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IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 69,334

RICHARD B. BING,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On April 26, 1985, respondent followed the victim, Mrs. Evelyn Yost and her companion, out of a restaurant in St. Augustine, Florida (R 59-60,63).[1] The women noticed Bing was following them (R 67). Even though she "had a premonition" and had a firm hold on her purse, Bing forcefully grabbed her purse and ran away (R 63,70,74,76). Mrs. Yost positively identified Bing as her assailant several times (R 79,81). The leather purse was valued at $35.00, and inside the purse was $167.00 in cash (R 74-75).

As a result of this incident, Bing was charged as follows:

Count One: Robbery, in violation of F.S. 812.13(1) and (2)(c).(sic)

In that Richard Bernard Bing, on or about the 26th day of April, 1985, within St. Johns County, Florida, did unlawfully by force, violence, assault or putting in fear, take away from the person or custody of Evelyn Yost certain property, to-wit: a purse and contents, of a value more than one ($1.00) dollar, the property of Evelyn Yost.

Count Two: Grand Theft of the second degree, in violation of F.S. 812.014. (sic)

In that Richard Bernard Bing, on or about the 26th day of April, 1985, within St. Johns County, Florida, did unlawfully and knowingly obtain or use or did endeavor to obtain or use the property of another, to-wit: a purse and contents, of a value of one hundred dollars ($100.00) or more, but less than twenty thousand dollars ($20,000.00), with the intent to permanently or tem-

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[1](R) refers to the record on appeal.

porarily deprive Evelyn Yost of her rights to the property or benefit therefrom, or with the intent to permanently or temporarily appropriate the property to his own use or to the use of a person not entitled thereto. (R 1)

Respondent was found guilty as charged on October 14, 1985 (R 15). On November 14, 1985, Bing was sentenced within the guidelines to seven years incarceration (R 16-21). Notice of Appeal was filed on November 25, 1985 (R 27).

After briefs were filed and oral arguments were heard, the District Court of Appeal, Fifth District, entered its opinion in this cause on August 14, 1986 (See Appendix). The majority opinion certified a question as one of great public importance. Fla. R. App. P. 9.030(a)(2)(A)(v).

Notice to Invoke Discretionary Jurisdiction was timely filed by petitioner on September 10, 1986.

SUMMARY OF ARGUMENT

The legislature has clearly expressed an intent that convictions and sentences should be imposed for separate criminal offenses arising from one transaction, so long as each offense requires proof of an element that the other does not require. Robbery requires proof that the taking was accomplished by force, violence, assault or putting infear; the value of the thing taken is immaterial. Grand theft has as one of its essential elements the value or character of the property.

Even if the legislative intent is unclear, the Blockberger analysis reaches the same result. Each offense has an essential element that the other does not have.

Respondent has failed to preserve this issue for review by presenting it to the trial court in any manner whatsoever.

ARGUMENT

CAN ONE TAKING OF PROPERTY VALUED AT $100.00[2] OR MORE, WITH FORCE, SUPPORT DUAL CONVICTION FOR ROBBERY AND GRAND THEFT, OR IS THE DEGREE OF THEFT IRRELEVANT TO DOUBLE JEOPARDY CONSIDERATIONS ABSENT AND INDICATION OF CONTRARY LEGISLATIVE INTENT?

The District Court of Appeal, Fifth District, certified the above question as one of great public importance. Fla. R. App. P. 9.030(a)(2)(A)(v). The opinion reversed the grand theft conviction based upon Rodriguez v. State, 443 So.2d 236 (Fla. 5th DCA 1983), review granted, No. 64,775 (State v. Rodriguez). Rodriguez is still pending before this honorable court because it has never been perfected; the respondent's brief is over two years overdue. The state moved to "compel respondent to file an answer brief and if respondent fails to do so, to have this court issue an opinion on the merits of this case" on August 5, 1985, but this motion has never been ruled upon.

The issue in this case is easily stated but not as easily answered. Can one forceful purse snatching of a purse and contents worth more than $100[2] support convictions and sentences for both robbery and grand theft? §§812.13(1)(2)(c), 812.014(2)(b), Fla. Stat. (1985).

Petitioner contends that the United States Supreme Court and this honorable court have both determined that the Blockburger[3] rule of statutory construction is inapplicable when the legislative

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2. Chapter 86-161, Laws of Florida, effective October 1, 1986, changes the statutory minimum for grand theft to $300.00.

3. Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 2d 306 (1932).

intent is clear to authorize cumulative punishments under two statutes. Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), State v. Enmund, 476 So.2d 165 (Fla. 1985). The Florida legislature has adopted section 775.021(4), Florida Statutes (1985), which clearly states their intent:

> Whoever, 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 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.

It is clear from Ball v. United States, _____U.S._____, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), Missouri v. Hunter; Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 113 F.67 L.Ed.2d 275 (1981); and Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980), "that the double jeopardy clause imposes no meaningful restriction on the legislative power to define offenses and to prescribe punishment. It is also clear from section 775.021(4), Florida Statutes (1977-83), that the legislature intends that separate sentences be imposed for separate offenses." State v. Enmund, 476 So.2d at 170 (J. Shaw, concurring). Our legislature has expressed an intent, and so resort to the Blockburgler rule of statutory construction is unnecessary.

The offenses of grand theft and robbery are separate because each offense requires proof of an element that the other does not; robbery requires that the taking of property be accomplished by force, violence, assault or putting in fear, while grand theft

requires proof that the property stolen is of a certain character or valued at $100 or more.

Further support for the position that the legislature intends cumulative punishment is found in section 812.025, Florida Statutes (1977-85). The legislature has prohibited cumulative convictions and sentences for grand or petit theft and dealing in stolen property. If the legislature wanted to proscribe multiple sentences and convictions for two other separate offenses in the same chapter, grand theft and robbery, it could have easily done so. Expressio unius est exclusio alterius.

The underlying question presented herein is how are separate offenses determined, or, restated, how are essential elements of a crime identified? Judge Cowart has addressed this question many times, and seems to have changed his opinion completely. See, Rodriguez v. State, 443 So.2d 236 (Fla. 5th DCA 1983) (Cowart, J. dissenting); Gotthardt v. State, 475 So.2d 281, 283 n. 3 (Fla. 5th DCA 1985); Bing v. State, 492 So.2d at 834. Judge Cowart would distinguish between "nuclear or core elements" that distinguish substantive offenses and "degree elements" that "serve to delineate and distinguish levels or degrees of egregiousness, culpability, or punishment of one basic substantive criminal offense." Bing v. State, supra. Judge Cowart would allow punishment for but one offense contained in chapter 812, because all the separate offenses contained in chapter 812 arise from the "nuclear offense of larceny", originating from the commandment "thou shalt not steal". Gotthardt v. State, supra. Petitioner respectfully disagrees with this analysis.

Even if this honorable court determines that the legislative

intent is not clearly expressed in section 775.021(4) Florida Statutes (1985), nonetheless, application of the Blockburger rule results in a positive answer to the certified question. Borges v. State, 415 So.2d 1265 (Fla. 1982); State v. Baker, 456 So.2d 419 (Fla. 1984); State v. Gibson, 452 So.2d 553 (Fla. 1984). As stated previously, both robbery and grand theft require proof of an element that the other does not; robbery requires a forceful taking which necessarily requires the awareness of the victim, grand theft requires proof of value or character. The fact that both crimes have similar elements like taking of personal property with the specific intent to deprive the owner does not matter. State v. Baker, supra, Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). Each crime has an essential element that the other does not.

Scores of cases hold that value or character of the property taken is an essential element of grand theft. Carnley v. State, 82 Fla. 282, 89 So. 808 (1921), Negron v. State, 306 So.2d 104 (Fla. 1974); State v. O'Hara, 448 So.2d 524 (Fla. 1985); State v. Getz, 435 So.2d 789 (Fla. 1983) (if firearm - value is not essential element); Johnson v. State, 380 So.2d 1024 (Fla. 1979) (motor vehicle); Davis v. State, 475 So.2d 223 (Fla. 1985) (motor vehicle); Luthur v. State, 76 So.2d 276 (Fla. 1955) (oranges); Cofield v. State, 474 So.2d 849 (Fla. 1st DCA 1985); Sori v. State, 477 So.2d 49 (Fla. 2d DCA 1985).

Force, violence, assault, or putting in fear is an essential element of robbery. The force used must be contemporaneous with the taking. Royal v. State, 490 So.2d 44 (Fla. 1986). The victim

need not be aware of a theft, or even present at the scene of the theft. It is clear that armed robbery under subsection 812.13(2)(a), Florida Statutes (1985) is a separate crime from "simple" robbery, as armed robbery requires proof of an additional element. See, State v. Gibson, 452 So.2d 553 (Fla. 1984); State v. Baker, 452 So.2d 170 (Fla. 1985). A true "pickpocket" crime, where the taking is committed stealthfully, is theft, petit or grand, but if the victim resists and any force is used to overpower the victim, the crime is robbery. Colby v. State, 46 Fla. 112, 35 So. 189 (1903). Grand theft is not included in the offense of robbery. Haley v. State, 315 So.2d 525 (Fla. 2d DCA 1975); McCants v. State, 382 So.2d 753 (Fla. 4th DCA 1980); Hammer v. State, 343, So.2d 856 (Fla. 1st DCA 1976), rev. denied, 352 So.2d 175 (Fla. 1977). (these cases were decided under the now-defunct single transaction rule, so petitioner rules upon the underlying rationale other than the holding).

In Haley v. State, supra, the defendant was charged with robbery. The robbery information did not allege value as to the property taken nor was the property designated as a specific type (e.g. a firearm or a fire extinquisher) under the grand theft statute. The jury returned a verdict of grand larceny. The Second District in reversing this conviction acknowledged that the proof showed that a hundred dollars ($100) or more of property was taken from the victim but the information did not allege any specific value. The Second District held that since grand theft was not a necessarily lesser included offense of the robbery the defendant's conviction had to be reversed and reduced to petit larceny,

since larceny was a necessarily lesser included element in the robbery information.

The rule in Haley is that grand theft is not a necessarily lesser included offense of the robbery in clear contrast to the holding announced in Rodriguez v. State, supra, and the instant decision below. If Rodriguez and Bing are upheld by this honorable court it would seriously question the validity of Haley if not implicitly overrule Haley all together. By overruling Haley this honorable court would be authorizing a defendant to be convicted of grand theft as a necessarily lesser included offense of robbery even though the robbery information did not allege the value of the property. In other words a defendant could be convicted of an offense which does not contain all the essential elements. Petitioner is confident that this honorable court would not allow such a result.

Finally, as it did below, the state respectfully suggests that this issue is not preserved for appellate review by specific, timely objection at the trial level, therefore, respondent has waived consideration of this issue. United States v. Bascaro, 742 F.2d 1335, 1348 (11th Cir. 1984). This honorable court's decision in State v. Johnson, 483 So.2d 420 (Fla. 1986), is distinquishable because Johnson involved a true double jeopardy constitutional issue, namely, a successive prosecution, whereas the instant case can be decided solely on the basis of legislative intent and does not involve double jeopardy through successive prosecution. §775.021(4) Fla. Stat. (1985). Consideration of this issue has been waived.

CONCLUSION

Based on the authorities and argument presented herein, petitioner respectfully requests this honorable court to answer the certified question by quashing the opinion of the District Court of Appeal, Fifth District, and reinstating the convictions and sentences for both grand theft and robbery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on the Merits and Appendix has been furnished, by delivery, to Larry B. Henderson, Assistant Public Defender for Respondent at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014 this 13th day of October, 1986.

Belle B. Turner

OF COUNSEL