IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 73,821

ANTHONY F. PAYNE,

Respondent.

RESPONDENT S BRIEF (N JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner claims that the district court erred in saying respondent was convicted of "armed" kidnapping because no such offense exists. Respondent disagrees. The district court used that term as an obvious shorthand reference to the conviction of kidnapping, a first degree felony punishable by life, which was enhanced to a life felony because of the use of a firearm during the kidnapping. Sections 787.01(2) and 775.087(1) Fla. Stat. (1987).

Attached as an appendix to this brief are conformed copies of the amended information, the jury verdicts, the judgements, and the guideline score sheet, all of which show that the district court was correct in characterizing the kidnapping conviction as an offense that was enhanced to a life felony because it was alleged and found that a firearm was used to commit the offense. (App. 1-7).

SUMMARY OF ARGUMENT

The district court decided this case in accord with the decisions of this court in Carawan v. State, **515** So.2d **161** (Fla. **1987)** and Hall v. State, **517** So.2d **678** (Fla. **1988)** when it ruled that the convictions for using a firearm during the commission of robbery and kidnapping should be vacated because the same act of using the firearm was used to enhance the punishment for those felonies.

The district court also correctly ruled in accordance with Royal v. State, 490 So.2d 44 (Fla. **1986)** that aggravated assault with a firearm was a necessarily lesser included offense of armed robbery with a firearm.

The petitioner has failed to show that the decision of the district court directly and expressly conflicts with the decision of any other appellate court.

ISSUE

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF ANOTHER APPELLATE COURT.

ARGUMENT

The jurisdictional question to be answered is whether the petitioner has shown that the decision of the district court is in conflict with the decision of another appellate court. Under Art. V, Sec 3(b)(3) of the Florida Constitution this court has jurisdiction to review "any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The issue stated in petitioner's brief does not even make out a prima facie showing of conflict. The petitioner states only that the district court's "opinion" conflicts with other "opinions" of this court. Conspicuously absent from the petitioner's brief is any demonstration of how the "decision" of the district court conflicts with any prior decision of this court on the same point of law.

In this case there is not "direct and express" conflict. Taken as a whole, petitioner's argument boils down to the state's disagreement with this court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1969). The state simply lapses into the tunnel visioned argument that the statutory elements test of Blockburger v. United States, 284 U.S. 299 (1932) is the sole guide to legislative intent, a position repudiated by this court in Carawan.

The district court followed Carawan in using the rule of lenity to find that the legislature did not clearly signify an intention to impose separate punishments for the crime of using a firearm while committing a robbery and a kidnapping when the robbery and kidnapping were also enhanced for the same act of using a firearm during their commission. The facts of this case, stated in the district court's opinion, are that respondent was convicted and sentenced for (1) armed robbery, (2) aggravated assault, and (3) use of a firearm during commission of a felony. The court's decision was that the convictions for use of a firearm during commission of both the armed robbery and the armed kidnapping should be vacated since the use of a firearm occurred during one criminal act committed in one place: similarly the conviction for aggravated assault should be vacated. (See P. 5 of the respondent's opinion, in Petitioner's appendix at 5) As noted by the district court in its opinion, the state even conceded on appeal that separate convictions for the use of a firearm in the commission of the robbery and the kidnapping were improper.

The district court's decision was in accord with the Carawan analysis and did not conflict with any decisions of this court. Petitioner has not identified any decision in which the same or similar facts produced a different result.

Petitioner cited Hall v. State, 517 So.2d 678 (Fla. 1988) in support of its jurisdictional argument. That decision was followed by the district court. In Hall the issue was whether

the legislature intended that a defendant be convicted of the offense of armed robbery and the offense of displaying a firearm when the offenses resulted from a single act. This court used a Carawan analysis to decide that the legislature did not intend separate punishments. Hall is controlling on the issue of whether the district court was correct in ruling that petitioner could not be convicted for using a firearm in the commission of felonies when the same act (using the firearm) was used to enhance the punishment for those felonies. This court said:

> We hold the legislature had no intent of punishing a defendant twice for the single act of displaying a firearm or carrying a firearm while committing a robbery. To hold otherwise would mean that, for every offense of robbery in which a defendant uses or carries or displays a firearm, in violation of section 812.13, there would also be a violation of section 790.02(2). Robbery, under section 812.13(1), becomes the enhanced offense of armed robbery under 812.13(2)(a) by reason of the element of carrying or displaying a firearm. Interpreting the statutes according to the state would mean the offense is enhanced twice for carrying or displaying the same weapon. It is unreasonable to presume the legislature intended this result. In accordance with Carawan, we find this would constitute a dual punishment for one single act, and would be contrary to the legislative intent under the principles set forth in our holdings....

517 So.2d at 680.

Had the district court not vacated the convictions for using a firearm in the commission of armed robbery and kidnapping, both of which were enhanced by using a firearm, its

decision would have been in direct and express conflict with Hall and this court would have jurisdiction. By following Hall, the district court avoided conflict.

The district court also vacated the separate conviction for aggravated assault, which was based on the same act as the robbery. That ruling was in accord with this court's decision in Royal v. State, 490 So.2d 44, 46 (Fla. 1986) that "aggravated assault with a deadly weapon... is a necessarily lesser included offense of robbery with a firearm.''

Even under the newest expression of legislative intent, separate convictions are improper for both the greater offense and one that is a necessarily lesser included offense. See, Sec. 775.021(4)(b)3. Fla. Stat. (1988 Supp.) When a defendant is convicted of both the greater and necessarily included lesser offense the appellate court should vacate the lesser, which is what the district court did in this case. Accord, State v. Barton, 523 So.2d 152 (Fla. 1988).

Petitioner also attempts to manufacture conflict by comparing the court's opinion in this case with this court's rulings in Faison v. State, 426 So.2d 963 (Fla. 1983) and Ferguson v. State, 533 So.2d 763 (Fla. 1988). That effort is unavailing because here again the district court followed the rule laid down by this court; the district court upheld the separate convictions for robbery and kidnapping, "since the armed kidnapping in this case involved movement and confinement of the victim in a manner that is not inherent in or incidental

to armed robbery.'' (Petitioner's appendix at 5-6) The district court cited both Faison and Ferguson as support for its holding. The state's attempt to show jurisdiction based on conflict with those decisions should be rejected. There is no conflict.

The petitioner's final arguments are not so much that there is conflict between the decision of the district court and decisions of this court as they are an appeal for this court to recede from its decision in Carawan in light of the legislature's enactment of Chapter 88-131 Laws of Florida. Obviously this court has not yet ruled on that issue, so there is no decision for the district court to be in conflict with on that point of law.

Finally, the principles of law represented by Lowry v. Parole and Probation Comm., 473 So.2d 1248 (Fla. 1985) and State v. Lanier, 464 So.2d 1385 (Fla. 1984) are much too general to constitute the basis for conflict jurisdiction. See, Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) ("Conflict must be express and direct, i.e., it must appear within the four corners of the majority decision.")

CONCLUSION

The district court adhered to the precedents set by this court in deciding this case and its decision, therefore, does not conflict with any of the decisions cited by petitioner. This court should decline to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, Anthony F. Payne, **#087699,** Florida State Prison, Post Office Box **747,** Starke, Florida, 32091, on this 27th day of March, **1989.**

MICHAEL J. MINERVA