

APP ^{reg} 78

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 72,850

BRUCE EDWARD GORDON
Respondent.

SEP 8 1988
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ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOR DISCRETIONARY JURISDICTION

BRIEF OF THE PETITIONER

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PRELIMINARY STATEMENT

BRUCE EDWARD GORDON will be referred to as the "Respondent" in this brief. The STATE OF FLORIDA will be referred to as the "Petitioner". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent, Bruce Edwards Gordon, was charged by information with possession with intent to sell or deliver, and in count two, with sale or delivery of cocaine. (R 34) At a hearing on July 3, 1986, defense counsel orally moved to dismiss the possession count, citing Fletcher v. State, 428 So.2d 667 (Fla. 1 DCA 1982). (R 3) Relying on an earlier decision of the Second District Court of Appeal, the trial court denied the motion. (R 3 - 4) Respondent subsequently entered a plea of nolo contendere. (R 5 - 12) Respondent's plea was accepted, and he received two concurrent one year sentences. (R 39 - 43) Gordon appealed.

On May 27, 1988, the Second District Court of Appeal reversed on the authority of Carawan v. State, 515 So.2d 161 (Fla. 1987); Gordon v. State, ___ So.2d ___, 13 F.L.W. 1286 (Fla. 2d DCA 1988).

The court reasoned that it could not discern a clear legislative intent from **§892.13 Florida Statutes** merely from the placement of the offenses in the statute¹ and then proceeded to a Blockburger² analysis. At this step, the court concluded that the offense of sale requires that a defendant (a) possess the

¹ The court cited in footnote five of its opinion State v. Getz, 435 So.2d 789 (Fla. 1983).

² Blockburger v. United States, 284 U.S. 299, 76 L.Ed. 306 (1932).

contraband with (b) the intent to sell it and, as a third element, actually sell it. The court opined that the first two elements were identical to the elements of possession with intent to sell and that, therefore, the Blockburger, test was not satisfied. The court concluded with the observation that it was unnecessary to reach the final step in the Carawan analysis of applying the rule of lenity (although that would have achieved the same result) 13 F.L.W. at 1289. The court then certified to this Honorable Court as one of great public importance this question:

IN APPLYING **CARAWAN V. STATE**, 515 SO.2D 161 (FLA. 1987) TO THE FACTS OF THIS CASE, DO CONVICTIONS AND SENTENCES FOR THE CRIMES OF SALE OF ONE ROCK OF COCAINE AND POSSESSION WITH INTENT TO SELL THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY PROTECTION PROVIDED BY THE STATE AND FEDERAL CONSTITUTIONS.

The state now seeks review in this court.³

³ The state timely sought rehearing below and on July 6, 1988, the Court amended its May 27th opinion and otherwise denied rehearing.

ISSUE PRESENTED

IN APPLYING **CARAWAN V. STATE**, 515 SO.2D 161 (FLA. 1987) TO THE FACTS OF THIS CASE, DO CONVICTIONS AND SENTENCES FOR THE CRIMES OF SALE OF ONE ROCK OF COCAINE AND POSSESSION WITH INTENT TO SELL THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY PROTECTION PROVIDED BY THE STATE AND FEDERAL CONSTITUTIONS.

SUMMARY OF THE ARGUMENT

The lower court erred in concluding that only one judgment and sentence is permissible for the offenses of possession of cocaine with intent to sell or deliver and sale or delivery of cocaine is involved. It is possible for the one offense to be completed without necessarily proving the other and so the test of Blockburger v. United States, 284 U.S. 299, 76 L.Ed.2d 306 (1932) is satisfied. The court below erred in believing that the legislature intended a single punishment when the legislature's expressed view is to the contrary.

ARGUMENT

Petitioner would respectfully submit that the lower court's analysis is erroneous. The respondent was charged in Count One with possession of cocaine "with the intent to sell or deliver" and in Count Two that he did "sell or deliver." (R 34) It is clear from the accusatory pleading that it would be possible to convict of both Counts One and Two, a defendant who possessed with intent to sell the cocaine and who delivered (without selling) the cocaine.⁴ The Blockburger test is satisfied because each offense contains an element not contained within the other. The offense in Count One is completed when the accused possesses the contraband with the intent to sell. (i.e. receive money or other consideration for it) No sale or delivery is needed. The offense in Count Two is complete when the accused makes a delivery of the contraband. No sale is required. Unlike Count One which may require an intent to sell; the Count Two offense of delivery does not require an intent to sell. Thus, the Second District Court of Appeal was in error in holding that Counts One and Two constitute the same offense for double jeopardy purposes.

⁴ Respondent may urge that, in this case, he actually did complete a sale. Unfortunately for respondent the instant record does not provide a sufficiently detailed record; the transcript of the nolo contendere plea contains only the admission; "we will stipulate the state would prove a prima facie case." (R 8) Questions of fact may not be reserved upon a plea of no contest. Gissendanner v. State, 373 So.2d 898 (Fla. 1979); Bowden v. State, 402 So.2d 1173 (Fla. 1981); Hand v. State, 334 So.2d 601 (Fla. 1976).

Quite apart from the preceding analysis, the lower court was wrong in its belief that sale and possession with intent to sell constitutes the same offense. The lower court reached that result by deciding that the offense of sale includes as an element of the offense possession. But this Court has previously held sale and possession to be separate offenses. Smith v. State, 430 So.2d 448 (Fla. 1983). Accord, Dukes v. State, 464 So.2d 582 (Fla. 2d DCA 1985). In Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1980) this Court specifically stated that possession is not an essential aspect of sale.⁵ The lower court's error, we submit, is in assuming that because a sale may frequently be accompanied by possession that the state necessarily has to prove both.

Florida Statute §775.021(4) provides that whoever commits several offense shall be sentenced separately for each and that offense are separate if each offense requires proof of an element tht the other does not "without regard to the accusatory pleading or the proof adduced at trial." It is not a necessary element of the offense of sale that the state prove possession, and it is irrelevant whether possession may be "comprehended"⁶ or

⁵ Indeed the lower court in Daudt v. State, 368 So.2d 52 (Fla. 2d DCA 1979), reversed a conviction for possession of marijuana for insufficient evidence, but let stand a conviction for sale of the same marijuana. It is thus clear that a defendant may be guilty of sale without actual or constructive possession.

⁶ See State v. Anderson, 270 So.2d 353 (Fla. 1973).

"implied"⁷ within sale.

Additionally, the court below erred in concluding that the offenses of possession with intent to sell and sale address the "same evil" of drug abuse. The court comments that the crime of possession-with-intent-to-sell is a crime "representing a frustrated or uncompleted sale," slip opinion at p. 9. However, the legislature has adequately addressed the problem of a frustrated or uncompleted sale by proscribing the attempt to sell illegal drugs. See **Florida Statute §893.13** and **Florida Statutes §777.04**.

Petitioner respectfully submits that separate evils have been addressed in the legislature's proscriptions in **Florida Statutes §893.13**. The statutory provision prohibiting 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 persons other than the perpetrator. Sale and delivery, on the other hand, necessarily include the involvement of other citizens and the legislature has a legitimate interest in punishing not only those who engage in private, personal illegal conduct, but who also seek to include the participation of others in the society in proscribed conduct.

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. As the United States Supreme Court explained in United States v. Feola, 420 U.S. 671, at 693, 43 L.Ed.2d 541, at 558 (1975), the

⁷ See Payne v. State, 275 So.2d 261 (Fla. 4th DCA 1973).

policy reasons underlying society's separately punishing conspiracy and the substantive offenses, include the protection of society from the dangers of concerted criminal activity and the intervention of the law to stop inchoate crime which has gone beyond preparation.

The rule of lenity --

Finally, the lower court concluded that it was unnecessary to proceed to the final step of Carawan -- application of the rule of lenity -- but that if it did, the result would be the same.

Initially, petitioner would submit that Carawan itself recognized that the rule of lenity was not an overriding doctrine, a principle to override the clear intent of the legislature.

Rather:

"We do not find that these two rules of construction are irreconcilable. Indeed, we believe that each may be accorded a field of operation that harmonizes with the other . . .

* * *

Since actual intent must prevail absent a constitutional violation, the two rules are applicable only when legislative intent is unclear. Moreover, by its own terms, the rule of lenity comes into play only where the statutes in question are susceptible of differing constructions, that is, when legislative intent is equivocal as to the issue of multiple punishments."

(515 So.2d 168)

The legislature has responded to this Honorable Court's decision in Carawan. Effective June 24, 1988, **Chapter 88-131** amended **Florida Statutes §775.021** and provided:

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 of a civil judgment or decree.

(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 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.

Simply put, the legislature has declared that, with three exceptions, the rule of lenity is not to be applied as determined of legislative intent if offenses are separate under section 4(a)

and none of those three exceptions apply here. As stated earlier, the offenses of possession with intent to sell and sale do not require identical elements of proof, so (4)(b)1 is inapplicable. Possession is not a degree of sale and thus, (4)(b)2 is inapplicable and the possession is not a lesser offense whose statutory elements are subsumed by the offense of sale, rendering (4)(b)3 inapplicable.

Moreover, the legislature's recent action demonstrates that the interpretation of legislative intent in Carawan was wrong. In Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985), this Court declared:

"When, as occurred here, 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.

* * *

In examining Chapter 947 in light of section 775.021(4), Florida Statutes (1983) and section 775.087(2) Florida Statutes (1983), it is unmistakable that the amendments contained in the pending bill are expressions of prior and continuing legislative intent."


(text at 1250)

CONCLUSION

Based on the above stated facts, arguments and authorities, Petitioner would ask that this Honorable Court reverse the order of the Second 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 has been furnished by U.S. Regular Mail to Deborah K. Brueckheimer, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida 33830, this 2nd day of September, 1988.



OF COUNSEL FOR PETITIONER.