

W O O A .

017
w/aff

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,780

THE STATE OF FLORIDA,

Petitioner,

vs .

ROBERTO PASTOR,

Respondent .

FILED

SID J. WHITE

JUL 7 1989

CLERK, SUPREME COURT

By _____
Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GISELLE D. LYLEN
Florida Bar # 508012
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS i

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

ISSUE PRESENTED FOR REVIEW 3

DID THE LOWER COURT ERR IN APPLYING
CARAWAN AND HALL RETROACTIVELY TO A
CONVICTION FOR ATTEMPTED FIRST DEGREE
MURDER WITH A WEAPON AND POSSESSION OF A
WEAPON DURING THE COMMISSION OF A FELONY
WHICH OCCURRED PRIOR TO CARAWAN WHEN
THIS COURT DECLINED TO APPLY CARAWAN
RETROACTIVELY AND THE LEGISLATURE HAS
SINCE MADE CLEAR ITS INTENTION TO
AUTHORIZE SEPARATE CONVICTIONS AND
SENTENCES FOR LIKE CRIMES?

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

CONCLUSION 9

CERTIFICATE OF SERVICE 9

TABLE OF CITATIONS

CASES

Carawan v. State, 515 So.2d 161 (Fla. 1987).....	1, 6
Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988).....	6
Hall v. State, 517 So.2d 678 (Fla. 1988).....	6
Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988).....	1, 6
Love v. State, 532 So.2d 1133 (Fla. 4th DCA 1988).....	6
Pastor v. State, 536 So.2d 356 (Fla. 3rd DCA 1988).....	1
State v. Gibson, 452 So.2d 553 (Fla. 1984).....	5
State v. Marshall, 455 So.2d 355 (Fla. 1984).....	5

INTRODUCTION

This is a Petition by the State of Florida for this Court's discretionary review of the Third District Court of Appeals' decision in Pastor v. State, 536 So.2d 356 (Fla. 3rd DCA 1988) which, in retroactively applying Carawan v. State, 515 So.2d 161 (Fla. 1987) to convictions prior to its decision expressly conflicts with Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988).

Throughout this brief, the Petitioner, the State of Florida, will be referred to as "the State" and the Respondent, Roberto Pastor, will be referred to as "the Defendant."

STATEMENT OF THE CASE AND FACTS

The State readopts its Statement of the Case and Facts as contained in its Response to Order to Show Cause dated December 14, 1988 in Third District Court of Appeals Case No. 88-02515 with the following additions.

The Third District Court of Appeals on December 27, 1988 reversed and remanded the Defendant's conviction for attempted first degree murder with a deadly weapon and unlawful possession of a deadly weapon while engaged in a criminal offense retroactively applying Carawan See Pastor v. State, 536 So.2d 356 (Fla. 3d DCA 1988). (R. 2-3).

The State filed a Motion for Rehearing which was denied by the lower court and the State thereafter sought to invoke the discretionary jurisdiction of the Court base upon conflict with this Court's decision in Carawan which it did not apply retroactively, as well as, conflict with the decisions of sister Courts. (R. 4).

ISSUE PRESENTED FOR REVIEW

DID THE LOWER COURT ERR IN APPLYING CARAWAN AND HALL RETROACTIVELY TO A CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER WITH A WEAPON AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A FELONY WHICH OCCURRED PRIOR TO CARAWAN WHEN THIS COURT DECLINED TO APPLY CARAWAN RETROACTIVELY AND THE LEGISLATURE HAS SINCE MADE CLEAR ITS INTENTION TO AUTHORIZE SEPARATE CONVICTIONS AND SENTENCES FOR LIKE CRIMES?

SUMMARY OF ARGUMENT

The Third District Court of Appeals decision in the case below retroactively applies Carawan in reversing a denial of the Defendant's motion for post-collateral relief in opposition to decisions in similar cases in other District Courts of Appeal.

This Court in its decision in Carawan and in subsequent cases declined to apply the holding in Carawan on a retroactive basis, Carawan does not represent a fundamental change in the law which requires retroactive application.

ARGUMENT

DID THE LOWER COURT ERR IN APPLYING CARAWAN AND HALL RETROACTIVELY TO A CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER WITH A WEAPON AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A FELONY WHICH OCCURRED PRIOR TO CARAWAN WHEN THIS COURT DECLINED TO APPLY CARAWAN RETROACTIVELY AND THE LEGISLATURE HAS SINCE MADE CLEAR ITS INTENTION TO AUTHORIZE SEPARATE CONVICTIONS AND SENTENCES FOR LIKE CRIMES?

The Third District Courts' decision in Pastor retroactively applied Carawan reversing the denial of the Defendant's motion for post-collateral relief. This was done despite the fact that no direct appeal of the Defendant's conviction and sentence was taken. More importantly, the offense and conviction occurred at a time when sentences for attempted first degree murder with a weapon and possession of a weapon during commission of a felony were permissible. This Court in State v. Gibson, 452 So.2d 553 (Fla. 1984), held in effect that even through crimes such as the one the Defendant was convicted of arose from the same factual basis, conviction of one was not a bar to conviction of the other. Therefore, since Gibson and its progeny was still "good law" at the time of the Defendant's conviction, the sentence he received was not illegal. See also: State v. Marshall, 455 So.2d 355 (Fla. 1984).

This Court reevaluated its position in Gibson and its progeny in Carawan v. State, 515 So.2d 161 (Fla. 1987) which held that dual punishment for crimes like those of which the Defendant was convicted which arose from a single act were impermissible. This Court, thereafter, in Hall v. State, 517 So.2d 678 (Fla. 1988) specifically overruled Gibson. This Court did not, however, choose to apply Carawan retroactively to convictions which occurred prior to its decision. As recognized in Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988), Carawan was not the law at the time the Defendant was convicted and sentenced and "nothing in Carawan makes it applicable to this case now..."

Based upon this analysis, the First and Fourth Districts Court of Appeal in Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988) and Love v. State, 532 So.2d 1133 (Fla. 4th DCA 1988) declined to retroactively apply Carawan and Hall. The Harris Court recognized that Harris' conviction, like that of this Defendant, was appropriate under Gibson and that Harris was not entitled to post-conviction relief stating:

Unlike the situation in Palmer, the Supreme Court had ruled at the time of Harris's conviction that such dual convictions were proper. In Hall, at 679, the court has changed the substantive law as it relates to convictions both for armed robbery under section 812.13, 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 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), Appellant's sentence was not illegal when imposed, as construed under Bass, as the Supreme Court had already decided such dual convictions were permissible in Gibson, 452 So.2d at 553. We therefore find that appellant is not entitled to post-conviction relief on this ground and AFFIRM the denial of the motion. (See also: Love v. State, supra.)

Carawan is not a fundamental change in the interpretation of law so as to require its retroactive application. There are three essential considerations in determining whether a new rule of law is so fundamental it must be applied retroactively. Witt, 387 So.2d at 926. These considerations are: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule. Witt v. State, supra.

Nevertheless, all constitutional rights affected by changes in the law are not fundamental. Compare Williams v. State, 363 So.2d 331 (Fla. 1978). Only those which are major constitutional changes of law resulting in fundamentally

significant developments may be raised initially on a motion for post conviction relief. State v. Washington, 453 So.2d 389 (Fla. 1984). State v. Austin, 532 So.2d 19 (Fla. 5th DCA 1988).

While the purpose behind the new rule of law set forth in Carawan is to prevent perceived double jeopardy violations for crimes occurring out of a single act, it is clear that prior to Hall all cases based on similar facts were decided pursuant to Gibson. Retroactive application would vastly increase the already overwhelming burden on the judicial system. Had this Court chosen to, it could have, either with its decision in Carawan or thereafter, chosen to apply Carawan retroactively. It is thus apparent that Carawan does not, reach the level of a fundamental change in the law so as to require its retroactive application. This is particularly true in view of the legislature's recent amendment to F.S. 775.021 which served to clarify its intention to allow separate convictions for the Defendant's crimes.¹

The State readopts its argument below as to the retroactivity of this statutory amendment, but does not otherwise argue same given the fact that this Court's recent decision in State v. Smith, Case Nos. 72,633; 72,850 on which Rehearing is pending, which controls.

CONCLUSION

For all of the foregoing reasons, the Petitioner, the State of Florida, respectfully requests that this Court reverse and remand the Third District Court of Appeals' decision in the subject case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

Giselle D. Lylen

GISELLE D. LYLEN
Florida Bar #508012
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF PETITIONER was furnished by mail to ROBERTO PASTOR, B-DORM, DC.# 181293, Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, Florida, 33430 on this 3rd day of June 1989.

Giselle D. Lylen

GISELLE D. LYLEN
Assistant Attorney General

GDL/ih