OA 2-10-89

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

BEN SMITH, JR., et al.,

Respondents.

Case No. 72,633

ANSWER BRIEF ON MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center
301 N. Olive Ave. - 9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

GARY CALDWELL
Assistant Public Defender

Counsel for Respondents

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PRELIMINARY STATEMENT

The petitioner was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The respondents were the appellants and the defendants, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondents agree with the statement in the initial brief except to add the following:

In the trial court, these causes were consolidated for a single hearing on the question of whether one can be convicted and sentenced for sale of cocaine and possession of that cocaine with intent to sell. At that hearing, the prosecutor set out the facts as follows:

> Basically, Your Honor, what would happen is the agents would -- two agents occupy the van. They will stop, they will inquire of the defendant if they had any cocaine or if they had a quarter rock of whatever they were referred to as. If one agent would make the purchase, you give him the money, that constituted two counts -- possession with intent to sell and sale. The other agent seated in the van may say "Do you have any more?" or "I would like some, too." The agent just sold to would say "Well, do you have any for my friend here?" There would be another sale of another rock or two or however many was involved. But that, basically, is the scenario.

Page 46 of the record in the appeal of James Wiggins, case 87-0550 of the district court of appeal.

SUMMARY OF ARGUMENT

Sale of cocaine and possession of cocaine are but a single crime under section 893.13(1)(a)1, Florida Statutes. Hence, multiple convictions for sale of cocaine and possession of the same cocaine with intent to sell violate the Double Jeopardy Clause. Petitioner's reliance on Blockburger v United States, infra, is misplaced, since Blockburger applies only where the same act or transaction applies to "two distinct statutory provisions." Section 775.021(4), Florida Statutes (1988 Supp.) does not apply at bar because: the legislature cannot abolish the rule of lenity, which is rooted in fundamental principles of due process; the application of the new statute at bar would violate the Ex Post Facto Clause; the law enacting the statutory amendment violates the one subject rule of our constitution; and the statute applies only to "separate criminal offenses."

ARGUMENT

Respondents were each charged both with "possession of cocaine with intent to sell," and with "sale of cocaine" in violation of section 893.13(1)(a)1, Florida Statutes. In each instance, the respondent sold to undercover police officers a small amount of cocaine in his possession. The cocaine involved in the two charges was the same. Section 893.13(1)(a) provides:

> (1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, purchase, manufacture, or deliver, or possess with intent to sell, purchase, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) is guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084.
>
> 2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> 3. A controlled substance named or described in s. 893.03(5) is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Petitioner, the State of Florida, has contended that the sale of a small amount of cocaine in one's possession constitutes two separate violations of section 893.13(1)(a).[1]

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[1] Taken to its logical conclusion, petitioner's position would be that each respondent actually committed at least four offenses: one, sale of cocaine; two, delivery of cocaine; three, possession with intent to sell; and four, possession

A review of section 893.13(1)(a)1 reveals that there is no separate offense called "sale of cocaine." The statutory offense is the sale, purchase, manufacture, or delivery of cocaine, or possession with intent to do the foregoing. For want of an official name, this offense may be termed "dealing in cocaine" just as the foregoing crime is called "trafficking in cocaine" when it involves more than 28 grams of cocaine under section 893.135(b), Florida Statutes. The purpose of section 893.13(1)(a) is to dam the stream of commerce in illegal drugs. It addresses the single evil of drug commerce by forbidding all of its forms: it is an omnibus statute that seeks to remedy a special problem -- drug dealing.

The Double Jeopardy Clause prohibits subjecting a defendant to multiple punishments for the same offense. E.g. Carawan v. State, 515 So.2d 161 (Fla. 1987). Since section 893.13 creates a single offense, multiple convictions for its violation in a single episode involving the same substance violates double jeopardy.

At bar, petitioner has contended that section 893.13(1)(a)1 creates a variety of separate crimes. It cites no case for its proposition that, where a crime is defined in the alternative, each alternative constitutes a separate crime. Instead it bases

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with intent to deliver.

Using similar logic, one who pumped some gas into his car and purposely drove off without paying for it would be guilty of four thefts in violation of section 812.014(1), Florida Statutes: the first theft would be in obtaining the gas, the second in using it, the third in endeavoring to obtain it, and the fourth in endeavoring to use it.

its argument on Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and on section 775.021(4), Florida Statutes (1988 Supp.).

In Blockburger the Court wrote:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304 (emphasis added). Accord Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) and the cases cited therein. It is immediately apparent that Blockburger and its progeny do not support petitioner's position since respondents did not violate "two distinct statutory provisions."

If Blockburger did apply at bar, it would do petitioner no good: the elements of section 893.13(1)(a)1 are obviously identical with the elements of section 893.13(1)(a)1. Even if there were distinct statutory offenses of sale of cocaine and possession of cocaine with intent to sell, one could not commit the sale without committing the possession with intent to sell. Obviously there can be no sale unless the seller actually or constructively possesses the cocaine or is an aider or abettor to another who is in actual or constructive possession of it with intent to sell it. In making this argument, respondents are aware of the contrary authority, set out at page 8 of petitioner's initial brief on the merits, that a sale does not require proof of possession. Those cases, however, simply neglect to consider that the seller can be an aider or abettor to one in

possession of contraband. The nub of being an aider or abettor is that one do or say something to incite, encourage, or assist the commission of a crime. E.g., G.C. v. State, 407 So.2d 639 (Fla. 3d DCA 1981). The seller encourages the possessor to maintain possession until the sale, makes the possession more profitable, and encourages the buyer's acquisition of possession. Hence the seller aids and abets the possession.

Assuming arguendo that sale of cocaine and possession of cocaine with intent to sell were analytically distinct statutory offenses under Blockburger, dual convictions for them would nevertheless be improper under Carawan. There this Court wrote that even where separate statutory offenses are distinct under Blockburger, multiple punishments are nevertheless improper where such a result is contrary to the rule of lenity codified in section 775.021(1). This Court wrote:

> Thus, where there is a reasonable basis for concluding that the legislature did not intend multiple punishments, the rule of lenity contained in section 775.021(1) and our common law requires that the court find that multiple punishments are impermissible. For example, where the accused is charged under two statutory provisions that manifestly address the same evil and no clear evidence of legislative intent exists, the most reasonable conclusion usually is that the legislature did not intend to impose multiple punishments. In Prince v. United States, 352 U.S. 322, 328, 77 S.Ct. 403, 406, 1 L.Ed.2d 370 (1957), the United States Supreme Court recognized this principle where the accused was charged simultaneously with bank robbery and entering a bank to commit a felony. The Prince court found that the legislative history was "meager" and concluded that Congress apparently intended the latter offense to apply only when a bank robbery is frustrated before completion, not when carried to fruition. We also recognize that, because of the constant patchwork revisions of

> Florida's criminal code, certain statutes may be drafted only to punish for frustrated criminal attempts, or to provide special penalties for crimes that essentially are only aggravated versions of other crimes, although perhaps going under different names. In such instances, we do not believe we serve the underlying legislative purpose by assuming that the legislature intended multiple punishments when reason itself points to a contrary conclusion, as where two crimes manifestly address the same evil.

515 So.2d at 168.

In its analysis, this Court receded from various precedents as having been incorrectly decided. It continued:

> Likewise, we must recede in part from our holding in Rotenberry v. State, 468 So.2d 971 (Fla. 1985). There, the accused was convicted of three separate offenses -- trafficking in, sale of, and possession of, cocaine. While we agree that sale of drugs can constitute a separate crime from possession, our analysis in this opinion compels us to conclude that a defendant cannot simultaneously be convicted of both sale and possession in addition to trafficking. Logic dictates that trafficking in illegal drugs as defined in the statute necessarily encompasses either or both of the evils addressed by the statutes outlawing sale and possession, since the manifest purpose of the trafficking statute was to penalize those who distribute large quantities of drugs. In this light, the most reasonable conclusion is that the legislature intended the crimes of sale and possession to cover only those situations where an individual violated the drug laws without possessing and selling the quantities of contraband that otherwise would constitute "trafficking."
>
> Thus, although a defendant may be convicted of both sale and possession under the appropriate circumstances, a defendant cannot be convicted of trafficking as well as sale and/or possession.

515 So.2d at 170. Although, for the reasons set forth above, respondents do not agree that one can be convicted of the sale and possession of the same piece of cocaine, the point here is that section 893.13(1)(a), like its big brother the trafficking statute, encompasses the evil of distributing drugs. Hence it addresses a single evil so that multiple punishments for its violation for one transaction are improper. The person possessing cocaine with the intent to sell it is, like the person entering a bank with the intent to rob it, violating a statutory provision "drafted only to punish for frustrated criminal attempts."[2]

All of the foregoing leads us to section 775.021, Florida Statutes. As amended in 1988, the statute reads:

> **775.021. Rules of construction**
>
> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.
>
> (2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.
>
> (3) This section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or degree.
>
> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each

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2 One wonders whether, under petitioner's theory, a person who goes to the street corner to sell cocaine can be convicted of both possession of cocaine with intent to sell and attempted sale of cocaine.

> 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.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

(The underscored language was added by the 1988 amendment.)

There are four reasons that the amendment should not apply to the case at bar. First, the rule of lenity, which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). See also Annotation: Supreme Court's Views as to the "Rule of Lenity" in Construction of Criminal Statutes, 62 L.Ed.2d 827. Hence while the legislature can certainly codify the rule, it cannot abolish it.

Second, the effect of the amendment is to enhance punishment. The retroactive application of a statute enhancing punishment violates the Ex Post Facto Clause. E.g. Miller v. Florida, 107 S.Ct. 2446 (1987). Since the amendment went into effect two years after the events here in question, its application at bar is illegal.[3]

Third, the amendment to section 775.021 was effected in chapter 88-131, Laws of Florida, which violates the one subject requirement of article 3, section 6 of our constitution. A statute violates this provision where it contains subjects bearing no reasonable relationship to each other. Bunnell v. State, 453 So.2d 808 (Fla. 1984). Chapter 88-131 seeks to effect changes in the sentencing guidelines statute, to effect new procedures for the prosecution and punishment of career criminals, and to amend the habitual offender statute, and to amend section 775.021, which governs rules of construction.

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[3] Much of petitioner's argument about section 775.021(4) is based on the "Senate Staff Analysis and Economic Impact Statement" appended to its initial brief on the merits. This document, apparently authored by one "Dugger O.P." demonstrates no intent that it be applied retroactively. It does, however, point out in its first paragraph that section 775.021(4) applies to violations of "two or more criminal statutes during one criminal episode," which is scarcely the case here. Petitioner apparently argues that the 1988 amendment should be retroactively applied because it merely clarifies the intent of the legislature when it passed section 775.021(4) in 1976. The views of the 1988 legislature do not form the basis for inferring the intent of the 1976 legislature. Cf. United States v. Price, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960) and United Air Lines, Inc. v. McMann, 434 U.S. 192, 200, n. 7, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history").

Thus, whereas the rest of chapter 88-131 deals with criminal procedure, the amendment to section 775.021 pertains to the unrelated matter of statutory construction. Hence chapter 88-131 is unconstitutional.

Fourth, section 775.021(4), even as amended, pertains only to "separate criminal offenses" which do not "require identical elements of proof." As already pointed out, the elements of section 893.13(1)(a) are identical with the elements of section 893.13(1)(a) -- the statute defines a single criminal offense.

In view of the foregoing, respondents' convictions and sentences for possession of cocaine with intent to sell are illegal.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, respondents respectfully request this Court to affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center
301 N. Olive Ave. - 9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Diane E. Leeds, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 9 day of January, 1989.

Of Counsel