IN THE SUPREME COURT OF FLORIDA

CHARLES W. FERGUSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 72,102

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellee in the Fourth District Court of Appeal and the defendant in the trial court. The Petitioner was the Appellant and the prosecution, respectively, in the lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case as found on pages one (1) through (2) to the extent it is a non-argumentative, and non-conclusory rendition of the proceedings below.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's statement of the facts as found on pages three (3) through six (6) of Petitioner's brief on the merits to the extent that it is a non-argumentative, and non-conclusory rendition of the facts, with the following additions and/or clarifications:

The robbery occurred on August 15, 1986 and approximately $800 to $900 was taken (R 18, R 28). Petitioner forced his way into the restaurant as the manager was receiving a morning food delivery (R 21). The restaurant was still closed for business that morning when Petitioner entered (R 19).

The manager, who was forced to collect the monies for Petitioner, was able to describe Petitioner (R 25). He also testified that he was able to briefly observe Petitioner during the robbery itself (R 25). Another employee, Dennis Garcia also observed Petitioner during the robbery (R 68-70). The Petitioner ordered the employees of the restaurant to leave the building (R 25). He followed them at gunpoint and forced the employees to enter an outside bathroom (R 27, R 49, R 71-72). The employees were then told to stay inside the room (R 27, R 50, R 72).

Detective Soccol only stated that Petitioner was already in jail at the time of the September robbery (R 97). Mark Shefter admitted that the same individual did not commit the August 3rd and September 15th robberies (R 124). Additionally,

when Mr. Dozier was in jail he telephoned Weaver. Dozier asked Weaver if he knew about the robberies that he (Weaver) had committed. Weaver replied that he did not know about the robberies (R 164).

SUMMARY OF THE ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court under Article V Section 3(b) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a) (iv) on the ground that this decision allegedly conflicts with decisions of the First District such as, Chaney v. State, infra, and Friend v. State, infra, on the same question of law. However, no basis for conflict certiorari jurisdiction exists insofar as the cases Petitioner relies on for same are legally consistent with the decisions over which review is sought.

Pursuant to the decision of Faison v. State, infra, and the test espoused there a defendant who moves robbery victims from inside of a dwelling of a building to its perimeter and barricades the victims in a bathroom may be convicted of kidnapping pursuant to Fla. Stat. §787.01. Here, the movement from inside a building to outside a building is not slight, nor inconsequential. Additionally, the movement and confinement, no matter how short in duration, substantially lessened the Petitioner's risk of detection in that it facilitated his escape and stalled the victims' pursuit for assistance.

Further, Petitioner cannot now seek review of Point II as that issue is ancillary to the issue vesting jurisdiction and was never raised on direct appeal. See, Trushin v. State, 425 So.2d 1126 (Fla. 1983); Cochran v. State, 476 So.2d 207 (Fla. 1985). However, as to the merits, the decision of Hall v. State,

infra, must not be applied retroactively. See, Harris v. State, 520 So.2d 639, 640 (Fla. 1st DCA 1988). Additionally, the decision of Hall v. State, is no longer viable in light of the legislature's clear intent in its most recent session to codify the Blockburger test. See, Fla. Stat. §775.021(4) effective July 1, 1988, (Respondent's Exhibit B.) As such Petitioner's convictions of robbery with a firearm and possession of a firearm while engaged in a criminal offense do not violate double jeopardy.

ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN AFFIRMING PETITIONER'S CONVICTION FOR KIDNAPPING WHERE CONFINEMENT IN AN UNLOCKED BATHROOM AT GUNPOINT WAS NOT SLIGHT, NOR INCONSEQUENTIAL AND DID SUBSTANTIALLY LESSEN THE RISK OF PETITIONER'S DETECTION.

Initially, the State asserts that this Honorable Court lacks jurisdiction to review the decision below. Here, Petitioner has failed to show a conflict among the appellate court decisions of Chaney v. State, 464 So.2d 1261 (Fla. 1st DCA 1985), pet. for rev.denied. 479 So.2d 118 (Fla. 1985) and Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980) are consistent with each other as they apply one rule of law in the context of two distinct factual scenarios. Again, the State maintains that this Honorable Court must decline to accept jurisdiction in this cause.

In the instant case, Petitioner was charged in Count I of the information with kidnapping (R 243). Kidnapping, as defined by statute, means "forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to ... facilitate commission of any felony." Florida Statutes §787.01 (1984).

This Honorable Court in Faison v. State, 426 So.2d 963 (Fla. 1983) adopted a definitive test for determining whether the

confinement or movement of a victim is sufficient to support a conviction for kidnapping in addition to the primary offense charged. The Faison Court accepted the following test enunciated in the Kansas case of State v. Buggs, 219 Kan. 203, 547 P.2d 720 (Kan. 1978).

> If a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequental and merely incidential to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison, at 965.

This test must be applied to the instant facts. Thus, in Ferguson, Petitioner forced his way into an Arby's restaurant armed with a gun (R 21). The restaurant had not yet opened for business and three employees, along with a manager, were preparing the food to be served (R 19). Petitioner forced the manager at gunpoint to open a safe and the cash registers and to place all the money he retrieved into a pillow case (R 22, 23). Then, Petitioner pointed the gun at the employees and forced them to leave the store. They were forced outside of the building and

into a bathroom located on the perimeter of the restaurant (R 27, 49, 72). Petitioner marched the employees out of the store. He stood behind them pointing a gun at their backs (R 49). Petitioner told the victims to remain inside the bathroom (R 27, 50). After 30 seconds the manager opened the bathroom door, Petitioner yelled back at the manager to close the door and stay inside (R 27). Petitioner then fled the scene.

In applying the Faison test to the facts it is clear that the Fourth District's decision affirming Petitioner's kidnapping conviction was correct. In Ferguson, the Petitioner moved the victims from inside the restaurant to an outside bathroom. He did so at gunpoint, inflicting substantial force and violence on the victims. Additionally , his use of the gun facilitated his purpose of overcoming any resistance in ordering the victims to go where he wanted them to go. Thus, under the first part of the Faison test it cannot be said that the asportation was either slight, inconsequential or merely incidental to the robbery Petitioner committed.

Secondly, Petitioner's movement of the victim's from inside of the restaurant to an outside bathroom meets the second prong of the Faison test, as not inherent or necessary to the commission of the robbery.

The final prong of the Faison test is that the movement must have some significance independent of the other crime, such that it makes the other crime substantially easier of commission

or substantially lessens the risk of detection. Here, Petitioner moved the victims from inside the restaurant to an outside bathroom and confined them there. Petitioner's purpose in moving the victim's to the bathroom and confining them there was to substantially reduce the danger of his detection and to facilitate his escape. Here, movement of the victims to the outside bathroom temporarily frustrated any attempt of the victims to immediately call for assistance or trigger any alarm devices. As a result petitioner's escape was accordingly facilitated by this movement.

Here the relative shortness of time in which the victims were confined is of no consequence as a time factor is not a component of the Faison test. All that is required is that the confinement "substantially lessen the risk of detection." See, Johnson v. State, 509 So.2d 1237, 1240 (Fla. 4th DCA 1987) (barricading victim in room, even for a brief time, was intended to facilitate defendant's escape and lessen the risk of his detection); Carter v. State, 468 So.2d 370, 371 (Fla. 1st DCA 1985) (fact that defendant knew victim could easily free herself from confinement does not disqualify case from meeting Faison test). Petitioner's escape was accordingly facilitated by this movement.

The Ferguson decision was not decided wrongly and is consistent with both the Faison test as well as the reasoning of the Faison decision. In Faison the defendant was charged with kidnapping, sexual battery and burglary. The defendant entered a small office and dragged the victim from her desk in the front of

the office and sexually assaulted her. He then forced her into a nearby bathroom and assaulted her again. Several minutes after his escape he broke into a home of another woman, dragged her from the kitchen to a bedroom and sexually assaulted her. The Court applied the three-part test adopted from State v. Buggs, supra, and found that defendant used substantial force and violence in moving the victims to different locations and rooms, that the asportations were not inherent in the commission of the other crimes, and that each asportation removed the victim from access to a door and substantially reduced the danger of the defendant's detection.

The Faison facts can be likened to the Ferguson facts. In both cases the defendants forced their victims to move to a bathroom or other room in a small building in order to facilitate their escape and to reduce the risk of their detection. Notably, in Faison the movement was within one structure and only amounted to a short distance. In Ferguson the movement was also a short distance but involved actually forcing the victims to leave the building. Here, the Faison Court pointed out that "the fact that relatively short distances were involved makes no difference." Faison, 426 at 966; Panno v. State, 517 So.2d 309 (Fla. 3rd DCA 1987). Consequently, Ferguson was decided consistently with this Court's decision in Faison.

Petitioner nonetheless claims that Ferguson was decided wrongly and is in conflict with other appellate decisions.

Petitioner claims that the Ferguson decision is in direct and express conflict with Chaney v. State, supra, a divided decision, and Friend v. State, supra. In Chaney, the defendant robbed a store clerk at gunpoint and then directed the victim to enter a bathroom located inside the store. Several 50lb. bags were placed in front of the bathroom to secure the door. The victim was able to free himself almost immediately.

The Chaney Court applied the three-part Faison test to the facts and, without significantly addressing all the factors of the test in relation to all the facts, decided that the confinement involved did not substantially lessen the risk of detection. In the view of the Chaney Court the circumstances of the particular confinement was of such short duration that it could not have substantially lessened the defendant's risk of detection. Additionally the court held that since the risk of detection was actually frustrated by the victim, as he was able to view the defendant's auto tag number, that the confinement did not substantially lessen the defendant's risk of detection. Here, Respondent asserts that the court engrafted a new sub-part to the Faison test, as the test does not require actual success of the felon in not being detected.

In Chaney the court also noted its strong reliance on the earlier decision of Friend v. State, supra. Friend involved similar facts as in Chaney but was decided prior to this Court's decision in Faison. As pointed out in a footnote in Faison,

Friend was one of several decisions decided pre-Faison applying the Buggs, supra, test with "seemingly inconsistent results." Faison, 426 at 965, note 6. Although this Court did not explicitly overrule the Friend decision it did note its incongruous application of the Buggs test. As such the Chaney decision does not enjoy a strong foothold in Friend.

Notably, subsequent to Friend and Faison the First District decided Dowdell v. State, 415 So.2d 144 (Fla. 1st DCA 1982) rev. denied, 429 So.2d 5 (Fla. 1983). The Dowdell holding was consistent with Faison. In Dowdell the court held:

> The movement of the manager from the well-lighted parking lot through the rear door into the building and the requirement that he stay out of sight below counter level in moving to and from the safe supports a jury finding that the movement and confinement served to lessen the risk of detection, Ayendes v. State, 385 So.2d 698 (Fla. 1st DCA 1980), and to facilitate the commission of the crime of robbery. (citations omitted).

This decision appears to apply the Faison rule correctly. Additionally, the First District after deciding Chaney decided Carter v. State, 468 So.2d 370 (Fla. 1st DCA 1985). The Carter decision implies that the severity of the confinement as to its effectiveness and duration does not qualify or disqualify a case from meeting the Faison criteria. Id. at 371. As such the First District may have actually repudiated its holding in Chaney to the extent that Chaney requires a durational component as part of the Faison test.

Again, it is Respondent's position that in fact no conflict exists between Chaney and Ferguson. The facts of Chaney and Ferguson are clearly distinguishable. Ferguson involved movement from the inside of a restaurant to the outside of a restaurant, and confinement to a bathroom on the perimeter of the building. Additionally, the movement was forced at gunpoint. In Chaney the movement was within the store where the robbery took place. The confinement was not at gunpoint. Both courts applied the Faison test to the individual and distinct facts of its case. Each Court made its determination based on the circumstances of its particular case.

Nonetheless, were this Court to decide that a conflict does exist between the decisions of Chaney and Ferguson, Respondent would submit that the conflict should be resolved in favor of upholding the Fourth District's decision in Ferguson. The Ferguson decision is clearly consistent with this Court's decision in Faison and thus the integrity of Faison would be upheld.

POINT II

PETITIONER'S CONVICTION FOR USE OF A FIREARM IN COMMISSION OF A FELONY MUST NOT BE ADDRESSED BY THIS COURT; IN THE ALTERNATIVE IT MUST BE AFFIRMED.

Initially, Respondent would strongly assert that this Court must refrain from exercising its authority to entertain issues ancillary to the issue vesting jurisdiction. Lee v. State, 501 So.2d 591, (Fla. 1987), n. 1; Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983). Further, not only is this issue ancillary to the issue now before this Court but Petitioner failed to raise it in the district court. As such, this Court must decline to consider this issue at such a late stage in the case. Cochran v. State, 476 So.2d 207, 208 (Fla. 1985). This Court's order of June 6, 1988 requested that both parties brief the issue of conflicts. Petitioner's brief on jurisdiction to this Court also did not address the issue Petitioner now seeks to be reviewed. As such Petitioner's attempt to persuade this Court to examine the merits of this second point must fail.

Notwithstanding the above analysis Respondent asserts that Petitioner's claim is without merit. Petitioner claims that his convictions for both robbery with a firearm under Fla. Stat. §812.13(1) and (2) (a) and possession of a firearm while engaged in a criminal offense under Fla. Stat. §790.07 cannot be upheld because they are a violation of double jeopardy. Hall v. State, 517 So.2d 678 (Fla. 1988).

Respondent initially maintains that Hall, supra, should not be applied retroactively. Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980). In determining whether a change of law should be applied retroactively thereby setting aside the doctrine of finality, the change must be fundamental and of constitutional proportions. Id., 928. Respondent submits that Hall represents a nonconstitutional, evolutionary development which arises from this Court's attempts to ascertain legislative intent. The Blockburger[1] and Carawan[2] lists have been utilized by the Court as guides in formulating basic rules of statutory construction. Hall, supra, 679; Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); Carawan v. State, 515 So.2d 161 (Fla. 1987). Double jeopardy is not offended if cumulative prosecution and punishment of two or more statutory offenses arise out of a single act. A legislature is permitted to effect such an outcome if it so intends. Albernaz, supra; Hall, 517 So.2d at 679 citing, Ball v. United States, 470 U.S. 856 (1985). Consequently, a change in the law as to the appropriate test applicable to determine legislative intent is not of the fundamental constitutional magnitude required for retroactive application. Witt, supra. This view has been recently adopted

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1 Blockburger v. United States, 284 U.S. 299 (1983).

2 Carawan v, State, 515 So.2d 161 (Fla. 1987).

by the First District Court of Appeal in Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988).

In Harris the defendant was convicted of both robbery with a firearm and possession of firearm during the commission of a felony. His convictions were proper under Gibson, 452 So.2d 553 (Fla. 1984). Subsequent to his appeal, the Supreme Court overruled Gibson. Defendant through post-conviction relief then attacked his conviction based on Hall. The First District Court of Appeal stated:

> ...the Supreme Court had ruled at the time of Harris'conviction that such dual convictions were proper. In Hall, 13 F.L.W., at 30, the court has changed the substantive law as it relates to convictions both for armed robbery under section 821.13, Florida Statutes, and for possession of a firearm under section 790.02, arising out of the same criminal act. We do not discern anything in Hall, 13 F.L.W., at 30, that would make that decision apply retroactively or provide that such dual convictions now constitiute fundamental error under the reasoning in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed. 612 (1980). (emphasis added).

Harris, at 640.

Appellant is not entitled to a retroactive application of Hall and his conviction for both offenses should be affirmed.

Additionally, and notwithstanding the above argument, Petitioner's claim that a person may not be convicted for two offenses based upon a single act under Hall v. State, supra, is error.[3] Hall has misinterpreted the legislature's intent in this

area, and was never truly viable. See, Fla Stat. §715.021(4) (1988).

Here the legislature, no doubt in reaction to this misinterpretation, amended §775.021.[4] The amendment is merely a legislative interpretation of the original statute and not a substantive change in the law. Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985) (See, Exhibit A). Thus, pursuant to the amendment Appellant's adjudication for both offenses would not constitute an ex post facto application of the law, since the unamended §775.021(4), properly interpreted, compels such a result.

In the instant case the elements of robbery with a firearm and possession of a firearm while engaged in a criminal offense each require proof of facts which the other does not. Additionally possession of a firearm during commission of a criminal offense is not a lesser included offense of robbery with a firearm as determined under Blockburger v. United States, 299 (1932).

Petitioner's argument is based on the faulty premise that a violation of more than one statute cannot be based on the commission of one criminal episode or transaction. The legislature has made it abundantly clear that one act can constitute the

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[4] §775.021(4) effective July 1, 1988.

basis for conviction of more than one criminal offense. Section 775.021(4)(b). The legislature has clearly expressed its intent to codify Blockburger in §775.021(4). Petitioner's convictions for robbery with a firearm and possession of a firearm while engaged in the commission of a criminal offense, are thus not a violation of double jeopardy and were clearly intended by the legislature (See, Exhibit B).

CONCLUSION

WHEREFORE, based on the foregoing analysis and authorities cited herein, the Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the cause; and in the alternative, to affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been furnished by courier to: MARGARET GOOD, ESQUIRE, Assistant Public Defender, Fifteenth Judicial Circuit, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401 this _____ day of July, 1988.

Of Counsel