IN THE SUPREME COURT OF FLORIDA

TERRANCE LORENZO LOVE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,401

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, FL 32399-1050

CELIA A. TERENZIO
Assistant Attorney General
111 Georgia Avenue - 204
West Palm Beach, FL 33401
Telephone (407) 837-5062

Counsel for Respondent

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LIST OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appear before this Honorable Court. A copy of the district court's opinion is attached to this brief as the Appendix.

The following symbol will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following additions and clarifications:

1. Petitioner appealed his conviction for two counts of armed robbery with a firearm and one count of possession of a firearm while engaged in a criminal offense in October of 1986 (Exhibit 1).

2. Petitioner raised five issues on his direct appeal. The double jeopardy issue was not raised (Exhibit 2).

3. Petitioner's convictions were upheld on appeal. Love v. State, 515 So.2d 364 (Fla. 4th DCA 1987). The district court, however, remanded since three of four reasons for departure were invalid. Love, 515 So.2d at 364. The district court made it clear that the one valid reasons, concerning an escalating pattern of criminal behavior was factually supported by the record. Id.

4. On remand, the trial court again relied on the valid reason and departed (R 24-25).

5. Petitioner again appealed the departure sentence. This time, however, Petitioner alleged an additional issue concerning double jeopardy.

6. The trial court made it clear that the Petitioner's escalating pattern of criminal conduct necessitated departure (R 7-8).

POINTS ON APPEAL

POINT I

WHETHER APPELLANT'S CONVICTION AND SENTENCE FOR BOTH ROBBERY WITH A FIREARM AND POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE WAS CORRECT UNDER THE LAW AS IT EXISTED AT THE TIME OF THE OFFENSE?

POINT II

WHETHER THE TRIAL COURT PROPERLY DEPARTED FROM THE RECOMMENDED GUIDELINES?

SUMMARY OF THE ARGUMENT

1. Petitioner is precluded from raising this issue under the law of the case doctrine. Hall v. State, **517** So.2d **678** (Fla. **1988)** should not be applied retroactively, as it is not a constitutional nor fundamental change in the law. Hall, supra, involves statutory construction and legislative intent. Petitioner's original appeal was already final when Hall was decided.

2. The trial court's reason for departure based on an escalating pattern of criminal activity is supported by the record. The trial court discussed at the sentencing hearing Petitioner's long history of criminal conduct.

ARGUMENT

APPELLANT'S CONVICTION AND SENTENCE FOR BOTH ROBBERY WITH A FIREARM AND POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE WAS CORRECT UNDER THE LAW AS IT EXISTED AT THE TIME OF THE OFFENSE. (Petitioner's issue restated).

Petitioner claims that his convictions for both robbery with a firearm under Fla. Stat. §812.13(1) and (2)(a) and possession of a firearm while engaged in a criminal offense under Fla. Stat. §790.07 cannot be upheld because they are a violation of double jeopardy. Hall v. State, 517 So.2d 678 (Fla. 1988).

Respondent would point out that this issue was never raised on Petitioner's first appeal. Petitioner's conviction was affirmed in the initial appeal, however, it was remanded for resentencing as three of the four reasons given for departure were invalid. Love v. State, 515 So.2d 364 (Fla. 4th DCA 1987).

On remand the trial court again departed from the recommended guidelines (R 24-25). Petitioner again appeals that departure as well as raises a new issue that was not considered in the first appeal.

Respondent submits that under the law of the case doctrine, Petitioner is precluded from raising any issues which either were or could have been raised on his prior appeal. Jefferson v. State, 516 So.2d 33 (Fla. 1st DCA 1986).

Respondent would further argue that Hall, supra, should not be applied retroactively. Witt v. State, 387 So.2d 922 (Fla.), cert denied, 449 U.S. 1067, 101 S.Ct 796, 66 L.Ed. 612 (1980). In determining whether a change of law should be applied retroactively thereby setting aside the doctrine of finality, the change must be fundamental and of constitutional proportions. Witt, 387 So.2d at 928. Respondent submits that Hall represents a nonconstitutional, evolutionary development which arises from the Florida Supreme Court's attempts to ascertain legislative intent.

Double jeopardy is not offended if cumulative prosecution and punishment of two or more statutory offenses arise out of a single act. A legislature is permitted to effect such an outcome if it so intends. Albernaz v. United States, 450 U.S. 333, 101 S.Ct 1137, 67 L.Ed.2d 275 (1981). Consequently, Petitioner's claim that this issue is fundamental and can be raised at any time is incorrect. A change in the law as to the appropriate test applicable to determine legislative intent is not of the fundamental, constitutional magnitude required for retroactive application. Witt, supra. This view has been adopted by the First District Court of Appeal in Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988).

In Harris, the defendant was convicted of both robbery with a firearm and possession of firearm during the commission of

a felony. His convictions were proper under Gibson, supra. Subsequent to his appeal, the Supreme Court overruled Gibson as in the case sub judice. Defendant through post-conviction relief now attacks his conviction based on Hall. The First District Court of Appeal stated:

> ... the Supreme Court had ruled at the time of Harris' conviction that such dual convictions were proper. In Hall, 13 F.L.W., at 30, the court has changed the substantive law as it relates to convictions both for armed robbery under section 821.13, Florida Statutes, and for possession of a firearm during the commission of a felony under section 790.02, arising out of the same criminal act. We do not discern anything in Hall, 13 F.L.W., at 30, that would make that decision apply retroactively or provide that such dual convictions now constitute fundamental error under the reasoning in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct 796, 66 L.Ed. 612 (1980).

Harris, at 439.

Petitioner alleges that Hall should not be applied retroactively as his appeal was still pending when Hall was decided. Respondent submits that Petitioner's reliance on Cantor v. Davis, 489 So.2d 18 (Fla. 1986) and State v. Stafford, 484 So. 2d 1244 (Fla. 1986) is not dispositive of the case sub judice. The defendant in Cantor argued that a specific statute was unconstitutional both on its face and as applied. Cantor, 409

So.2d at 20. The trial court ruled the statute unconstitutional on its face and never reached the issue of constitutionality as applied. This Court stated that the defendant should not be precluded from raising that issue in the Supreme Court. That factual scenario is distinguishable from the instant case. Petitioner never raised the claim of double jeopardy on his initial appeal. It was not raised until the initial appeal was complete.

In Safford, this Court stated that a person was entitled to rely on cases which were decided during their original appeal. Safford, 484 So.2d at 1245. In the instant case, this is not Petitioner's original appeal. This is a second appeal predicated upon a departure sentence.

Respondent submits that this Court should answer the district court's certified question in the negative. Petitioner is not entitled to retroactive application of Hall. Gilmore v. State, 13 F.L.W. 709 (Fla. December 8, 1988).

POINT II

THE TRIAL COURT PROPERLY DEPARTED FROM THE RECOMMENDED GUIDELINES.

Initially, it must be pointed out that this issue has been decided against Petitioner by the district court on two separate occasions. Love v. State, 515 So.2d 364 (Fla. 4th DCA 1987) and Love v. State, 13 F.LW. 2387 (Fla. 4th DCA, October 26, 1988) (see, Petitioner's appendix).

Petitioner claims that the trial court failed to recite the specific pattern of criminal conduct which illustrates the escalating pattern of criminal conduct.

Respondent submits that the trial court has in fact articulated the specific pattern of conduct which prompted his decision to depart:

> THE COURT: Okay. After reviewing and after refreshing my recollection of the facts of there is an escalating pattern of criminal conduct on behalf of this individual, evidence by the fact that the first contact with the law authorities was in March of 1980, assault and battery. He was placed on -- The case was resolved outside of court by means of community arbitration and then in February of 1983, there was another robbery he committed as a juvenile.
>
> It was resolved in the judicial system by placing him on community control. And that was in February of '83, and then in March of '83 there was another aggravated -- I am sorry, that was part of the same offense, a robbery, agg. assault and battery, and that was strong arm robbery in April of 1983.

> He violated his community control and was then put on commitment status, then in May of 1984, he committed another assault and battery.
>
> It was handled none-judicially. October of 1984 another assault and battery. Trespassing, that was handled non-judicially, then as an adult he came before me initially on attempted sexual battery, attempted sexual battery with slight force.
>
> Apparently the case was negotiated as a result of being placed on sentence as a youthful offender for two years in prison to be followed by two years community control.
>
> Thereafter, while on community control facet of his youthful offender sentence, he committed two counts of armed robbery and one offense of possession of a firearm during the commission of a felony.
>
> **I** found, in fact, that that was an escalating pattern, escalating pattern of criminal conduct that goes from a serious to very serious to repetitive serious, and **I** feel that under the circumstances that there is a good ground because of the escalating pattern of criminal conduct to aggravate the sentence.
>
> So I will maintain my prior imposition of sentence and sentence the Defendant to a period of incarceration on Count One and Count II of 19 years on Count I and Count 11, and fifteen years on Count III. (e.a.).

(R 7-8). The trial court's written order also reflects the Court's concern with Appellant's escalating criminal pattern:

> The Defendant's criminal activity is of an escalating nature from property crimes to violent personal crimes with the uti-

> lization of a firearm. This Court finds that the above finding is sufficient to justify a departure of the Defendant's presumptive sentence.

(R 24). As the reason clearly articulated by the trial court is a valid reason for departure, Appellant's sentence must be affirmed. Keys v. State, 500 So.2d 134 (Fla. 1980); Silveria v. State, 525 So.2d 429 (Fla. 1st DCA 1980).

CONCLUSION

Respondent respectfully requests that this Court AFFIRM the opinion of the district court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, FL 32399-1050

CELIA A. TERENZIO
Assistant Attorney General
111 Georgia Avenue - 204
West Palm Beach, FL 33401
Telephone (407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded, by courier, to JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 18th day of January, 1989.

Of Counsel