may be imposed for contemporaneous conduct facially violating two or more criminal statutes under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States begins rather than ends with the determination that each offense contains a discrete element under the Blockburger test as codified by §775.021(4), Fla.Stat. (1983)[1, 2]. The State would

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[1]Houser's reliance upon Ball v. United States, 470 U.S.___, 84 L.Ed.2d 740 (1985) for the foregoing proposition is misplaced insofar as the suspect adjudication therein, receipt of a firearm by a convicted felon, was a necessarily included offense of the predicate offense of possession of a firearm by a convicted felon. Mills, unlike Houser, is ostensibly predicated not upon double jeopardy grounds, but rather upon the doctrine of "merger." This predication is clearly erroneous; the doctrine of merger merely prohibits a defendant's dual sanctioning for necessarily lesser included offenses under the greatest offense for which he has been sanctioned - i.e. for petit larceny where he has been sanctioned for robbery, see Brown v. State, 206 So.2d 377 (Fla. 1968) - and should not be applied to bar separate sanctions for contemporaneously-committed offenses different in kind rather than in degree, particularly considering that the latter application, unlike the former, plainly violates §775.021(4), Fla.Stat. (1983).

[2]§775.021(4), Fla.Stat. (1983) reads as follows:

775.021 Rules of construction.--

(4) Whoever, in the course of one criminal transaction or episode,

strongly urge this Court to uphold Rotenberry and overrule Houser and Mills by emphatically reaffirming that the Blockburger statutory possibility test applies in all circumstances, thus bringing to a close a near-decade of oft-confusing and time consuming litigation on the question of when separate penalties for separate offenses committed during the course of a single criminal episode are authorized. The State would caution that the Court not seeks to avert this bold step by reconciling Rotenberry with Houser and Mills to hold here that the double jeopardy clause prohibits separate sanctioning only for absolutely simultaneous as opposed to merely closely contemporaneous or ongoing conduct, as such a result, althouth it would benefit the State in the instant case, would be contrary to the plain language of Blockburger[3] as codified by §775.021(4).

Footnote 2 Continued

> 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 the 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 pleading or the proof adduced at trial.

[3]"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 these are two offenses or only one, is whether each provision requires proof of an addition fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304.

See State v. Boivin ____So.2d____(Fla. 1985), 10 F.L.W. 466, quashing Boivin v. State, 436 So.2d 1074 (Fla. 3rd DCA 1983), review denied, 451 So.2d 847 (Fla. 1984), cert. denied, U.S.____, 83 L.Ed.2d 410 (1984), and correctly affirming the imposition of separate sentences for attempted first degree murder, aggravated battery, and possession of a firearm during a felony although all charges resulted from a single gunshot.

Should the Court elect to retain the rule of Houser and Mills without limitation, the State would alternatively submit that the legislative intent to authorize separate sanctions for respondent's offenses of dealing in stolen property as a trafficker in violation of §812.019(1), Fla.Stat. and conspiracy to commit grand theft in violation of §777.04 and 812.014(2)(b)(1), Fla.Stat. is nonetheless clearly expressed by §775.021(4). Only if the Legislature has statutorily specified that separate adjudications and sentences will not lie for certain acts do the general provisions of §775.021(4) not apply;[4]

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[4]See Goddard v. State, 458 So.2d 230 (Fla. 1984), holding that a defendant may not be separately adjudicated for both thieving and dealing in the same stolen property as an organizer under §812.019(1-2), Fla.Stat. because §812.025, Fla.Stat. specifically prohibits such dispositions; and State v. Watts, 462 So.2d 813 (Fla. 1985), holding that a defendant may not be separately adjudicated for possession of multiple articles of contraband by a state prisoner because §944.47(1)(a)(5), Fla.Stat., by providing that this offense is committed thrugh the possession of "any" undifferentiated contraband, prohibits such dispositions. Compare Grappin v. State, 450 So.2d 480 (Fla. 1984), holding that a defendant may be adjudicated for committing grand thefts of

it has not done so here, and indeed, had not done so concerning the offenses involved in Houser (vehicular homicide and D.W.I. manslaughter) or Mills (first degree murder and aggravated battery), which once again highlights the fact that these decisions are legally incorrect and should be repudiated.[5] See United States v. Woodward, 469 U.S. ___, 83 L.Ed.2d 518 (1985).

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. The Court simply cannot look §775.021(4) in the eye and rule otherwise. "Whatever views [the courts] may...entertain regarding severity of punishment,...[punishment is] peculiarly [a] question...of legislative policy." Gore v. United States, 357 U.S. 386, 393 (1958) (Frankfurter, J.); quoted with approval, Rummel v. Estelle, 455 U.S. 832, 396, footnote 27 (1980) (Rehnquist, J.). This Court may certainly urge the Legislature to repeal §775.021(4), but may not do so itself by refusing to enforce this statute here.

Footnote 4 Continued

multiple firearms belonging to the same owner during a single burglary; see also Colvin v. State, 445 So.2d 657 (Fla. 1st DCA 1984).

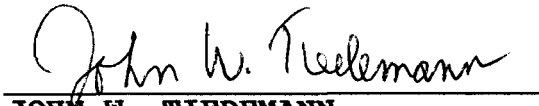
[5]Ironically, if the victim of the single gunshot fired in Mills had lived, Mills could have been separately sentenced for both attempted first degree murder and aggravated battery under this Court's decision in Boivin. Viewed in this light, the erroneousness of Mills becomes even more apparent. The State would probatively note, with no disrespect intended, that the two justices who dissented to the affirmance of the separate sentence at issue in Boivin concurred with the vacation of same in Mills.

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. Neal T. McShane, 209 E. Ridgewood Street, Orlando, FL 32801, on this 26th day of March, 1986.

JOHN W. TIEDEMANN
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