13,140 A-Reg.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NOS. 86-2296
86-2443
LLOYD RANDOLPH PARKER, et al. 86-2510
86-2596
Respondents. 86-2597

ON DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES CITED

FLORIDA STATUTES:

Kaden. The End of the Single Transaction Rule.
Florida Bar Journal/December, 1983..... 7

LAWS OF FLORIDA:

PRELIMINARY STATEMENT

Although each of the above respondents had filed a separate appeal in the court below, the lower court consolidated the appeals for purposes of its opinion.

If, and where necessary, the record on each respondent will be referred to by the respondent's name followed by the symbol "R" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Each of the above respondents were charged, inter alia, with possession of cocaine with intent to sell and sale of cocaine, occurring during the same criminal transaction or episode. In each, the respondent was convicted of both offenses and sentenced. In each, the respondent appealed.

The District Court of Appeal, Second District, State of Florida, in a consolidated opinion, reversed, saying:

> These six consolidated cases present essentially the same facts as were presented in Gordon v. State, No. 86-2444 (Fla. 2d DCA May 27, 1988). We reverse on the authority of Gordon and certify the same question to the supreme court.
>
> (The above quote is taken from the slip opinion. The case will be reported at 530 So.2d 344.)

Petitioner filed a timely petition for rehearing on the consolidated cases, which was denied September 7, 1988. Notice to Invoke Discretionary Review was timely filed.

In Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), the lower court concluded that the crime of sale of cocaine and possession of cocaine with intent to sell were the same offense under the precepts of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and remanded with instructions to vacate one or the other of the convictions. The court then certified the question which petitioner hereinafter raises in this brief as the issue in this cause.

The Gordon decision is presently before this Court styled State of Florida v. Bruce Edward Gordon, Case No. 72,850.

SUMMARY OF THE ARGUMENT

Legislative history manifests that the crimes of possession of cocaine with intent to sell and sale of cocaine, even though arising out of the same act, transaction or occurrence are to be punished cumulatively.

This legislative history demonstrates that **Fla.** Stat. **§775.021** has been amended time and again to clarify the legislative purpose to allow cumulative punishments for separate offenses.

Offenses are separate when each requires a statutory element the other does not. Elements may not be assumed or inferred.

ARGUMENT

ISSUE

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?

It is now abundantly clear that the Double Jeopardy Clause of the Constitution of the United States does not prohibit multiple convictions and punishments under two criminal statutes in a single trial, simply because under Blockburger, supra, they may be construed as proscribing the same conduct. Missouri v. Hunter, **459** U.S. **359, 74** L.Ed.2d **535, 103** S.Ct. **673 (1983);** Albernaz v. United States, **450** U.S. **333, 67** L.Ed.2d **275, 101 S.Ct. 1137 (1981);** Whalen v. United States, **445** U.S. **684, 63** L.Ed.2d **715, 100** S.Ct. **1432 (1980).**

The primary proscription of the Double Jeopardy Clause is multiple trials for the same offense. The Blockburger decision serves two purposes. First, it defines "same offense" in order to determine whether the multiple trial proscription has been violated.

Second, it defines "same offense" as one means of determining legislative intent as to whether cumulative punishments will be allowed. The Double Jeopardy Clause also protects against cumulative punishments occurring in a single trial; but, in that instance the protection of the Double Jeopardy Clause is more limited:

> With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended. (emphasis supplied)
>
> Missouri v. Hunter, **74** L.Ed.2d at **542.**

Consequently, where there has been a single trial resulting in multiple convictions for the same criminal episode, the question is whether the legislature intended to allow cumulative punishments. The Blockburger test serves only as one means of determining legislative intent. It compares the elements of the two crimes. If each has one element the other does not, then the presumption arises that the offenses are separate and that the legislature did not intend to prohibit cumulative punishments. Carawan v. State, **515** So.2d **161** (Fla. **1987).** But Blockburger is not the first-step in divining legislative intent. The first step is:

> [t]he presumption when [the legislature] creates two distinct offenses is that it intends to permit cumulative sentences and legislative silence on this specific issue does not establish ambiguity or rebut this presumption.
>
> Garrett v. United States, **471 U.S. 773, 793, 85** L.Ed.2d **764, 780, 781, 105 S.Ct. 2407 (1985)**

Thus, contrary to what this Court said in Carawan at **167,** the Double Jeopardy Clause presumes that where the legislature creates two distinct offenses cumulative sentences are permitted.

Moreover, as in Garrett, the Florida legislature " . . . was not silent as to its intent to create separate offenses . . ."

and ". . . authorize cumulative punishments absent some indication of contrary intent." Garrett, 85 L.Ed.2d at **781.**

The fact is, the legislature of the State of Florida has, time and again, evinced its desire to allow cumulative punishments, but, time and again, the appellate courts of this state have refused to accept this clear legislative purpose. The legislative intent is revealed in **Fla. Stat. §775.021(4).** The history of that statute discloses constant legislative revision designed to obviate decisions of this Court proscribing cumulative punishment. See Kaden, The End of the Single Transaction Rule, Florida Bar Journal/December **1983.**

To summarize:

In **1973,** this Court decided Cone v. State, 285 So.2d 12 (Fla. 1973), which held that separate sentences for robbery and use of a firearm during the robbery were not permissible because both arose out of the same criminal transaction. In response to Cone the legislature promulgated **subsection (4)** of **Fla. Stat. 775.021 (1976)** which read:

> (4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

See Chap, **76 - 66 Laws of Florida**

This statute clearly evinced a legislative intent that whenever two or more crimes are committed during one criminal episode, each shall be sentenced separately be it concurrently or consecutively, save and except where one is lesser included to the other.

Apparently, the legislative will was not sufficiently clear for the courts of this state because in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), this Court interpreted the 1976 version of 775.021(4). This Court held that, although neither the statute nor jeopardy precluded multiple convictions for both first degree murder and the underlying predicate robbery, the statute did preclude cumulative punishment. This Court reasoned that " . . . by definition, proof of the predicate robbery . . ." is required to prove first degree murder. This made the robbery a lesser included offense. Obviously, it was not a necessarily lesser included offense as defined by this Court in Brown v. State, 206 So.2d 377 (Fla. 1968) because it is not necessary to prove a robbery in order to prove first degree murder. Only by looking at the proof in the particular case could the Hegstrom court conclude that the robbery was, in fact, the predicate offense for the murder. In other words, this Court construed §775.021(4) as precluding cumulative punishments where the lesser offense, of two charged offenses, by proof, although not by necessary statutory elements, is included within the greater.

The Florida legislature tried again. This time it amended subsection (4) to read:

> (4) Whoever, in the course of one criminal transaction or episode, commits 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.

See **Laws** of **Florida 83-156**

This amendment was a clear legislative attempt to convey its desire to allow cumulative punishments except where the two offenses, each had separate statutory elements.

To no avail. This Court decided Carawan v. State, 515 So.2d 161 (Fla. 1987). Realizing that **§775.021(4)** allowed cumulative punishments except where the elements were statutorily the same, this Court in Carawan, resorted to the rule of lenity codified in **subsection (1)** of **§775.021.** This Court held that neither multiple convictions nor cumulative sentences could be imposed for the crime of attempted manslaughter and shooting into an occupied structure since they addressed the "same evil."

Again, the Florida legislature tried to convey its intent. This time it went after Carawan's interpretation of the rule of lenity. **Chapter 88-132, Laws of Florida,** amended **§775.021** in two ways. It amended paragraph **(4)** with paragraph 4(a) by deleting the words " . . . commits separate criminal offenses . . . " and substituting " . . . commits an act or acts which constitute one or more . . . " separate offenses. The manifest legislative purpose was to clarify that if any one act constitutes two offenses,

as defined, cumulative punishments would be allowed.

It then added paragraph (b) to read:

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal enisode 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 reqiure 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.

In the interim, the lower court decided Gordon. But Gordon was not decided under Carawan's construction of the rule of lenity. It was decided under the "same offense" test of Blockburger as codified in §775.012(4) (1987), and here is where the court erred.

In rendering the Gordon decision, the lower court applied the three step analysis of Carawan. The Gordon decision first determined that there was no statement from whence legislative intent could be determined. It then applied the Blockburger test for determining whether the crime of sale of cocaine and possession of the same cocaine with intent to sell satisfy Blockburger and concluded the offenses were the same. Finally, the lower court determined that since both offenses met the Blockburger test, it was unnecessary to make a lenity analysis.

In concluding that the offenses were the same under Blockburger, as codified, the lower court, not only ignored the legislative history of §775.021(4), but engaged in an erroneous analysis. It inferred an element instead of looking to see what was statutorily required.

Fla. Stat. §775.021(4) (1983) states that offenses are separate if each requires proof of an element that the other does not. The crime of possession of cocaine with intent to sell requires proof of an element not required in sale; viz: possession. The crime of sale of cocaine requires proof of an element not required in possession with intent to sell; viz: sale. Nevertheless, the Second District found the crimes to be the same through the creation of an inference. It inferred proof of possession in the crime of sale because, said the court " . . . the prosecution cannot also help, but prove the element[s] of possession . . ." in the sale. Gordon at 913. The court reasoned that even where the sale is conducted through a third party, that third party is in possession and, through the principal statute, what the third party possesses, the defendant possesses.

But, Fla. Stat. §775.021(4) (1983) does not permit elements to be inferred or implied. It specifically states that each offense must require proof of an element the other does not, and that in making this determination, a court should not look to either the accusatory pleadings or the proof at trial. As hereinabove discussed, legislative history discloses the

legislative intent that only necessary statutory elements be considered in determining whether the offenses are the same. Each time this court has inferred or implied an element, the legislature has amended the statute in an attempt to make it explicitly clear that only necessary statutory elements are to be considered. The ultimate test as to whether an element is statutorily necessary is whether proof at trial can withstand a motion for directed verdict, that is, can a defendant charged with sale of cocaine argue that possession is a necessary element of the charge.

It is surprising that the lower court ignored the statutory mandate of **§775.021(4) (1983)** that the elements be statutorily necessary because in a previous opinion the court recognized the distinction between a necessary element and an inferred element. In Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1981), the lower court held that sale and possession of cannabis occurring in the same transaction could be separately punished saying:

> "While a seller of marijuana might in the ordinary case also possess the marijuana sold, possession is not an essential aspect of the sale."

Id. at 315

In so holding, the lower court relied on the definition of a necessarily lesser included offense as espoused in Brown v. State, 206 So.2d 377 (Fla. 1968). It should be observed that in deciding Portee the court was relying on the 1976 version of **§775.021(4)** and not the 1983 version which, even more explicitly,

mandates reliance on statutory elements only. Even then, as the quote indicates, the lower court refused to infer on element.

Similarly, relying on the 1976 version of the statute, this Court in Smith v. State, 430 So.2d 448 (Fla. 1983), held that sale and possession are not the same offense even where they occur during the same episode or transaction.

Finally, even Carawan appears to agree that they are separate offenses. In Carawan, this Court receded in part from Rotenberry v. State, 468 So.2d 971 (Fla. 1985), but continued to recognize that

> ". . . sale of drugs can constitute a separate crime from possession . . ."

This Court has always, and the lower court at one time, understood that, simply because one offense may be "comprehended" State v. Anderson, 270 So.2d 353 (Fla. 1973) or "implied" within another, Payne v. State, 275 So.2d 261 (Fla. 4th DCA 1973), does not mean one is a lesser included to the other, Anderson, Payne or, we submit, that that implication makes it a necessary element under **775.021(4).** As the court said in Payne:

> While the state may be correct that an allegation of delivery **implies possession** or **constructive possession,** an implied allegation is insufficient to bring a secondary offense within the scope of the information where the secondary offense is not a **necessarily included offense.** Where the secondary offense is not necessarily included within the offense charged, the elements of the secondary offense must be specifically alleged -- not implied -- by the accusatory instrument.
>
> Id. at 263

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.

Initally, 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 it, when legislative intent is equivocal as to the issue of multiple punishments."
>
> (515 So.2d 168)

As the legislative history of §775.021(4), hereinafter discussed, discloses the legislative resolve that cumulative punishment be allowed demonstrates that there has been no equivocation by the legislature on this point.

Shortly after, and in response to Carawan, **Chapter 88.131 Laws of Florida** amended **S775.021** becoming effective June 24, 1988. The entire new version with the addition reads as follows:

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 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.

This simply means that, with three exceptions, the rule of lenity is not to be applied as determinative of legislative intent if offenses are separate under section 4 (a). None of the three exceptions are applicable here. Exception one, that is, offenses which require identical elements of proof, is not applicable because the elements of possession and possession with intent to sell are not identical.

4. In Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985), this Court - the same court that decided Carawan -- succinctly stated:

> When, as occurred here, an amendment to a statute is enacted soon after controversies as to the 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 therof.
>
> * * *
>
> 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.
>
> (emphasis supplied)
> (Text 1250)

In other words, Carawan's interpretation of legislative intent was simply wrong.

Regardless, Carawan was decided before the 1988 amendment to S775.021, The lower court's decision, on the other hand, was not final until after the amendment became effective. The legislative intent was unmistakeably clear by then.

US

Based on the above and foregoing reasons, arguments and authorities, the decision of the lower court should be quashed and the judgments and sentences in the respective causes re-instated.

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 Stephen Krosschell, Deborah K. Brueckheimer and William H. Pasch, Assistant Public Defenders, P. O. Box 9000, Drawer PD, Bartow, Florida 33830, this 4th day of November, 1988.

OF COUNSEL FOR PETITIONER.