IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 73,249

ALPHONSO McCRAY,

Respondent.

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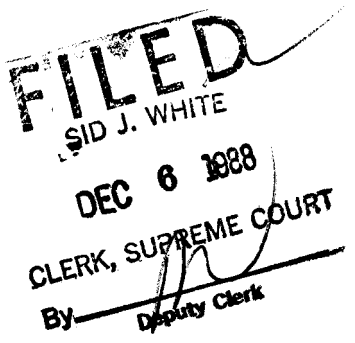

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT AND
STATEMENT OF THE CASE AND FACTS

Respondent was the defendant in the trial court and the appellant in the lower tribunal. The parties will be referred to as they appear before this Court. The brief of petitioner on the merits will be referred to as "PB", followed by the appropriate page number in parentheses. Attached hereto as an appendix is the opinion of the First District, which has been reported as McCray v. State, 531 So.2d 408 (Fla. 1st DCA 1988). Respondent accepts petitioner's statement of the case and facts, except for the editorial comment on PB 3.

SUMMARY OF THE ARGUMENT

Respondent will argue that there is no reason to reverse the opinion of the lower tribunal in this case. Petitioner has failed to demonstrate that the opinion is an erroneous interpretation of the rule of lenity contained in Section 775.021(1), Florida Statutes. Petitioner has further failed to demonstrate that the recent amendment to Section 775.021(4), Florida Statutes, can be constitutionally applied to respondent's May, 1986, crimes.

ARGUMENT

THE LOWER TRIBUNAL CORRECTLY HELD THAT THE LEGISLATURE DID NOT INTEND TO PUNISH RESPONDENT FOR THE SEPARATE CRIMES OF POSSESSION OF DRUG PARAPHERNALIA

Petitioner argues that respondent was required to receive separate judgments and sentences for the two plastic baggies which contained the cocaine that he sold, because the Legislature intended same. Respondent begs to differ, because petitioner's entire argument is premised upon the faulty assumptions that Carawan v. State, 515 So.2d 161 (Fla. 1987) was wrongly decided and that the 1988 amendment to Section 775.021(4), Florida Statutes, applies to crimes which occurred on May 6 and 21, 1986.

As to the continued vitality of Carawan, petitioner has not demonstrated that this Court erred when it found a rule of lenity in Section 775.021(1), Florida Statutes. That statute provides:

> 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. (emphasis added).

Even without this statutory rule of lenity, the outcome would be the same, because of the care with which the Legislature defined what paraphernalia is, and, more importantly, what it is not.

By Counts II and VI of the information, respondent was charged with delivery of drug paraphernalia, i.e., the plastic baggies containing the cocaine allegedly sold to Griffin on May

6 and 21st, in violation of Section 893.147(2), Florida Statutes. That statute provides:

> It is unlawful for any person to deliver, possess with the intent to deliver, or manufacture with the intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know that it will be used:
>
> (a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance ... . (emphasis added).

See also, Section 893.145(9) and (10), Florida Statutes, defining "drug paraphernalia" inter alia, as "[c]apsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances"; and, "[c]ontainers and other objects used, intended for use, or designed for use in storing or concealing controlled substances." See also, Section 893.146, Florida Statutes, providing the criteria for determining whether an object is drug paraphernalia; Baldwin V. State, 498 So.2d 1385 (Fla. 5th DCA 1986); and Florida Businessmen, etc. v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1983).

Because the evidence as introduced by the State did not by any stretch of the imagination prove that respondent had the requisite intent to deliver drug paraphernalia as opposed to sell cocaine, or that he knew or reasonably should have known that the plastic baggies that already contained the powdery cocaine in this case will be utilized by Griffin to pack, store, etc., controlled substances other than that already

packed and stored therein, respondent maintains that the result reached by the lower tribunal was imminently correct.

In Baldwin, supra, the defendant entered a plea of nolo contendere to attempted delivery of drug paraphernalia and to the unlawful possession of drug paraphernalia with the intent to deliver reserving the right to appeal the denial of his motion to dismiss. His main contentions on appeal were that the State could not prosecute him because the necessary element that it prove that the buyer intended to use the paraphernalia in an illicit manner was absent in the case since the items were purchased by undercover agents. The court disagreed and affirmed holding:

> The statute does not require that a person unequivocally know that the paraphernalia will be used for an illicit purpose; rather, the state must only show that the defendant knew or reasonably should have known that the drug paraphernalia would be used for such purposes. It is important to note that the intent at issue in the statute is that of the seller/defendant, not that of the buyer.

Id., at 1386. Similarly in Florida Businessmen, etc. v. City of Hollywood, supra, the appellate court held:

> To ensure that defendants will not be convicted based on the transferred intent of others, we also note that the three states of mind on which the definition of drug paraphernalia relies - (1) "used," (2) "intended for use," or (3) "designed for use" - require proof of general criminal intent of the accused.
>
> * * * *
>
> We hold that the phrase "reasonably should know" is not impermissibly vague and adopt the reasoning advanced by the district

> courts. We note that proof that a defendant reasonably should have known something is established in substantially the same manner as actual knowledge. . . .
>
> Further support is found in the many statutes imposing criminal liability under a "reasonably should know" standard and which have withstood constitutional attack. . . . Florida courts also have construed this standard to require proof that "the circumstances of the transaction were sufficiently suspicious to put a person of ordinary intelligence and caution on inquiry." . . . The "reasonably should know" standard does not punish innocent or inadvertent conduct but establishes a scienter requirement that the defendant acted in bad faith, with intent or knowledge that the recipient will use the paraphernalia with controlled substances.

Id., at 1219.

In this case, the State's evidence consisted exclusively and absolutely of the testimony of Griffin that respondent sold him powder cocaine worth $20 in two occasions. That the cocaine was contained in two small plastic bags is of no consequence. No evidence was introduced to prove or tending to prove that the transactions allegedly occurring on May 6 and 21st, involved also the independent sale or purchase, or delivery for that matter, of any drug paraphernalia, i.e., the plastic baggies, nor did the State establish or attempted to establish that generally the type of cocaine that respondent supposedly sold, powder, is often sold loose as opposed to packed and that it was respondent who specifically decided to deliver the cocaine in the plastic baggies.

Although respondent realizes that a defendant's state of mind is not often subject to direct proof and that the State may prove it by circumstantial evidence, here the State's circumstantial evidence, if any, was wholly insufficient to support the convictions. And such evidence was consistent with respondent's hypothesis of innocence, i.e., that he did not intend to deliver drug paraphernalia but rather sell cocaine; and in fact, respondent's jury could have only convicted him by stacking inference upon inference.

This is *so* because to reach the conclusion that respondent was guilty, the jury had to infer that at the time the sales of cocaine allegedly occurred, respondent also intended to commit the independent crime of delivery of paraphernalia. And from this inference, the jury had to further infer that respondent knew or reasonably should have known that Officer Griffin will use the baggies for illicit purposes. Mayo v. State, 71 So.2d 899 (Fla. 1954); Driggers v. State, 164 So.2d 200 (Fla. 1964); McArthur v. State, 351 So.2d 972 (Fla. 1977); Jaramillo v. State, 417 So.2d 257 (Fla. 1982); Fox v. State, 469 So.2d 800 (Fla. 1st DCA 1985), rev. denied, 480 So.2d 1296 (Fla. 1986); Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), rev. denied, 503 So.2d 328 (Fla. 1987); and Law v. State, 502 So.2d 471 (Fla. 1st DCA 1987) (review pending).

Based on the evidentiary record, respondent insists a violation of Section 893.147(2), Florida Statutes, was not present in this case. To hold otherwise would lead to automatic violations, and attendant convictions, of the statute every

time a defendant sells a controlled substance packed or stored in a container be it a plastic bag, burlap wrap or the like. Clearly that is not the legislative intent behind Section 893.147(2), notwithstanding Section 775.021(4). But the existence of Section 775.021(1) and this Court's well-reasoned opinion in Carawan are even further support for the conclusion that the Legislature did not intend to punish the mode of delivery of drugs as a separate offense.

Now to the crux of petitioner's brief. Petitioner's reaction to Carawan was to run to the Legislature to seek an amendment to Section 775.021(4), seeking to overrule Carawan. Petitioner sees nothing wrong with applying the 1988 amendment retroactively to respondent's 1986 crimes. The fact that respondent committed his crimes two years prior to the amendment shows how ridiculous it would be to apply the amendment retroactively to respondent.

Criminal statutes are supposed to apprise an individual of the nature of his conduct which the Legislature will deem to be criminal, so that the defendant has fair notice of what acts are criminal and what are not. Here, when respondent committed his May, 1986, crimes, he knew there was a statute on the books dealing with paraphernalia, but he had no idea the Legislature would come along two years later and mandate that he receive a

separate judgment and sentence for the paraphernalia charges.[1] Only a person with clairvoyance would be able to know that his conduct would be deemed punishable by separate sentences.

As a general rule, we must apply the law governing the elements of crimes as well as their penalties which was in effect at the time of the crime. Art. X, §9, Fla. Const. If applied retroactively, a law becomes an ex post facto violation of Art. I, §10, Fla. Const. and Art. I, §10, U.S. Const.

This Court is probably weary of hearing that its decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985), which held that revisions to the sentencing guidelines rule may be applied retroactively, was overruled by Miller v. Florida, 482 U.S. , 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). But it should be wary of petitioner's argument in the instant case that the anti-Carawan statute may be applied retroactively, because that was exactly the same rose-covered path petitioner misdirected this Court into following in State v. Jackson.

In Miller. the Court found that the revision to the guidelines could not be applied to a defendant whose crime occurred prior to the effective date of the revision, because the resulting penalty was more harsh than it would have been under the rules in effect at the time of the crime. There is no difference between retroactively applying a more severe

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'Moreover, when the Legislature amended § 775.021(4), it did nothing whatsoever to alter the rule of lenity contained in § 775.021(1).

guidelines penalty and retroactively applying the anti-Carawan amendment. The practical result is the same -- the penalty is more severe than it was before the amendment. The legal result must be the same as well -- it cannot be applied retroactively.

The lower tribunal properly applied these principles in Heath v. State, 13 FLW 2325 (Fla. 1st DCA, opinion on rehearing filed October 13, 1988). The court had originally "Per Curiam" reversed the conviction for use of a firearm in the commission of an armed robbery on authority of Carawan, supra, and Hall v. State, 517 So.2d 678 (Fla. 1987). The state argued on rehearing, much like the instant case, that the 1988 amendment was retroactive. The court disagreed and held:

> [W]e hold that the interpretation by the highest court of this state, as found in the Carawan and Hall decisions, of the criminal statutes existing at the time of the offenses committed here, govern as to the permissible criminal punishments which may be imposed on appellant, rather than the subsequently adopted legislation having the effect of increasing those punishments.

Id. As in Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984), the First District has properly found an ex post fact violation. Respondent begs this Court to heed the warning the the patent medicine salesman is again knocking at the door of this Court, for the third time, peddling the same superficial cure. See Weaver v. Graham, 450 U.S. 24 (1981), holding that an amendment to remove gain time previously earned was an ex post facto violation and overruling Harris v. Wainwright, 376 So.2d 855 (Fla. 1979).

See also Booker v. State, 514 So.2d 1079 (Fla. 1987), in which this Court properly held that a revision to the guidelines statute could not be retroactively applied.

Petitioner's reliance on Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985) is misplaced. That case held that Lowry could claim the benefit of an amendment to the parole statute, which made him eligible for immediate release. Obviously, that amendment was beneficial to the defendant, and so could be applied to him. But where an amendment makes the punishment more severe, an ex post fact violation occurs.

Petitioner's reliance on Clark v. State, 13 FLW 2098 (Fla. 5th DCA September 8, 1988) is equally misplaced. That case has nothing to do with the issue at hand. In that case, the court held that an appellate attorney was not ineffective for failure to argue a Carawan violation on direct appeal, well before Carawan was even decided.

In 1979 (Harris), 1985 (Jackson), and now in 1988, petitioner has assured this Court it will not create constitutional error if it applies a statute retroactively. Let us not make the same mistake again.

CONCLUSION

Petitioner has not demonstrated the decision of the lower tribunal was incorrect. This Court should reject petitioner's thinly-veiled attempt to overrule Carawan, supra, or answer the certified question in the negative and rule that the amended statute has nothing whatsoever to do with these **1986** crimes, or decline to accept discretionary review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Walter M. Meginniss, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, 1533 Southeast 15th Avenue, Gainesville, Florida, this 6 day of December, 1988.

P. DOUGLAS BRINKMEYER