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<u>Burton v. State</u> , 13 F.L.W. 2660 (Fla. 2d DCA, Opinion filed December 9, 1988)	
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STATEMENT OF THE CASE AND FACTS

The State of Florida will rely the pertinent facts set forth by the Second District Court in its opinion below:

" Defendant was charged by information with six counts of drug-related offenses: (1) delivery of cocaine; (2) possession of cocaine; (3) possession of marijuana; (4) possession of cocaine; (5) possession of diazepam; and (6) possession of codeine. Defendant filed a plea of guilty to Counts I and II and a plea of nolo contendere to the remaining counts, reserving his right to appeal the trial court's denial of his motion to suppress contraband. After a judgment was entered, defendant received an eighteen month sentence for Count I and separate eighteen months sentences for each of the remaining counts, to run concurrent to his sentence for Count I.

The affidavit in support of the information revealed that counts I and II were based on a single incident occurring on January 2, 1987, where defendant had in his possession and sold to an undercover detective

of the St. Petersburg Police Department a half
gram of cocaine . " Burton v.
State, So.2d _____, 13 F.L.W. 2660 (Fla.
2d DCA, Case #87-2669, Opinion filed December
9, 1988)

Relying on Carawan v. State, 515 So.2d 161 (Fla. 1987), the
Second District Court determined that Burton's convictions for
both Counts I and II violated his double jeopardy rights under
the federal and state constitutions.

On February 2, 1989, the State's Motion for Rehearing was
denied by the Second District Court. On February 8, 1989, the
State filed its Notice to Invoke Discretionary Jurisdiction on
the basis of alleged conflict of decisions; and the instant Brief
on jurisdiction follows.

SUMMARY OF THE ARGUMENT

This Court needs to resolve the conflict between the Second District and this Court's opinion in Smith v. State, infra, as well as Section 775.021(4). As the decisions now stand, the trial courts of this district are left **in** the dark **as** to whether to rely on this Court's opinion in Smith v. State, and Section 775.021(4) or to follow the Second District's mandate that possession cannot be a separate offense from sale or delivery.

ARGUMENT

ISSUE

WHETHER THE DECISION BELOW IS IN CONFLICT WITH
SMITH V. STATE, 430 So.2d 448 (Fla. 1983), AND
WHETHER THE COURT SHOULD EXERCISE ITS
DISCRETION TO REVIEW THE DECISION?

With its decision in the The Florida Star v. B.J.F., 530 So.2d 286, (Fla. 1988), this Court has established the standard for measuring jurisdictional conflict at the hypothetical level. Having done so, this Court recognized that it ". . . has subject matter jurisdiction to hear any petition arising from an opinion that establishes a point of law . . ." Id. at 288 - 289. This case certainly falls within that class as there is a written decision establishing a point of law.

The question thus becomes whether the court should exercise its discretion in a given case involving a written opinion establishing a point of law. B.J.F. recognizes that jurisdiction is appropriately exercised where the decision under review establishes a ". . . point of law contrary to a decision of this Court or another district court," Id. at 289.

The point of law established by the district court is that a defendant cannot be convicted of both delivery of a controlled substance and simple possession (not possession with intent to sell) of the same substance. This position is in conflict with this Court's opinion in Smith v. State, 430 So.2d 448 (Fla. 1983). Smith, analyzed the offenses of sale and possession and found that each had an element of proof that the other did not.

This holding was not changed by Carawan v. State, 515 So.2d 161 (Fla. 1987), which held only that one could not be convicted of both sale and possession in addition to trafficking. Carawan appears to agree that they are separate offenses. In Carawan, this court recede in part from Rottenberry 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 understood that, simply because one offense may be "comprehended" State v. Anderson, 370 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 nor that the implication makes it a necessary element under 775.021(4). As the court in Payne stated:

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

Finally, sale and possession also remain separate crimes under the new statute effective July 1, 1988, for crimes occurring thereafter, because each has an element separate from

the other. Section 775.021(4), Florida Statutes (1988). ~~See also~~ State v. Doaphin, 533 So.2d 761 (Fla. 1988) [Simple possession is not a necessarily lesser included offense of trafficking by delivery].

The Second District's opinions fails to follow both this Court's opinion in Smith and the legislative intent expressed in Section 775.021(4) in failing to distinguish the requisite elements of possession and delivery. In Gordon v. State, 524 So.2d 1047 (Fla. 2d DCA 1988) (review pending, State v. Gordon, Fla. S.Ct. #72,850) the court held that a defendant cannot be convicted and sentenced for both sale and possession with intent to sell. The charges before the court in the instant case, however, were delivery and simple possession. Smith specifically holds that convictions can be had for both sale and possession.

This Court needs to resolve the conflict between the Second District and this Court's opinion in Smith v. State, supra, as well as Section 775.021(4), Florida Statutes. As the decisions now stand, the trial court's of this district are left in the dark as to whether to rely on this Court's opinion in Smith v. State and Section 775.021(4) or to follow the Second District's mandate that simple possession cannot be a separate offense from sale or delivery.

CONSLUSION

Based on the foregoing reasons, arguments and authorites, Petitioner respectfully requests this Court to exercise its discretionary jurisdiction in this case.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Katherine V. Blanco
KATHERINE V. BLANCO, #327832
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to ALLYN GIAMBALVO, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33830 this 16th day of February, 1989.

K. Blanco
OF 'COUNSEL FOR PETITIONER _____