IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NUMBER **73,249**

ALPHONSO MCCRAY,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

On Review From the District Court of Appeal
First District of Florida

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STATEMENT OF THE CASE AND THE FACTS

From a decision of the District Court of Appeal, First District of Florida, certifying a question of great public importance, the State of Florida, pursuant to Rule 9.120(c), Fla.R.App.P., filed its motion to invoke the discretionary jurisdiction of the Supreme Court described in Rule 9.030(a)(2)(A). On November 2, 1988, a Briefing Schedule was set prescribing the dates for service of briefs on the merits. This brief is filed on behalf of the State of Florida which will be referred to herein as Petitioner or the State. Alphonso McCray, the defendant before the trial court and appellant before the District Court of Appeal, will be referred to in this brief as Respondent or McCray. References to the record on appeal will be made with the letter "R" followed by page number and the transcript with the letter "T."

In this case, Respondent was charged with two counts of sale of cocaine, two counts of possession of cocaine, two counts of delivery of drug paraphernalia and one count of conspiracy to deliver cocaine. (R 11-13). The charges were based on two sales by Respondent of cocaine contained in clear plastic baggies. (T 44; T 54). After conviction on all counts, the District Court of Appeal affirmed the trial court with the exception of the two convictions of delivery of drug paraphernalia which were reversed. McCray v. State of Florida, 13 F.L.W. 2218 (Fla. 1st

DCA, Sept. 27, 1988, Case No. 87-1815). McCray's sentence was left undisturbed. [1]

The District Court of Appeal concluded that the plastic baggies in which Respondent delivered the cocaine were without question drug paraphernalia as statutorily defined. The appellate court questioned ". . . whether the legislature intended [under § 893.147, F.S.] to punish the transfer of the container as a separate offense from the transfer of the drug itself." It was further opined ". . . that the paraphernalia laws were aimed instead at punishing those persons who supply paraphernalia with the intent that it will be used to distribute illegal drugs, even if they do not possess or sell the drugs themselves." Id. It was recognized, however, that there had been a recent legislative amendment to § 775.021, Fla. Stat. (1987), titled "**Rules of construction**" and thus the following question was certified to this Court:

> Whether the Florida Legislature intended to punish as two separate offenses, the single act of sale of a contraband substance in a container (i.e., whether the legislature intended to punish the transfer of the container as a separate offense from the transfer of the drug itself)?

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[1] The trial court sentenced McCray to serve 30 months in prison per offense, the sentences to run concurrently.

The lower appellate court, by setting aside or reversing the paraphernalia delivery convictions, has supplied a negative answer, and it is respectfully submitted that this result is erroneous.

SUMMARY OF ARGUMENT

Appellee contends that this is another in a series of cases which has been erroneously decided because of confusion in the application of § 775.021(4), Fla. Stat. (1987). The interpretation of that section by the judiciary has been addressed by the legislature in the enactment of Chapter 88-131(7), Laws of Florida, and the imposition of dual punishments for a criminal act or episode is mandated. The certified question presented to this court should therefore be answered in the affirmative and it should be recognized that the statutory enactment expresses legislative intent prior to the decision in Carawan v. State, 515 So.2d 161 (Fla. 1987), as well as today.

ARGUMENT

WHETHER THE FLORIDA LEGISLATURE INTENDED TO PUNISH, AS TWO SEPARATE OFFENSES, THE SINGLE ACT OF SALE OF A CONTROLLED SUBSTANCE IN A CONTAINER (I.E., WHETHER THE LEGISLATURE INTENDED TO PUNISH THE TRANSFER OF THE CONTAINER AS A SEPARATE OFFENSE FROM THE TRANSFER OF THE DRUG ITSELF)?

This case is another in a series in which the courts, particularly the courts of appeal, have struggled and grappled with the concept of multiple criminal convictions flowing from one criminal transaction or episode. The District Court of Appeal of Florida, First District, though recognizing the existence of an amendment on the subject by the Legislature in Chapter 88-131(7), Laws of Florida, is still reluctant to uphold dual punishments and, in fact, in the case under review refused to uphold two convictions for delivery of drug paraphernalia in connection with two sales of cocaine. This reluctance of the appellate courts appears to flow from Carawan v. State, 515 So.2d 161 (Fla. 1987).

Very shortly after the Carawan case issued, the amendment to § 775.021(4) was enacted. The amended statute reads:

> (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 purpose 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 he 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 arg subsumed by the greater offense.

It would seem that this enactment would resolve whatever might be the confusion, for it has been held by this Court that a legislative amendment is a reflection of what the legislature intended all along:

> When, as occured here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may

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[2] Underlined words represent new additions to the statute.

> consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.

Lowry v. Parole & Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985).

Nonetheless, District Court of Appeal, First District, in Heath v. State, 13 F.L.W. 2325 (1st DCA, October 13, 1988, Case No. 87-1269), when advised of the new legislation ruled:

> On appeal, appellant contended that he should not have been adjudged guilty of both armed robbery and using a firearm during the commission of the same robbery. This court agreed and issued its "Per Curiam" reversal, filed July 21, 1988. In its motion for rehearing, appellee State of Florida urges that this court was in error in overlooking the recent amendments to section 775.021(4), Florida Statutes, contained in Chapter 88-131(7), Laws of Florida (1988). The State contends that the amendment overrules Carawan v. State, 515 So.2d 161 (Fla. 1987), and Hall v. State, 517 So.2d 678 (Fla. 1988)(cited as authority for our "Per Curiam" reversal).
>
> We find no merit in these conclusions. First, it is a function of the judiciary to declare what the law is. 10 Fla.Jur.2d Constitutional Law, § 166. Although legislative amendment of a statute may change the law so that prior judicial decisions are no longer controlling, it does not follow that court decisions interpreting a statute are rendered inapplicable by a subsequent amendment to the statute. Instead, the nature and effect of the court decisions and

> the statutory amendment must be examined to determine what law may be applicable after the amendment. (Citations omitted).
>
> Secondly, it is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator may be convicted, as well as the punishments which may be imposed. (Citations omitted).
>
> Finally, the amended statute, if given retroactive effect as urged by the state would result in additional punishment for appellant, thus running afoul of the *ex poste facto* clauses of the State and federal constitutions.

Heath v. State, 13 F.L.W. 2325.

It is respectfully submited that the conclusion in Heath, like the conclusion in McCray misses the mark. The better view of the the new legislation is expressed in the concurring opinion of Mr. Justice Shaw in State v. Barritt, **13** F.L.W. **591** (Fla. **1988,** Case **No. 71,624):**

> It is clear from the above amendment [Chapter **88-131(7)]** that the legislature intends and previously intended, that separate offenses, as defined by the legislature, are subject to separate convictions and separate sentences and that the sentencing judge has sole discretion on whether the sentences for separate offenses will be imposed concurrently or consecutively. The impact of these statutory changes on this Court's case law is substantial.

In a footnote to his opinion, Justice Shaw commented:

> In Carawan v. State, 515 So.2d 161 (Fla. 1987), we relied on a perceived distinction between "act" and "acts" and the rule of lenity in § 775.021(1), Fla. Stat. (1985), to hold the legislature did not intend separate convictions and separate sentences for two separate offenses as stated in § 775.021(4), Fla. Stat. (1985). The amendment expressly rejects our interpretation by making it clear that we are to strictly apply § 775.021(4) without regard for "act" or "acts" and the rule of lenity. . . .

The District Court of Appeal, Fifth District, reached a similar conclusion in Clark v. State, 13 F.L.W. 2098 (5th DCA, September 8, 1988, Case No. 88-1548):

> After this petitioner's case was decided on plenary appeal our Supreme Court made its decision in Carawan v. State, 515 So.2d 161 (Fla. 1987), which would have affected this petitioner had it been the law when his appeal was considered. Carawan was not the law then and is not the law now because the legislature has amended § 775.021(4) to permit multiple convictions for crimes arising out of a "single evil." In this case petitioner shot a single shot and was convicted and sentenced for attempted murder one, shooting into an occupied building and being a

person engaged in a criminal offense with a weapon.

Nothing in Carawan makes it applicable to this case now, in our opinion, because it was not specifically retroactive to prior convictions, did not mention Vause which was directly on point and the legislature has spoken to make clear its intent in section 775.021(4), Florida Statutes. See Chapter 88-131 s. 7 (F.L.W. Session Law Rptr. July 4, 1988).

Pre-Carawan decisions were not always consistent. In Portee v. State, 392 So.2d 314 (Fla. 2nd DCA 1980), separate sentences for sale and possession of more than five grams of cannabis were upheld and the same appellate court reached a similar conclusion in Dukes v. State, 464 So.2d 582 (Fla. 2d DCA 1985). The Second District however was forced to recede from Dukes because of Carawan in its decision in Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), but a Carawan question was certified to this court for consideration and is under review. Likewise in Carawan, supra, at 169, this court reviewed the various situations in which dual punishments were permitted to stand, viz., State v. Baker, 456 So.2d 419 (Fla. 1984), Scott v. State, 453 So.2d 798 (Fla. 1984), and State v. Carpenter, 417 So.2d 986 (Fla. 1982). This court then reviewed decisions in which dual convictions were not permitted, such as Mills v.

State, 476 So.2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031, 89 L.Ed.2d 349, 106 S.Ct. 1241 (1986); Houser v. State, 474 So.2d 1193 (Fla. 1985); and State v. Boivin, 487 So.2d 1037 (Fla. 1986).

The effort to separate and indentify those special cases warranting multiple punishments is not longer required. The emphasis on the rule of lenity, relied upon in Carawan to justify cases denying multiple punishments, has now been rejected by the legislature. The double jeopardy clause does not prohibit a state legislature from imposing cumulative punishments under two separate statutes. Missouri v. Hunter, 459 U.S. 368-69, 741 L.Ed.2d 535, 103 S.Ct. 673 (1983), and our legislature has made it clear that multiple sentencing is to be the rule of statutory construction except in those three instances noted by Mr. Justice Shaw in Barritt, supra. The intent of the legislature is no longer clouded. Furthermore, in the case under review before this court, the Carawan rule, even if valid, would not pertain, for the simple reason that the paraphernalia charge falls under a separate statute from the possession and sale of cocaine for which Appellant was also convicted.

The First District in its opinion in the case below reasoned that the Florida Legislature did not intend to punish as two separate crimes the single act of sale of a drug contained in a package as well as the transfer of the container. Supposedly,

statutory language, in the view of that court, indicated that such intent was not expressed. However, no reference to any statutory phrase or language was made by that reviewing court and the clarity with which the legislature has now expressed its intent for multiple sentencing is beyond question. It is therefore submitted that the revision to § 775.021, Fla. Stat., compels an affirmative answer to the question certified to this court.

CONCLUSION

Based upon the reasons and citations set forth above it is respectfully submitted that the District Court of Appeal, First District of Florida, erred in reversing the two convictions of Appellant for delivery of drug paraphernalia. It is therefore submitted that the question certified to this Court should be answered in the affirmative, i.e., the legislature did intend to punish as two separate offenses, the single act of sale of a controlled substance in a container. The vacation of those sentences should be reinstated.

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. Mail to MARIA INEZ SUBER, ESQUIRE, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32301, this 22nd day of November, 1988.

WALTER M. MEGINNISS