IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. RICHARD B. BING, Respondent.	)	CASE NO. 69,334

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The defendant in this case was convicted of two offenses for but a single taking. Bing was convicted of robbery for the forceful taking of a purse and he was convicted of grand theft-second degree for taking the more than $100.00 contained within the purse.

At common law a robbery and a larceny could not be simultaneously committed for one taking, and the same holds true today as a matter of Constitutional protection against double jeopardy and a matter of statutory construction. The "different element" test espoused in Blockburger, infra, is wrong because it fails to provide consistent double jeopardy protection for mala in se offenses that existed when the Constitution was written.

Even if the Blockburger analysis is used, the theft and robbery statutes define the respective offenses in a manner that precludes simultaneous convictions of said offenses for but one taking. In any event, assuming that different statutory elements are present, the Legislature has not expressed an intent to allow multiple convictions for robbery and larceny for a single act of taking.

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QUESTION CERTIFIED

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

In pertinent part, the Fifth Amendment to the United States Constitution provides:

> "No person shall be subject for the same offense to be twice put in jeopardy of life or limb;

The counterpart in the Florida Constitution states; "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself." Art. 1, Sec. 9 Fla.Const. (1976). There is an adage

that states, "If it ain't broke, don't fix it." It is respectfully submitted that application of the foregoing constitutional principles concerning double jeopardy is "broke", and it is time to fix it.

It is broken because the approach relied on since 1932 to apply principles of double jeopardy to all "offenses" is wrong. Specifically, Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.306 (1932), stands for the premise that "[t]he Double Jeopardy Clause "presents no substantive limitation on the legislature's power to prescribe multiple punishments,' but rather, 'seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982) quoting State v. Hegstrom, 401 So.2d 1343, 1345 (Fla. 1981).

This premise is faulty because it elevates the intention of the legislature to a position over the intention of the Framers of the Constitution. Blockburger is wrong because it approves what is in effect future delegation to the legislature to determine what constitutes double jeopardy simply by defining offenses. This approach renders the Double Jeopardy clause meaningless; it provides no double jeopardy protection at all, and courts are forced to utilize the fiction of "clear legislative intent" on an ad hoc basis to avoid absurd results.

It is respectfully submitted that rather than remain in the turbulent waters of double jeopardy in the federal context (which quite frankly is a hopeless morass incapable of being understood or consistently applied), this Court should move on to

the unrippled waters of double jeopardy in the context of the State constitutional law. So long as the State construction of State constitutional law provides as much protection as federal application of the Constitution of the United States, there can be no interference from the federal courts. Begin by viewing the terms of the Double Jeopardy Clause contained in the Florida Constitution as those terms were viewed at the time the original constitution was written. The term "offenses" as used in the Double Jeopardy Clause refers, at a minimum, to the offenses that were recognized as offenses at common law, existing when the Constitution was written. Cf. Ford v. Wainwright, __ U.S.__, 39 Crl 3198 (1986)("There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted" id at 3198).

At common law offenses were broken down into two categories, mala in se crimes and mala prohibitum crimes. The mala in se crimes never change, and those offenses always enjoy Constitutional protection against double jeopardy, as intended by the Framers.

> Crimes from early days have been divided into things that are criminal because they are mala in se and crimes which are prohibited by statute or mala prohibita. The former class embraces those acts which are immoral or wrong in themselves such as burglary, larceny, arson, rape, murder, and breaches of the peace, while the latter embraces those things which are prohibited by statute because they infringe upon the rights of others, though no moral turpitude may attach, and they are crimes only because they are prohibited by statute. See 4

Blackstone Commentary 8; Commonwealth v. Adams, 114 Mass. 323, 19 Am.Rep. 362; 16 C.J. 58; 8 R.C.L. 55.

Coleman v. State, 119 Fla. 653, 161 So.89, 90 (1935).

Some Florida statutes embrace the mala in se crimes today with subsections that define the offense consistently with the common law definition; i.e. §812.13(1) Fla.Stat. (robbery), Royal v. State, 490 So.2d 44 (Fla. 1986). Other Florida statutes create elaborate hybrids of a mala in se offense creating different statutorily defined "crimes" but for double jeopardy considerations only one basic "offense" exists. [i.e. Chapter 782 (homicide)]. Houser v. State, 474 So.2d 1193 (Fla. 1985). It is better to recognize this principle as the first inquiry for double jeopardy considerations than it is to rely on a nebulous and inspecific standard of legislative intent when problems arise.

Obviously mala prohibitum crimes, such as legislation concerning controlled substances, require analysis of constituent elements and legislative intent for determination of what constitutes a single offense for double jeopardy purposes. See Ball v. State, 437 So.2d 1057 (Fla. 1983). This analysis does absolutely no harm to existing cases, in that the same result is reached but without the fiction of divining a legislative intent where there actually is none. Instead there is protection consistently afforded by the Constitution against double jeopardy as intended by the Framers of the Constitution.

It remains the legislature's prerogative to prescribe the punishments for the respective crime, fettered only by the

constitutional requirement that the punishment not be cruel or unusual. Art. 1, §17, Fla. Const. (1976). Take, for instance, the situation presented in State v. Getz, 435 So.2d 789 (Fla. 1983). A mobile home was burglarized; a firearm and a calculator and coins were taken. The defendant was convicted of burglary, grand theft-second degree of the firearm, and petit theft of the calculator and coins. The multiple convictions were proper, because a burglary occurred and at least two separate pieces of property were separately taken, that is, there were two independent acts of taking. The multiple sentences were proper because the legislature has prescribed that burglary is a third degree felony, theft of a firearm is a third degree felony, and theft of property worth less than $100.00 is a second degree misdemeanor. There is no double jeopardy problem concerning the separate theft offenses because you have separate takings, a taking of the firearm and a taking of other property worth less than $100.00.

A totally different result obtains where there is only one taking [ergo, one offense] as in the instant case. The facts here are that Bing took a purse and its contents by force, thus robbery is the correct offense. The defendant should be punished for that offense as statutorily prescribed. The problem in the instant case is that the state is pursuing a duplicituous charge, relying on the same act of taking that supported the robbery offense to also support the separate act of taking needed to support the grand theft conviction. At common law, a robbery and

theft could not simultaneously occur. Montsdoca v. State, 84 Fla. 82, 93 So.157 (1922).

Whether couched in the above double jeopardy analysis or based solely on legislative intent, it is clear that where there is one taking as a matter of fact, only one taking may be punished as a matter of law. Consider the situation where a loaded firearm is taken. Can the state prosecute the grand theft of the firearm, and the petit theft of the ammunition contained therein? And the sling? And the scope? And the magazine? If a cash register is taken in a robbery, can the state also prosecute the defendant for the robbery of the cash register and a petit theft for each dollar less than a hundred contained therein? When $101.00 is stolen can the state obtain one grand theft conviction for the one hundred dollars taken, and 100 separate petit theft convictions for the one hundred separate pennies that were also contained in the same deposit bag? Common sense says that such multiple convictions are improper and unjust, and it is respectfully submitted that the Double Jeopardy Clause proscribes such multiple punishments for what is but one offense, to wit, an unlawful taking. Two separate takings do not occur as a matter of law where as a factual matter only one item of property was taken, albeit that the property taken is divisible or otherwise contains other pieces of property. If a person takes a wallet, he should be prosecuted for taking the wallet, but not separately for each item contained in the wallet.

The State's concluding suggestion that the issue of double jeopardy is not adequately preserved is specious. Without

a doubt the protection afforded by the Double Jeopardy Clause is a fundamental constitutional right, requiring a knowing, voluntary and intelligent waiver by the defendant personally. That is the precise holding of State v. Johnson, 483 So.2d 420 (Fla. 1986). It is respectfully submitted that no waiver exists by Mr. Bing of his double jeopardy rights guaranteed by the Constitution of the State of Florida. No affirmative waiver is present in any form in this case. This issue is well preserved for this Court's consideration.

CONCLUSION

Because the defendant received two convictions for what is in law and fact one taking, the Fifth District Court of Appeal was correct in reversing the grand theft conviction, and this Honorable Court should affirm that holding based on the foregoing argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Fla. 32014, in his basket at the Fifth District Court of Appeal, and mailed to Mr. Richard B. Bing, #884555, P.O. Box 628, Lake Butler, Fla. 32054-0628 on this 29th day of October 1986.

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