

IN THE SUPREME COURT OF FLORIDA

TERRANCE LORENZO LOVE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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CASE NO. 73,401

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Petitioner was the appellant and Respondent was the appellee in the Fourth District Court of Appeal. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal

ARGUMENT

POINT I

PETITIONER'S CONVICTION AND SENTENCE FOR BOTH ROBBERY WITH A FIREARM AND POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE VIOLATES THE DOUBLE JEOPARDY CLAUSE.

Throughout its argument on this issue Respondent distinguishes cases and claims that Petitioner should be denied relief because he did not present this issue to the district court during his initial appeal. However, it must be noted that at the time of the appeal, and even at the time of resentencing, this issue was controlled by State v. Gibson, 452 So.2d 553 (Fla. 1984). Petitioner could not be expected to raise this issue in the district court which was then bound by Gibson which was directly on point. The first opportunity to utilize Hall v. State, 517 So.2d 678 (Fla. 1988) was during the appeal in the Fourth District. It would be a manifest injustice to permit relief to others with the same issue while denying Petitioner relief even though he had raised Hall, supra, at the first available opportunity on direct appeal and not during post-conviction proceedings.

Respondent next claims that, even though the present issue had not been initially decided by the district court, that the instant issue is controlled by the law of the case. In Preston v. State, 444 So.2d 939 (Fla. 1984) this Court noted that law of the case doctrine will generally control where the issue has been adjudicated previously in the case, but that where a manifest injustice would result reconsideration is warranted:

We do recognize the general rule that all points of law which have been adjudicated become the "law of the case." Greene v. Massey, 384 So.2d 24, 28 (Fla. 1980). However, an appellate court does have the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case. Strazzula v. Hendrick, 177 So.2d 1, 4 (Fla. 1365). Reconsideration is warranted only in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.

444 So.2d at 942; ~~see also~~ Young v. State, 503 So.2d 1360, 1361 (Fla. 1st DCA 1987) (appellate court should follow latest pronouncements of law from higher court even though same issue was apparent law of case, appellate court should not "blindly and tenaciously adhere" to apparent law of case which is no longer the correct interpretation of law). In the present case the district court had never adjudicated the issue in question thus the law of the case doctrine is not applicable. Also, applying such a doctrine in this case would be a manifest injustice.

Also, double jeopardy violations may be corrected at any time, even after a guilty plea, State v. Johnson, 483 So.2d 420 (Fla. 1986), or even where it has not been asserted until after all appeals have been concluded. Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981). Respondent claims that Gibson, supra and Hall, supra, involve only legislative intent and not whether double jeopardy violations occurred. While those cases do involve the interpretation of legislative intent, such intent is in issue in order to determine the primary issue involved -- whether there was a double jeopardy violation. Again, the double jeopardy violation here can be corrected at any

time. Johnson, supra, at 422 (noting that the "United States Supreme Court has held that the right not to be twice placed in jeopardy is 'fundamental'").

Respondent relies on Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988) to argue that Hall, supra, should not be applied to Petitioner's case. However, in Harris, the court necessarily indicates that a violation of the double jeopardy clause is not fundamental. Clearly, such a violation is fundamental. Id. In addition, Harris involves a purely retroactive application of Hall, whereas the instant case does not. This Court's decision in Hall was the law at the time the instant issue was raised on appeal. Petitioner, unlike Mr. Harris, was not attacking his dual convictions and sentences by way of the post-conviction process. Because he had not totally completed the appellate process, Petitioner was entitled to the law in effect at the time the district court was deciding his appeal. State v. Stafford, 484 So.2d 1244, 1245 (Fla. 1986).

Finally, assuming arguendo that a double jeopardy violation is not fundamental, and that cases still in the appellate process, as opposed to the collateral process, should not apply the law in effect at the time of the appeal, Hall should still be applied retroactively based on the goal of ensuring fairness and uniformity in cases. Respondent has not, and can not, legitimately argue that it would not be manifestly unfair to treat individuals differently merely due to the timing of their cases.

See Bass v. State, 13 F.L.W. 527, 528 (Fla. September 1, 1988).
For the reasons stated in Petitioner's Brief on the Merits at
pages 8 and 9, Hall should apply retroactively.

Petitioner relies on his brief on the merits for further
argument on this point.

POINT II

THE TRIAL COURT ERRED IN DEPARTING FROM THE
RECOMMENDED GUIDELINE SENTENCE.

The trial court's written order for departure indicates that departure was due to an escalating pattern of crime from property crimes to violent personal crimes (R24). In his brief on the merits, Petitioner posited that the trial court failed to recite such a pattern of escalation. In response, Respondent claims that the trial court articulated a specific pattern of conduct in support of the reason for departure and cited to pages 7 and 8 of the record. However, an examination of the trial court's explanation shows that the explanation does not support, but instead repudiates, the trial court's justification for departure.

As noted by Respondent, the trial court articulated that Petitioner first was convicted of assault and battery followed by convictions for robbery, aggravated assault and battery, attempted sexual battery and the present counts of robbery (R7-8). Nowhere is there any reference to any property crimes.¹ Thus, this does not constitute a recitation of a specific pattern of conduct which supports the sole written reason for departure -- the escalating nature from property crimes to violent personal crimes.² Consequently, the failure to recite the specific

¹ Also, there is no escalating pattern; there is simply a repetitive pattern.

² In addition, this recitation is not within the trial court's written order for departure, and when "the trial court's order fails to recite a specific pattern of criminal conduct" the pattern will not be a valid reason for departure. See State v. Jones, 530 So.2d 53 (Fla. 1988).

pattern of property crimes escalating to violent personal crimes will invalidate this as a reason for departure. See State v. Jones, 530 So.2d 53, 55 (Fla. 1988). Since this was the only valid reason for departure, the departure should be reversed and Petitioner resentenced within the guidelines. Petitioner relies on his brief on the merits for further argument on this point.


CONCLUSION

For the reasons stated in Point I, Petitioner requests this Honorable Court to quash the decision of the district court with directions that Petitioner's conviction and sentence for possession of a firearm during the commission of a criminal offense be reversed and, because such reversal affects the recommended guideline range, his other sentences must be reversed and the cause remanded for recomputation of the guideline score and resentencing.

For the reasons state in Point 11, Petitioner respectfully requests this Honorable Court to reverse his sentences and to remand this cause for resentencing within the recommended guideline range.

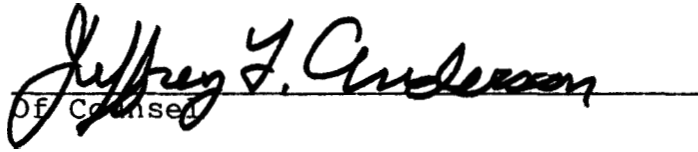
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA A. TERENCE, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 3rd day of February, 1989.


of Counsel