

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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CASE NO. 72,503

STATE OF FLORIDA,

Petitioner,

v.

WEBSTER F. MCKINNON,

Respondent.

JURISDICTIONAL BRIEF OF PETITIONER

ROBERT L. BUTTERWORTH
ATTORNEY GENERAL

EDWARD C. HILL, JR.
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #238041

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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ISSUE

THE OPINION OF THE LOWER TRIBUNAL IS IN EXPRESS AND DIRECT CONFLICT WITH OPINIONS OF THIS COURT ON THE ISSUES OF:

I. WHETHER THE USE OF A FIREARM IS AN ELEMENT OF HOMICIDE WHEN THE PENALTY IS ENHANCED BY THE USE OF §775.087(1);

II. WHETHER MULTIPLE PUNISHMENTS CAN BE IMPOSED FOR THE COMMISSION OF A HOMICIDE AND USE OF A FIREARM IN THE COMMISSION OF THAT HOMICIDE.

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JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and the Appellee in the lower tribunal. Appendix A is the opinion of the lower tribunal.

STATEMENT OF THE CASE AND FACTS

Respondent, Webster F. McKinnon, owner of the "Red Carpet Lounge," was charged with second degree murder and display or use of a firearm during the commission of a felony as a result of the shooting death of a patron of the lounge. The jury found him guilty of manslaughter, a lesser included offense of second degree murder, and of display or use of a weapon during the commission of a felony. (Opinion of First District Court of Appeal, p. 3).

On appeal the First District Court of Appeal affirmed the manslaughter conviction but reversed the firearm conviction. A motion for rehearing was denied and this Petition followed.

SUMMARY OF ARGUMENT

ISSUE I

The First District Court of Appeal ruled that when you are charged with homicide and use of a firearm, the firearm becomes an element of the offense. This directly conflicts with opinions of this Court that have held that when analyzing multiple punishment issues the phrase "elements of the offense" means the statutory elements only.

ISSUE II

The First District Court of Appeal improperly applied the Carawan analysis by reversing the Blockburger test, applying the rule of lenity without conducting a complete analysis of the offenses, of the evils prohibited, or of the intent of the legislature. Thus, its holding directly conflicts with Carawan itself.

ARGUMENT

ISSUE

THE OPINION OF THE LOWER TRIBUNAL IS IN EXPRESS AND DIRECT CONFLICT WITH OPINIONS OF THIS COURT ON THE ISSUES OF:

I. WHETHER THE USE OF A FIREARM IS AN ELEMENT OF HOMICIDE WHEN THE PENALTY IS ENHANCED BY THE USE OF §775.087(1);

II. WHETHER MULTIPLE PUNISHMENTS CAN BE IMPOSED FOR THE COMMISSION OF A HOMICIDE AND USE OF A FIREARM IN THE COMMISSION OF THAT HOMICIDE.

I.

In its opinion, the First District Court of Appeal reasoned that use of the reclassification or enhancement of penalty statute §775.087, Florida Statutes, added an additional element to the offense of manslaughter. The court then reasoned that because use of a firearm was now an element of manslaughter; the conviction could not stand because Carawan v. State 515 So.2d 161 (Fla. 1987), prohibited multiple punishments for offenses containing the same element and which address the same evil.

The reasoning used by the First District Court of Appeal that the enhancement statute adds an element to the offense directly conflicts with Strickland v. State, 437 So.2d 150 (Fla. 1983) and Whitehead v. State, 472 So.2d 730 (Fla. 1985), which held that the use of a weapon was not an essential element of a homicide. This reasoning also conflicts with State v. Baker, 456

So.2d 419 (Fla. 1984), in which this Court again held that for multiple punishment analysis you look to the statutory element of the offenses, not the pleading nor the proof adduced at trial in determining if the offenses are the same.

In Baker this Court approved convictions for murder and for use of a firearm in the commission of a crime. This Court in Carawan, supra, approved Baker, citing that these statutes involve two separate evils, one being killing, the other being use of a firearm in the commission of a crime.

Therefore, contrary to the First District Court of Appeal ruling in the instant case, there are separate evils addressed by these statutes and the offense of manslaughter is not changed by Section 775.087, Florida Statutes.

II.

Because of this faulty analysis, the First District Court of Appeal's application of Carawan to these facts is deficient and its opinion directly conflicts with Carawan itself.

The previously cited cases establish that these offenses are separate. Thus, the proper Carawan analysis is

. . .if each offense indeed requires proof of a fact that the other does not, the court then must find that the offenses in question are separate, and multiple punishments are presumed to be

authorized in the absence of a contrary legislative intent or an reasonable basis for concluding that a contrary intent existed. Carawan, supra at 168.

Thus, in this situation, multiple penalties are presumed to be authorized by Carawan.

The First District Court of Appeal misapplied Carawan by reversing the Blockburger v. United States, 294 U.S. 299, 76 L.Ed 306 (1932), doctrine codified in Section 775.021(4), Florida Statutes. Blockburger's analysis holds that offenses are separate if one offense requires proof of an element the other does not. The First District Court of Appeal's analysis found one element in common and somehow determined the offenses to be the same. This is not the holding of Carawan.

Further, the First District Court of Appeal improperly applied the rule of lenity when it invoked the rule of lenity without an analysis of the legislative intent behind these offenses. In Carawan, this Court stated the rule for the application of the rule of lenity when it said

. . .where there is a basis for concluding that the legislature intended a result contrary to that achieved by the **Blockburger** test, a conflict arises that requires resort to the third rule of construction applicable to this problem, the rule of lenity. (Emphasis supplied).Carawan, supra at 168.

The First District Court of Appeal applied the rule of lenity without finding any basis upon which the legislature intended a result contrary to Blockburger. This was improper.

Therefore, as the First District Court of Appeal ruling that:

- (1) the use of a firearm became an element of manslaughter;
- (2) the offenses of manslaughter and use of a firearm are intended to prevent the same evil; and
- (3) the rule of lenity is automatically applied whenever offenses contain a single identical element and address the same evil; (reverse Blockburger analysis)

directly and expressly conflicts with rulings of this Court and this Court should accept jurisdiction to resolve the conflict.

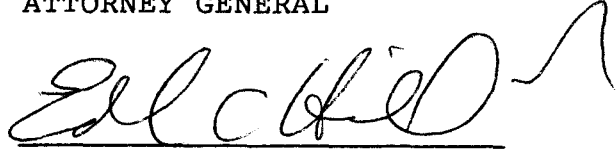
As of the day the brief is being written the Florida Legislature has passed an amendment to Section 775.021(4), Florida Statutes, which overrules Carawan, supra, and Hall v. State, 517 So.2d 678 (Fla. 1988). Therefore, Baker, supra, and State v. Gibson, 452 So.2d 553 (Fla. 1984) control and the basis upon which the First District Court of Appeal ordered supplemental briefs in this case is no longer good law.

CONCLUSION

The State of Florida respectfully urges this Honorable Court to accept jurisdiction to resolve the conflicts.

Respectfully Submitted,

ROBERT L. BUTTERWORTH
ATTORNEY GENERAL



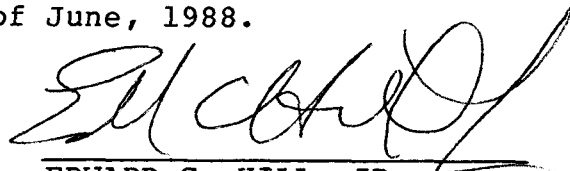
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THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. David P. Gauldin, Assistant Public Defender, Post Office Box 142, Tallahassee, Florida, 32302, this 7th day of June, 1988.



EDWARD C. HILL, JR.
ASSISTANT ATTORNEY GENERAL