IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 73,821

ANTHONY F. PAYNE,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent, Anthony F. Payne, was the defendant in the trial court and the Appellant below, and will be referred to herein as "Respondent." Petitioner, the State of Florida, will be referred to herein as "the State.'' References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Petitioner adopts the following statement of facts from Respondent/Appellant's First District Court of Appeal brief.

Robert M. Bird, manager of Wendy's restaurant on Monument Road at Regency Square, testified that he closed the business at 2:00 a.m. on July 12, 1986. At 3:00 a.m., he left and was confronted outside with a black male holding a gun. He was led back inside and surrendered his wallet, containing his paycheck and $20.00. He then was led to the back of the store and ordered to open the safe. He did so and turned over $2,000.00 to the robber. He was then placed in a closet and stayed there for two minutes while the robber, whose face he did not recognize, left. He did, however, identify a 9 mm gun (T 330-43).

Appellant was charged with aggravated assault, armed robbery, kidnapping and three counts of use of a firearm in the commission of a felony.

Detective John Zipperer arrested appellant and seized the gun (T 351-73). Appellant's girlfriend, Patricia Thomas, testified that she drove appellant to the robbery and theft in the car until he returned with the money. She had entered a plea to time served for her role (T 379-96). Appellant admitted the robbery to Detective Christopher A. Robinson (T 469-77) and admitted using the gun to jailer William Chappell (T 496-504).

Appellant was subsequently convicted of all charges, adjudicated guilty of all charged, and sentenced on all charges. This appeal follows.

On appeal the District Court upheld the conviction on the armed robbery, and "armed kidnapping" and reversed the other three convictions.

SUMMARY OF ARGUMENT

Petitioner argues that the district court incorrectly applied the multiple punishment analysis to the facts of this case.

Initially Petitioner argues that the district court has distorted the meaning of multiple offenses stemming from one discrete act. Instead the district court has applied the old rejected single transaction rule to the multiple punishments analysis, thus impermissibly extending Carawan v. State.

Further, Petitioner argues that the First District has improperly applied the Carawan analysis and that its opinion in this case is one more in a line of opinions in which this Court has engaged in improper judicial legislating.

Finally, the Petitioner argues that the Legislature's intent never changed from the time it abrogated the single transaction rule to the recent Chapter 88-131, Laws of Florida, amendment. The Legislature's intent has been to punish multiple offenses occurring during a criminal act or episode. Petitioner asserts that the only thing that has changed is this Court's perception of the legislative intent. Thus, the proper way to apply Chapter 88-131 is as an expression of intent retroactive to the inception of §775.021(4), Florida Statutes.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT PROPERLY INTERPRETED AND APPLIED THIS COURT'S RULINGS ON MULTIPLE PUNISHMENT FOR CONVICTIONS ARISING IN THE COURSE OF A SINGLE CRIMINAL TRANSACTION.

APPLICATION OF THE LAW

At the outset it should be reiterated that in multiple punishment analysis the controlling factor is the intent of the Legislature. If the Legislature intended multiple punishments, then multiple punishments are permissible. Missouri v. Hunter, 459 U.S. 359 (1987); Carawan v. State, 515 So.2d 161 (Fla. 1987).

The First District Court of Appeals application Carawan is bizarre. First, they presume because of Hall v. State, 517 So.2d 678 (Fla. 1988), and Neal v. State, 531 So.2d 410 (Fla. 1st DCA 1988), that any aggravated assault occurring with an armed robbery must be thrown out. Petitioner acknowledges that in some instances under Hall the aggravated assault might be subsumed into the armed robbery. Such a case would involve multiple charges stemming from the single act of pointing a gun and demanding money. However, that is not the case presented by this appeal.

The victim, Mr. Bird, the store manager, was assaulted outside the Wendy's restaurant by the defendant with the

firearm. The aggravated assault was complete at this point (R 332, 333, 343). Mr. Bird was then forced back into the restaurant and forced to walk towards the rear of the restaurant, where his wallet was taken from him. This second series of acts became the crime of armed robbery (R 334, 335).

The Appellant forced Mr. Bird to proceed to the office, where Mr. Bird was made to open the safe (R 339) (Armed robbery 2). Finally, Mr. Bird was forced in the mop closet (R 342) (Kidnapping).

There were four separate discrete acts constituting criminal offenses, one aggravated assault outside, two robberies inside (different victims), Palmer v. State, 438 So.2d 1 (Fla. 1983), and a kidnapping of Mr. Bird. The First District Court of Appeal bizarrely holds that this is all one discrete act, ignoring Carawan and Section 775.021(4), which states:

> Whomever in the cause of one criminal transaction or episode commits separate offenses upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense. ...

As this Court acknowledged in Borges v. State, 415 So.2d 1262 (Fla. 1982). This language abolished the single transaction rule. The First District continues to ignore Borges, supra, and Section 775.021(4), Florida Statutes. It also ignored the specific limitation of Carawan's applicability to only one discrete act (Id. at 169), Hall v. State, supra.

The State does not make this accusation lightly. However, by ignoring the separate acts in this case and by citing to Neal, supra, in which the First District vacated aggravated assault and use of a firearm convictions because "they violate Appellant's right against double jeopardy due to the armed robbery convictions ~~for~~ ~~the~~ ~~same~~ transactions", the court has deliberately chosen to extend Carawan by focusing on the full transaction. Thus overruling this Court's Borges decision and Carawan itself. This is impermissible. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

In fact the First District's analysis is illogical. The First District describes this multiple act transaction as one act. However, it upholds the armed robbery conviction and the kidnapping conviction. This Court has repeatedly said that in order for the movement or confinement to be kidnapping, it must not be inconsequential or inherent in the nature of the other felony. Faison v. State, 426 So.2d 963 (Fla. 1983); Ferguson v. State, 533 So.2d 763 (Fla. 1988).

Petitioner asserts that the test to determine if a kidnapping occurred developed by this Court in those cases requires a separate discrete criminal act to occur in order to have a kidnapping conviction. The existence of such an act totally refutes the First district's statement that this criminal episode is all one act. The First District result oriented single transaction analysis should be rejected by this

Court. See also Denmark v. State, 538 So.2d 68 (Fla. 1st DCA 1989) (review pending, State v. Denmark)[1] .

In this case under the proper Carawan analysis, a conviction for an aggravated assault, a conviction for armed robbery, and a conviction for kidnapping, are appropriate because of the separate discrete acts committed by the Respondent, which make up part of the whole transaction.

Further, just as in its ill-fated McKinnon v. State, 523 So.2d 1238 (Fla. 1st DCA 1988), opinion reversed State v. McKinnon, 14 F.L.W. 109 (Fla. March 14, 1989).

The First District in this case engaged in judicial legislating. In this instance, they legislated new elements to kidnapping. Kidnapping is defined in Section 787, Florida Statutes;

> **787.01 Kidnapping; kidnapping of child under age 13, aggravating circumstances.--**
> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority with intent to:
> 1. Hold for ransom or reward or as a shield or hostage.
> 2. Commit or facilitate commission of any felony.
> 3. Inflict bodily harm upon or to terrorize the victim or another person.

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[1] The First District again construed multiple discrete acts in a criminal episode to be one act for purposes of Carawan analysis.

4. Interfere with the performance of any governmental or political function.

No where is arming even discussed in this statute; having a weapon simply is not an element of kidnapping. The First District has, just as in McKinnon, impermissibly looked to pleadings. The rule of law is clear, for multiple punishment analysis you look to the statutory elements of the crime. Strickland v. State, 437 So.2d 150 (Fla. 1983); State v. Carpenter, 417 So.2d 986 (Fla. 1982). Kidnapping and use of a firearm in the commission of a felony like manslaughter and use of a firearm in the commission of a felony, contain no elements in common. Thus, they are separate crimes. McKinnon, supra; State v. Baker, 456 So.2d 419 (Fla. 1984). Further, these offenses manifestly address separate evils, one addresses using a firearm in the crime of felony, the other addresses confining a person against his will. Thus, even under a "Carawan analysis" they are presumed separate. The First District opinion points to no statements of the Legislature's intent, indicating that these offenses are to be considered the same. This is so because there are no such statements in existence. The court instead relies on "principles of double jeopardy", ignoring that double jeopardy in a multiple punishment context means, the will of the Legislature. Instead of acknowledging its proper role, the court arrogantly asserts that, "It says what the law is." Respondent reads Article I of the Florida Constitution to indicate that the people, through their elected representatives, say what the law is.

Thus, the conviction for one count of use of a firearm in the commission of a felony (kidnapping) is also proper when the correct analysis is applied.

Likewise in analyzing the aggravated assault conviction a similar flaw exists in the First District's logic. An aggravated assault is defined in Section 784, Fla.Stat. as an assault with a deadly weapon. There is no requirement that a firearm be used. A knife, or tire iron, or bar, or even a shoe can be a deadly weapon. Therefore, each statute contains elements the other does not, and each statute is intended to combat separate evils. Aggravated assault is designed to prevent the general evil of assaulting people with some sort weapon. Use of a firearm, the evil of using a firearm because of a firearms inherent nature. Thus, the analysis is identical to this Court's analysis in Baker and Carawan, involving murder and use of a firearm. Since such multiple convictions are proper, McKinnon, supra, the conviction for aggravated assault and use of a firearm in the commission of a crime are also proper.

The Respondent acknowledges that under Hall, supra, separate convictions and punishments for armed robbery and use of a firearm in the commission of a felony, cannot stand. However, Respondent asserts that this Court should reexamine those decisions in light of two matters.

First, as this Court found in State v. Gibson, 452 So.2d 553 (Fla. 1984), the armed robbery statute requires only that the offender carry a firearm or other deadly weapon. Section 812.13, Florida Statutes. Section 790.07(2) requires that the person display, use threaten or attempt to use a firearm or carries a concealed firearm.

The statutory element of armed robbery requires only a carrying a deadly weapon or firearm. The elements of Section 790.07 require use of the weapon. Thus, looking at the statutory elements of the crimes, they are separate offenses under Blockburger v. United States, 284 U.S. 299, 76 L.Ed 306 (1932) and State v. Barton, 523 So.2d 152 (Fla. 1988).

Further, in this case, the use of the firearm did not stop with the first robbery, but continued and a second one occurred. This continued use of the weapon after the robbery was complete supports a separate conviction under a multiple acts theory. Jones v. State, 528 So.2d 490 (Fla. 4th DCA 1988).

It is time that this Court recognized that in response to this Court's misinterpretation[2] of the Legislature's long-standing commitment to punish criminals for all separate criminal offenses set out in the statute books, the Florida Legislature has enacted Chapter 88-131, Section 7, Laws of

[2] Carawan v. State, 515 So.2d 161 (Fla. 1987).

Florida to amend Florida Statute Section 775.021 (4). The amended statute reads:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purpose of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to ~~convict~~ and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
> 2. Offenses which ~~are de~~grees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of ~~wh~~ich are subsumed by the greater offense.

As Justice Shaw noted in his concurring opinion to the decision in State v. Barrit, 531 So.2d 338, 341 (Fla. 1988):

> It is clear from the above amendment [Chapter 88-131(7)] that the legislature intends, and previously intended, that separate offenses, as defined by the Legislature, are subject to separate convictions and separate sentences and that the sentencing judge has sole discretion on whether the sentences for separate offenses will be imposed concurrently or

> consecutively. The impact of these statutory changes on this Court's case law is substantial.

In the footnotes to his opinion, Justice Shaw continued:

> The new §775.021(4)(b) does not change the substantive meaning of §775.021(4)(a). It simply explains the meaning of §775.021(4)(a) and lists the only three instances where an offense which is **not** separate from the charged greater offense and not subject to separate conviction and separate punishment.
>
> In **Carawan** v. **State,** 515 So.2d 161 (Fla. 1987), we relied on a perceived distinction between "act" and "acts" and the rule of lenity in §775.021(1), Fla.Stat. (1985), to hold that the legislature did not intend separate convictions and separate sentences for two separate offenses as stated in §775.021(4), Fla.Stat. (1985). The amendment expressly rejects our interpretation by making it clear that we are to strictly apply §775.021(4) without regard for "act" or "acts" and the rule of lenity. In Brown v. **State,** 206 So.2d 377 (Fla. 1968), we designated a set of separate offenses as category four, permissive lesser included offenses. These offenses are currently designated as category two offenses in our standard jury instructions. The explicitness of the legislative amendment, only three exceptions to the rule that separate offenses will receive separate convictions and separate punishments, bars further use of category two, permissive lesser included offenses, except for attempts, as alternatives to the charged offenses. The three types of offenses listed in §775.021(4)(b) are the only lesser included offenses which may be presented as alternative verdicts for the jury to consider.

A reading of Borges, supra, establishes the correctness of Justice Shaw's loyic. In Borges this Court held that the

enactment of §775.021(4), Florida Statutes (1977), "was intended to authorize multiple convictions and separate sentences when two or more separate criminal offenses are violated as part of a single criminal transaction. Id. at 1266. As Justice Shaw recognized the legislative intent of how the statute is to be applied has not changed one iota between 1977 and 1988. This Court should affirm the judgment and sentences pursuant to Chapter 88-131(7). The offenses in the instant case contain separate elements[3] from each other; the offenses are not degrees of the same offense and neither offense is a lesser offense of the other, who's elements are subsumed by the greater offense. Furthermore, the Legislature commanded that the rule of lenity not be utilized to determine legislative intent.

The legislative amendment simply reflects what the Legislature's intent has been all along. Respondent asserts that this Court should interpret change as a statement of intent of the original law; for this Court has said;

> When, as occurred, here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.

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[3] See Section 893.131(a), Fla.Stat.

Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985), State v. Lanier, 464 So.2d 1192 (Fla. 1985); Brooks v. State, 478 So.2d 1052, 1053 (Fla. 1985), Denmark, supra (Barfield concurring in part and dissenting in part); Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1983).

The First District Court of Appeals concern over retroactivity is unfounded. See Dobbert v. Florida, 432 U.S. 282 (1977), since the intent of the Legislature on how punishment is to be imposed has not changed. Further, the change would not be retroactive as to this Respondent. This crime was committed in 1986, prior to Carawan. The law then was that such punishments were proper. Gipson, supra. Since Chapter 88-131, Laws of Florida, returns the law to its status at the time of the offense, no retroactive application occurs.

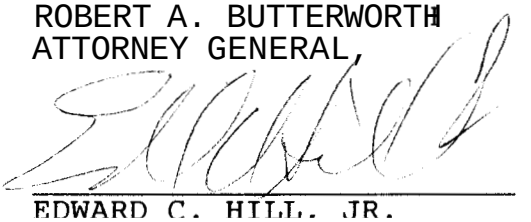
Criminals such as Respondent merit as much punishment as the law will allow. Contrary to the First District's holding in Heath v. State, 532 So.2d 9 (Fla. 1st DCA 1988), cited in this case, the people of this State, through their elected legislators, say what the law is. This Court should abide that determination absent a conflict with overriding constitutional provisions. Here the Legislature has reaffirmed its historical, constitutionally valid, determination to allow for cumulative punishment in cases such as this one. Accordingly, the Petitioner contends that the district court erred, and its opinion should be quashed and the convictions found by the jury reinstated.

CONCLUSION

Therefore, the opinion of the District Court should be quashed and the judgment and sentence imposed by the trial court should be reinstated.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL,



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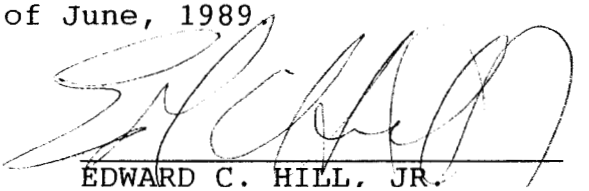
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Michael J. Minerva, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 6th day of June, 1989.



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