IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
BEN SMITH, JR., ET AL.,
Respondents.

CASE NO. 72,633

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

State v. Bruce Edward Gordon, Case No. 72, 850 has been consolidated with the instant case for purposes of oral argument. As Gordon involves an identical issue - whether possession with intent to sell and sale of the same controlled substance constitutes a violation of double jeopardy - the State herein incorporates the Brief of the Petitioner in Gordon by reference.

The parties will be referred to as they appeared before the trial court.

STATEMENT OF THE CASE AND FACTS

During an undercover drug investigation conducted by the Florida Department of Law Enforcement, between July and September, Defendants were videotaped from an undercover van making cocaine rock transactions with F.D.L.E. agents. For every sale a Defendant made, he was charged with sale and possession with intent to sell the same cocaine. Defendants each plead no contest and some reserved the right to appeal the issue of whether they could lawfully be convicted of both sale and possession with intent to sell the same controlled substance. (See Answer Brief on direct appeal).

On appeal, the Fourth District found that "Under the facts of this case we do not believe the appellants could properly be convicted and sentenced for both the sale and possession with intent to sell of the same cocaine sold to undercover police agents in street transactions videotaped by other police officials," Smith v. State, 524 So.2d 461 (Fla. 4th DCA 1988). The case was reversed in part and remanded with instructions to vacate Defendants convictions for possession of cocaine with intent to sell. Conflict between districts was noted and this court accepted discretionary jurisdiction to resolve the issue.

SUMMARY OF THE ARGUMENT

Convictions and sentences for both possession with intent to sell and sale of the same controlled substance do not violate double jeopardy. The timing of the legislative amendment to §775.021, coming in immediate response to this Court's decision in Carawan and carrying an immediate effective date, indicate a non-substantive change. The same rights existed prior and subsequent to the amendment and as such a literal Blockburger interpretation and not Carawan applies to the instant facts. Under a literal Blockburger analysis possession and sale are two very distinct crimes.

Assuming arguendo that Carawan applies, double jeopardy again is not violated by dual convictions and sentences. The first step under Carawan, as the statute is devoid of an express statement of legislature intent, is a Blockburger analysis which proves different statutory elements. The second step is to determine whether the legislature intended a contrary result to that achieved by the Blockburger test. As the statute proscribes two clusters of crimes separated by the word "or" - "sell, manufacture or deliver, or possess with intent to sell, manufacture or deliver", it is obvious that the legislative intent was to create 2 different clusters of offenses for which Defendants may be independently charged and convicted. The legislative insertion of this middle "or" can not be construed as surplusage.

As to the third step in a Carawan analysis, this need not be taken as there is no reasonable basis for concluding that the legislature did not intend multiple punishments. However, assuming arguendo of a reasonable basis for concluding same, the two statutory provisions in question do not address the same evil so the rule of lenity does not come into play. The punishment of possession of a controlled substance with intent to sell same is aimed at punishing the individual possessor for his criminal activity which does not directly or necessarily involve or harm other persons. The punishment of sale, on the other hand, is aimed at punishing an individual who directly and necessarily involves or harms persons other than himself.

Further, assuming Carawan applicable, the instant offenses constitute one transaction and not one act so that Carawan would not apply. A related senes of acts transpired - Defendant possessed the contraband with intent to sell same and when the possession was completed Defendant performed his second act in the series - the sale of that same contraband.

ARGUMENT

WHETHER CONVICTIONS AND SENTENCES FOR BOTH POSSESSION WITH INTENT TO SELL AND SALE OF THE SAME CONTROLLED SUBSTANCE VIOLATE DOUBLE JEOPARDY.

The State respectfully submits that the lower court erred in holding that Defendants could not properly be convicted and sentenced for both the sale and possession with intent to sell the same cocaine.

A. LEGISLATIVE AMENDMENT

On September 4, 1987 this court rendered its decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987). Immediately thereafter, during the next legislative session, and obviously in direct response to Carawan, §775.021, Fla. Stat. was amended to express a legislative intent contrary to that expressed in Carawan:

> §775.021(4)(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.

Solely three exceptions were established to this ironclad rule.

The statutory amendment did not become effective on October 1, 1988 as did the remainder of the statutory revisions encompassed by Chapter 88-131 but instead the legislature

displayed urgency, setting an individual and immediate effective date of July 1, 1988.[1] The legislature rarely speaks so swiftly and forcefully, and, with all due respect, was clearly and consisely delivering a message to this court. Said amendment obviously served as a legislative clarification of this court's misinterpretation of the already existing §775.021, Fla. Stat. As such, the amendment was merely formal in nature and non-substantive, Williams v. Hartford Accident and Indemnity Co., 382 So.2d 1216, 1220 (Fla. 1980); State v. Dickinson, 286 So.2d 529, 531 (Fla. 1973). It can only be considered as an interpretation of the original statute and not a substantive change thereof. The same rights existed prior and subsequent to the amendment, Williams, 382 at 1220.

As aptly stated in Lowry v.Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985):

> When an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. United States ex. rel. Guest v. Perkins, 17 F. Supp. 177 (D.D.C. 1936); Hambel v. Lowry, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute. Gay v. Canada Dry

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[1] The statutory amendment took effect immediately upon adjournment of the legislative session on June 6, 1988.

Bottling Co., 59 So. 2d 788 (Fla. 1952).

See also State v. Lanier, 464 So.2d 1192, 1193 (Fla. 1985); Parker v. State., 406 So.2d 1089, 1092 (Fla. 1982); Ivey v. Chicago Insurance Co., 410 So.2d 494, 497 (Fla. 1982); Keyes Investors v. Dept. of State, 487 So.2d 59 (Fla. 1st DCA 1986); Speight v. State, 414 So.2d 575, 577 (Fla. 1st DCA 1982); Ocala Breeder Sales Co. v. Division of Pari-Mutual Wagering, 464 So.2d 1272 (Fla. 1st DCA 1985).

A cursory review of the Senate staff analysis proves the amendment merely an interpretation of existing law. In Section B entitled "Effect of Proposed Changes" it is written that the bill would "clarify" that Blockburger controls and would "clarify" and "restate" those instances where the legislature does not intent to impose separate sentences under Blockburger (See Appendix).

An analysis of the policy surrounding a non-substantive interpretation of the amendment reveals the interests of justice to be served as well by this approach. A post amendment double jeopardy analysis must be bottomed upon Blockburger. The same is true for a pre-Carawan analysis, see State v. Baker, 456 So.2d 419 (Fla. 1984); Borges v. State, 415 So.2d 1265 (Fla. 1982). As such, when the instant Defendant committed his crime he was well aware that the dual convictions and sentences could be imposed. There is no policy reason to protect a Defendant from receiving just punishment when he is fully informed as to the nature and consequences of his actions. A Carawan approach by its very nature of lenity will relieve Defendant of punishment justly due.

It is clear that the Blockburger test is met. There can be no doubt that sale and possession are two separate and distinct crimes for double jeopardy purposes. A sale does not require proof of possession, Smith v. State, 430 So.2d 448 (Fla. 1983); Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1980) affirmed, 447 So.2d 219 (Fla. 1984); Doubt v. State, 368 So.2d 52 (Fla. 2d DCA 1979); and, possession does not require proof of a sale, Priestly v. State, 450 So.2d 289, 291-2 (Fla. 4th DCA 1984); Runge v. State, 368 So.2d 366 (Fla. 2d DCA 1979). The standard jury instructions in fact provide dramatically different definitions for the two crimes:

> "Sell" means to transfer or deliver something to another person for money or something of value or a promise of money or something of value.
>
> To "possess" means to have personal charge of or execute the right to ownership, management or control over the thing possessed.[2]

Clearly, under the statutory amendment requiring a Blockburger analysis dual convictions and sentences may properly be imposed.

B. Carawan

Assuming for purposes of argument that the legislative amendment does not apply and Carawan applies, double jeopardy still is not violated.

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[2] The fact that the possession was accomplished with the intent to sell does not alter the fact that the basic crime committed was still possession which was completed without an actual sale transpiring.

The first step under Carawan, as the statute itself is devoid of an express statement of legislative intent, is a Blockburger analysis. As previously explained, under Blockburger sale and possession with intent to sell contain different statutory elements (see argument A).

The second step is then to determine whether the legislature intended a contrary result to that achieved by the Blockburger test. In the instant case, there is no basis for concluding that the legislature intended a result contrary to that achieved by the Blockburger test, Carawan 515 at 167-168. The fact that both offenses are defined in one statute does not indicate that the legislature intended a contrary result, see State v. Getz, 435 So.2d 789, 791 (Fla. 1983); State v. Gibson, 452 So.2d 553, 554-555 n. 1 (Fla. 1984).

The legislature's intent, although not expressed, is clear from the face of the statute. The choice of language utilized by the Legislature is revealing. The statute as written proscribes two clusters of crimes separated by the word "or". It is unlawful to "sell, manufacture, or deliver, OR possess with intent to sell, manufacture, or deliver, a controlled substance." As such, the crimes contained within each cluster may alternatively be charged-sale, manufacturing or delivering; possession with intent to sell, manufacture or deliver. Because of the obvious literary construction where these two clusters are intentionally separated by the word 'or', the crimes separated by the middle 'or' are separate and distinct and may be independently charged.

The legislative insertion of this additional 'or' clearly created separate offenses. Had the legislature desired to create solely alternate crimes the statute would have read "...it is unlawful to sell, manufacture, deliver, possess with intent to sell, possess with intent to manufacture or possess with intent to deliver." It is an elementary provision of statutory construction that words in a statute should not be construed as surplusage, City of Pompano Beach v. Capalbo, 455 So.2d 4681 (Fla. 4th DCA 1984). A statute must be construed so as to give meaning to all words and phrases contained within it, Terrinoni v. Westware Ho, 418 So. 2d 1143 (Fla. 1st DCA 1982). To hold that the middle 'or' adds nothing to the meaning of the statute is clearly in direct contravention of the legislature's intent in including said word within the statute.

As to the third step in the Carawan analysis, there is no reasonable basis for concluding that the legislature did not intent multiple punishments, Carawan 515 at 168 so this step is never reached. However, assuming arguendo that the legislature did not intend multiple punishments, the two statutory provisions in question do not address the same evil, so the rule of lenity does not come into play, Carawan 515 at 168. Clearly the punishment of possession of a controlled substance with intent to sell is aimed at punishing the individual possessor for his criminal activity which does not directly or necessarily involve or harm persons other than the perpetrator. The sale is never completed, only the possession. To the contrary, punishment of

sale of a controlled substance is designed to punish an individual for directly and necessarily involving persons other than himself in the criminal activity. The perpetrator harms the public at large. The legislature may permissibly decide to punish separately those who seek to involve other persons in illegal activity as well as those who individually engage in proscribed conduct.

C. Single Transaction

Again, assuming Carawan to be applicable, Carawan solely applies to separate punishments arising out of one act and not to one transaction. An act is defined as a discrete event arising from a single criminal intent, whereas a transaction is a related series of acts, Carawan 515 at 170 n. 8. In the instant case a single transaction is apparent as opposed to a single act. A related series of acts transpired. Defendant possessed the contraband with intent to sell same. When the possession was completed Defendant performed his second act in the series, the sale of that same contraband. Consequently the holding in Carawan does not apply, see n. 8.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and citations of authority, it is respectfully requested that the instant case be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" with appendix has been furnished by courier to: GARY CALDWELL, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 19th day of December, 1988.

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