IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 72,503

WEBSTER F. MCKINNON,

Respondent.

_____/

WEBSTER F. MCKINNON,

Petitioner,

v. CASE NO. 72,601

STATE OF FLORIDA,

Respondent.

_____/

WEBSTER FLEMING MCKINNON,

Petitioner,

v. CASE NO. 73,218

STATE OF FLORIDA,

Respondent.

_____/

PETITIONERS' BRIEF ON THE MERITS

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PETITIONERS' BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The record for Case Nos. 72,503 and 72,601 (Fla. 1st DCA Case No. BT-109) consists of one volume of the record proper, referred to by the symbol "R" followed by the appropriate page number; three volumes of the trial transcript, referred to by

the symbol "T" followed by the appropriate page number; and one volume of the sentencing transcript, referred to by the symbol "S" followed by the appropriate page number.

The record in Case No. 73,218 (Fla. 1st DCA Case No. 88-1563) is brief and consists of the record proper and the transcription of the proceedings held on June 13, 1988. These documents will be referred to specifically by identifying characteristics which will leave no doubt as to their identity.

STATEMENT OF THE CASE AND FACTS

NOTE: The substantive facts are not particularly relevant for this appeal but for the purpose of reference will be found in the appendix to this brief.

By indictment, Webster Fleming McKinnon was charged with second degree murder (Count I) and unlawful display or use of a firearm while committing murder (Count II) (R-3). These acts were alleged to have taken place on or about September 12, 1986 (R-3).

McKinnon proceeded to jury trial on January 26 through January 28, 1987, at the conclusion of which he was convicted of manslaughter, a lesser included offense to second degree murder and display or use of a firearm during the commission of a felony (Count II) (R-9).

The trial court sentenced McKinnon to 14 years imprisonment on Count I (to run concurrently with the sentence on Count II) and three years imprisonment on Count II (to run concurrently with Count I) (R-18-19).

On April 10, 1987, appellant timely filed his notice of appeal (R-21).

On February 5, 1988, the First District Court of Appeal ordered that supplemental briefs be submitted on the sentencing issue and on April 20, 1988, the First District Court of Appeal issued its first opinion in this case (appendix). In this opinion, the Florida First District Court of Appeal affirmed McKinnon's manslaughter conviction and reversed McKinnon's conviction for use of a firearm during the commission of a

felony. The case was then remanded to the trial court for correction of the judgment to reflect conviction of a reclassified first degree felony on Count I, deletion of conviction on Count II, and resentencing using a corrected scoresheet (page 5 of the opinion in BT-109).

Both the state and appellate counsel petitioned this Court for discretionary review and by order dated October 20, 1988, this Court accepted jurisdiction of this case. As both the state and defense counsel petitioned this Court for review, two case numbers were assigned (72,503 and 72,601).

In the meantime, McKinnon's case was sent back to the trial court pursuant to the mandate of the opinion in McKinnon v. State, 523 So.2d 1238 (Fla. 1st DCA 1988). A sentencing hearing was held on June 13, 1988, in the trial court. McKinnon was resentenced pursuant to the dictates of that opinion (see the hearing held on June 13, 1988 at 8).

Thereafter, on June 21, 1988, the state filed a motion to vacate sentence and on June 27, 1988, the trial court entered an order vacating its sentence because it believed that it did not have jurisdiction to impose sentence (see the record in DCA Case No. 88-1563 at 17-18).

On or about August 24, 1988, the undersigned filed a motion for stay of the initial brief in Case No. 88-1563 in the First District Court of Appeal on the basis that both the state and the defendant had filed for review in the Florida Supreme Court.

On September 20, 1988, apparently on the basis of this motion, the Florida First District Court of Appeal issued an opinion in Case No. 88-1563, dismissing the appeal and certifying the following question:

> Does the pendency of a petition for review in the Florida Supreme Court deprive the trial court of jurisdiction to resentence a defendant pursuant to the district court's mandate reversing and remanding the cause for resentencing?

The District Court of Appeal did not bother to send either defense counsel or counsel for the state a copy of this opinion. The first time the undersigned knew about this opinion was when he received the mandate on or about October 6, 1988.

Thereafter, on October 20, 1988, the undersigned filed a notice in this Court to invoke its discretionary jurisdiction. On October 25, 1988, Case No. 73,218, this Court accepted jurisdiction in this case.

not correct; set up schedule for briefs on merits but juris. not yet ruled on.

By way of separate motion, and because this case (73,218) arises out of facts from the other case, the undersigned has requested that 73,218 be consolidated with 72,503 and 72,601.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal was incorrect in concluding that when petitioner was convicted of the crime of (simple) manslaughter and of the separate crime of the use or display of a firearm during the course of a felony, the defendant could be convicted of a first degree felony. This is so because pursuant to Hall v. State, 517 So.2d 678 (Fla. 1988) and Carawan v. State, 515 So.2d 161 (Fla. 1987) McKinnon would be punished twice for the same activity.

The District Court of Appeal's certified question should be answered in the negative because if this Court answers it in the affirmative, Florida Rule of Appellate Procedure 9.310 would be rendered a nullity under the circumstances here.

ARGUMENT

ISSUE I

THE FIRST DISTRICT COURT OF APPEAL WAS WRONG IN RECLASSIFYING MCKINNON'S MANSLAUGHTER CONVICTION FROM A SECOND DEGREE FELONY TO A FIRST DEGREE FELONY.

The defendant was convicted of manslaughter, a second degree felony. In the course of sentencing the defendant, the trial court treated his conviction for "simple" manslaughter (as opposed to manslaughter with a firearm) as the primary offense and enhanced the second degree felony to a first degree felony because he was also convicted of the use or display of a firearm in violation of Section 790.07(1), Florida Statutes (see the appellate court record of BT-109 at 15 and the District Court of Appeal's opinion). The judgment, however, continued to list the primary offense as a second degree felony (which, as pointed out below, it is) (R-17 and DCA opinion in BT-109).

As noted by the first opinion, trial counsel objected to the sentencing but was overruled by the trial court on the basis that McKinnon's conviction for use or display of a firearm during the course of a felony constituted a conclusion by the jury that he committed manslaughter with a firearm.

The District Court of Appeal, in its first opinion, then concluded that the trial court was correct in increasing McKinnon's conviction for manslaughter from a second degree felony to a first degree felony but that the judgment should be

made to conform to the sentencing of the defendant for a first degree felony.

Starting with this premise as correct (which is where the First District Court of Appeal went wrong), the District Court of Appeal then realized it had a problem: to punish McKinnon twice for the same activity (display of a firearm) would violate this Court's opinions in Carawan v. State, 515 So.2d 161 (Fla. 1987) and Hall v. State, 517 So.2d 678 (Fla. 1988). Its solution to this problem was to strike McKinnon's conviction for use or display of a firearm during the course of a felony (which, even though stricken, was used to enhance the manslaughter charge).

The First District Court of Appeal correctly characterized the defendant's position:

> The assistant public defender, asserting in his supplemental brief that he has re-thought his original position "until his head hurt," argues that Section 775.087 (1)(b) does not permit the trial court to reclassify the manslaughter offense, because conviction on one count in an information may not be used to enhance the punishment for a conviction on another count. In other words, [defendant's] counsel contends that [defendant] may be convicted on both counts, but that the manslaughter offense may not be reclassified to a first degree felony.

[opinion at 3].

Counsel for the defendant has taken this position because (insofar as sentencing is concerned) the defendant is better off being sentenced for conviction of a second degree felony

and a third degree felony than being sentenced ("just") for a first degree felony and because it is the law.

The law provides that conviction on one count in an information may not be used to enhance the punishment for conviction in another count of the information. See, for example, Blackwelder v. State, 476 So.2d 280-281 (Fla. 2d DCA 1985) and Cochenet v. State, 445 So.2d 398 (Fla. 5th DCA 1984) [Blackwelder: "The allegation contained in the robbery count that [the defendant] used a weapon cannot be used to supplement the count for attempted first degree murder."]

Clearly, McKinnon was convicted of a second degree felony to which the firearm enhancement provisions of Section 775.087, Florida Statutes, do not apply. Had the state charged "manslaughter with a firearm" and then had McKinnon been convicted of the same or even had the state (on the verdict form) placed a separate line which stated: "During the course of the felony above for which the defendant has been found guilty, did the defendant use a firearm _____ yes _____ no", than the enhancement provisions of Section 775.087 might apply. See, for instance, Buckbee v. State, 463 So.2d 1240 (Fla. 4th DCA 1985).

Count II (use of a firearm during the course of a felony) constitutes a separate crime and does not relate to sentence (whereas Section 775.087 relates to sentence and does not constitute a separate crime). See Parker v. State, 482 So.2d 576 (Fla. 5th DCA 1986) [possession of a firearm in the commission of a felony requires (1) proof of the commission of a felony and (2) use or display of a firearm.]

Thus, rather than originally receiving 136 points for a first degree felony on the scoresheet, McKinnon should have received 77 points for a second degree felony which, by the undersigned's count, changes his sentencing score by two cells [from a total of 175 points to a total of 116 points, and a 3-7 year range as opposed to the original 12-17 year range under which McKinnon was sentenced.]

Now (unfortunately) it's time to descend into the legal maelstrom created by the courts, culminating in Hall v. State, supra.

After studying the tea leaves of Hall and the opinions leading up to it, it is the undersigned's conclusion that the state could properly convict and sentence McKinnon for manslaughter and display or use of a firearm during the course of a felony but could not do the same if (1) McKinnon had been convicted of both manslaughter with a firearm and display or use of a firearm during the commission of a felony or (2) McKinnon's manslaughter conviction is treated as a first degree felony because of the enhancement provision of Section 775.087(1)(b).

Hall seems to prohibit multiple punishments for the same act (but not the same transaction.) The same "act" involved in this case is the use of a firearm. No better proof of this conclusion is the fact that Hall overruled State v. Gibson, 452 So.2d 553 (Fla. 1984), where the defendant was punished for both armed robbery with a firearm and use of a firearm during the course of that robbery. Clearly, the act multiply punished

in Gibson was the use of the firearm, so Hall (given this Court's reasoning) explicitly overruled Gibson.

Here, two separate crimes were committed: (1) manslaughter and (2) use or display of a firearm during the course of a felony. The state can punish McKinnon for manslaughter (one time) and for use of a firearm used in the manslaughter (one time) but cannot enhance McKinnon's punishment for manslaughter because he used a firearm and then (again) punish McKinnon for use or display of a firearm during the course of the manslaughter.

Finally, the state seems to believe that recent amendments to Section 775.021(4), Florida Statutes, have overruled Carawan and Hall. This argument has been rejected by the Florida First District Court of Appeal in Heath v. State, opinion on motion for rehearing (appendix) for, among other reasons, violation of the ex post facto clauses of the state and federal constitutions.

ISSUE II

DOES THE PENDENCY OF A PETITION FOR REVIEW IN THE FLORIDA SUPREME COURT DEPRIVE THE TRIAL COURT OF JURISDICTION TO RESENTENCE A DEFENDANT PURSUANT TO THE DISTRICT COURT'S MANDATE REVERSING AND REMANDING THE CAUSE FOR RESENTENCING?

This issue was certified to this Court as a question of great public importance. At present, the law is in a state of flux.

In Vicknaire v. State, 501 So.2d 755 (Fla. 5th DCA) review dismissed, 511 So.2d 299 (Fla. 1987), the Fifth District Court of Appeal concluded that because of Florida Rule of Appellate Procedure 9.310 and the 1977 Florida Rule of Appellate Procedure 9.120 committee notes, the trial court did have jurisdiction after a notice attempting to invoke the discretionary review of this Court had been filed. This committee note states:

> It should be noted that the automatic stay provided by former Rule 4.5(c)(6) has been abolished because it encouraged the filing of frivolous petitions and was regularly abused. A stay pending review may be obtained under Rule 9.310. If a stay has been ordered pending appeal to a district court, it remains effective under Rule 9.310(e) unless the mandate issues or the district court vacates it. The Advisory Committee was of the view that the district courts should permit such stays only where essential. Factors to be considered are the likelihood that jurisdiction will be accepted by the Supreme Court, the likelihood of ultimate success on the merits, the likelihood of harm if no stay is granted and the remediable quality of any such harm.

But read in pari materia with each other and the committee notes, Florida Rules of Appellate Procedure 9.120 and 9.310

clearly indicate that the certified question should be answered in the negative.

The Florida First District Court of Appeal disagrees in Payne v. State, 493 So.2d 1104 (Fla. 1st DCA 1986) and Everage v. State, 516 So.2d 81 (Fla. 1st DCA 1987). Payne relies upon Lelikis v. Liles, 240 So.2d 478 (Fla. 1970) for the proposition that the subject matter of an "appeal" vests in the reviewing court for the filing of the notice. Payne at 1105. Payne also relied upon Bailey v. Bailey, 392 So.2d 49 (Fla. 3d DCA 1981) which indicated that the issue was decided upon whether the subject matter on appeal was affected.

It should be pointed out that we are not dealing with an "appeal"; we are dealing with "conflict jurisdiction", which is different.

When the undersigned was on the other side of the hill (i.e., an Assistant Attorney General), he was reversed in Boynton v. State, 378 So.2d 1309 (Fla. 1st DCA 1980), a murder case. He filed a notice attempting to invoke the "conflict jurisdiction" of this Court. In the meantime, the case was sent back to the trial court, where it was retried and defendant Boynton was acquitted. The Assistant Public Defender (Carl McGinnes) notified this Court immediately thereafter and this Court denied certiorari. 386 So.2d 642, Case No. 58-738. If the trial court had the jurisdiction in that case to try a defendant after the mandate had issued and after a notice had been filed to invoke the conflict jurisdiction of this Court,

surely it had the jurisdiction to attempt to resentence the defendant.

The legal waters, however, have been further muddied by the Florida Star v. B.J.F., 13 FLW 518 (Fla. 1988). In that case, an appeal was taken to the First District Court of Appeal. An attempt to take discretionary review in this Court was denied. Florida Star v. B.J.F., 509 So.2d 1117 (Fla. 1987). Then a petition was taken to the United States Supreme Court. The appellee in that case argued that this Court lacked jurisdiction to review the appeal (apparently because the discretionary review had been denied) and thus the District Court of Appeal was the highest court empowered to hear the cause and, as the time limit to take a petition to the U.S. Supreme Court had expired if counted from the date of the District Court of Appeal's opinion, the petitioner in the U.S. Supreme Court case was jurisdictionally out of luck.

This Court, in a very understandable attempt to enlarge or to protect a petitioner's rights, indicated that its jurisdiction was indeed invoked upon the filing of the notice. ["We thus conclude that we had complete subject matter jurisdiction to hear B.J.F. and decide the case on its merits with finality." Id. at 519].

The whole thrust behind this Court's opinion in Florida Star v. B.J.F. was to protect the litigant's rights.

Clearly, there appears to be a conflict between the rule and the Florida Star v. B.J.F.

However, to resolve that conflict in the favor of the Florida Star v. B.J.F would render the appellate rule requiring a stay a nullity. In order to harmonize both the rule and to protect a litigant's rights, it seems that the only course open to this Court is to hold that for petition purposes to the United States Supreme Court, jurisdiction does vest in this Court but for other purposes the appellate rules must prevail. If not, it seems that the appellate rules are indeed now a nullity.

CONCLUSION

In regard to Issue I, petitioner's conviction for manslaughter should only be scored as a second degree felony. In regard to Issue II, the First District Court of Appeal's certified question should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Edward C. Hill, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Webster F. McKinnon, this 15th day of November, 1988.

DAVID P. GAULDIN