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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitinner,

v. CASE NO. 73,821

ANTHONY F. PAYNE,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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RESPONDENT'S RRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent accepts **the statement** of case **and facts in Petitioner's** bi-**ief.**

SUMMARY OF THE ARGUMENT

The decision of the district court in this case follows precedent established by this court on every point including the applicability of Chapter 88-131(7) Laws of Florida, on which this court recently ruled.

The state's position is basically that the prior decisions of this court, particulrly Carawan v. State, 515 So.2d 161 (Fla. 1987), should be overruled. Assuming that is an issue in this case, Carawan should be reaffirmed because it offers a common sense approach to determining legislative intent when single acts violate multiple criminal statutes. Without the rules for determining intent supplied by Carawan there is grave danger of wholesale violations of double jeopardy by the infliction of more punishment for a single criminal act than the legislature envisioned or intended.

This court ha5 now ruled that Chapter 88-131 (7) Laws of Florida does not apply to offenses committed before its effective date. The state's argument that the law applies retroactively should be i-ejected. The new act declares the rule of lenity inapplicable in determining legislative intent. The effect of that law is clearly disadvantageous and if applied to crimes committed prior to its enactment would violate constitutional provisions against ex post facto law.

ARGUMENT

ISSUE PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL WAS A CORRECT INTERPRETATION OF THE PRIOR DECISIONS OF THIS COURT.

The state says that separate convictions are permissible for using a firearm in the commission of a felony and for the felony being committed, even when punishment for the felony is enhanced by use of the firearm.

In its brief in the district court the state conceded that the convictions for use of a firearm in committing robbery and kidnapping were improper. (Appendix to Respondent's Brief at 2-5). The district court noted the state's concession in its opinion. (Opinion of district court quoted in Petitioner's Appendix at 5).

Renegging on its confession of error on which the district court relied, the state now says that at least the conviction for using a firearm in the commission of the kidnapping should be reinstated because it is not an element of kidnapping.

Respondent agrees that being armed with a firearm is not an element of kidnapping. The firearm was used. however, to enhance the penalty for kidnapping from a first degree felony punishable by life up to a life felony. Sections 787.01(2) and 775.087(1), Fla. Stat. (1987). A conviction for using a firearm during the kidnapping, when the penalty for that offense was already enhanced for using the firearm, punished respondent twice for the same act. Under the analysis prescribed in Carawan v State, 515 So. 2d 161 (Fla. 1987) and

Hall v. State, 517 So.2d 678 (Fla. 1988) double punisment for the same act is not permissible unless clearly authorized by the legislature. When there is doubt as to the legislature's intent to punish the same art twice the rule of lenity requires courts to resolve the issue in favor of single rather than double punishment. That is what the district court did in this case, correctly concluding that there was no clear legislative intent to allow use of a firearm to serve as both an enhancement to the penalty for kidnapping and as a conviction for a separate offense.

The logic of that holding flows inescapably from the ruling in Hall v. State, supra, which held that the legislature had not clearly signified an intent to punish twice the single act of using a firearm to commit a robbery. Thus this court, vacated the conviction for using a firearm during commission of a robbery, after the robbery was enhanced to armed robbery because of the same use of the firearm.

The state's brief does no more than quibble with the district court's proper application of Carawan and Hall. The state simply advocates adoption of the statutory elements test of Blockburger v. United States. 284 US 299 (1932) as the sole guide to legislative intent. The inadequacies of Blockburger were explained in Carawan; the state just does not iike the explanation.

There is no need to revisit the well reasoned opinion in Carawan. Six members of this court agreed to the result in that case and to the result in Fail v. State. supra.

Respondent doubts that jurisdiction in this case was granted to reconsider Carawan, but if it was, the court should reaffirm that decision for all the reasons the court gave when Carawan was decided.

Next the state argues that separate convictions were allowable for robbery and aggravated assualt. In Royal v. State, 490 So.2d 44, 46 (Fla. 1986) this court held that "aggravated assault with a deadly weapon ... is a necessarily lesser included offense of robbery with a firearm." When an offense is necessarily included in a greater offense, the legislature and the courts have said that only one conviction can be imposed, and it should be for the most serious offense. Section 775.021(4)(b)3, Florida Statutes (1988 Supp.); Section 775.021(4), Florida Statutes (1987); State v. Barton, 523 So.2d 152 (Fla. 1988).

This case is even clearer than Royal v. State, supra, in which the aggravated assault was committed after the property was taken. Here the assualt with the weapon was the force used to commit the robbery.

Among the elements of robbery are a taking of property by "force, violence, assault, or putting in fear." Sec. 812.13 (1)(a), Fla. Stat. (1987). Since assualt, as well as force and putting in fear, are statutory elements of robbery, it was logical for the court in Royal to hold that aggravated assault is necessarily included in armed robbery.

The same result applies using either the Blockburger statutory elements test or the broader legislative intent test

adopted in Carawan. Under a Blockburger analysis, all the elements *of* aggravated assault **are** present in armed robbery. Using Carawan logic, the legislature did not clearly indicate intent to punish the same art of aggravated assault (putting in fear with a firearm) twice by authorizing separate convictions for- aggravated assault and armed robbery. Etlinger v. State, 538 So.2d *1354* (Fla. 2d DCA 1989).

It is immaterial that in some cases armed robbery can be committed without committing aggravated assault, as when the person robbed is killed or rendered unconcsious before being aware of anv threatened force. As long as assault with a deadly weapon **is** one of the statutory ingredients of **armed robbery**. it is a necessary **lesser**, even if assualt is not the only way of committing robbery. This point, sometimes *over-* looked in slavish devotion to the so-called pure Blockberger analysis, is a rule applied even in federal courts where Blockberger prevails.

In Whalen v. United States, ***445*** US *684* (1980) the Court held that a person could ***not*** he punished for rape when also sentenced for felony murder **based** on that rape. The court rejected the argument that because the felony murder statute included felonies other than rape both felony murder and rape contained elements the other did not, thus failing the Blockburger statutory elements test. The Court's answer to that contention is enlightening:

> Where the offense to **be** proved does not include prnof of a rape-for examble, where the offense is a killing in the

> perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under Blockburger. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. (Emphasis added.)

445 US at 725.

Whalen stands for the proposition that if an offense can be committed in different ways, and some of those ways depend upon committing necessarily included lesser offenses. Blockburger's statutory elements test does not require the imposition of separate punishments for each lesser offense merely because there are other ways to commit the crime. That likely was the rationale used by this court when deciding in Royal that the aggravated assault with a firearm was necessarily included in the armed robbery.

Since the district court in this case correctly applied Royal, the state has failed to demonstrate any error.

The state's final point urges application of the provisions of Chapter 88-131, Laws of Florida, to this case, even though that act became law after these crimes were committed. If the state's position is adopted it will undoubtedly result in a violation of the constitutional prohibitions against ex post fact laws. Weaver v. Graham, 450 U.S. 24 (1981); Miller v. Florida, 107 S.Ct. 2446 (1987).

The test for an ex post facto law is whether it applies to events before its enactment and whether it is disadvantageous. The state is asking for the new law to he applied retroactively, so the first part of the test is satisfied. As to the second part, there can be no doubt that elimination of the rule of lenity from consideration of legislative intent in determining punishment is a disadvantageous consequence.

The state's argument that the new law merely clarifies preexisting legislative intent actually proves the disadvantageous effect. The rule of lenity comes into play only when the legislative intent lacks clarity. The new law is a legislative admission that it had not made clear before that the rule of lenity was not to be used to resolve doubts as to its intent. That clarification is itself disadvantageous and could not he applied retroactively without running afoul of ex post facto constraints.

In State v. Smith, __So.2d__, Case No. 72,633 (Fla. June 22, 1989) the issue of retroactivity was authoritatively decided against the state. Smith approves Heath v. State, 532 So.2d 9 (Fla. 1st DCA 1988), which held that retroactive application of 88-131(7) would violate ex post facto. The state's position, that Heath was wrong, has been rejected.

CONCLUSION

All the state's arquments are contrary to the precedents set by this Court in its most recent decisions. The decision of the district court should, therefore, be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a ropy of the foregoing ha5 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 Payne, #087699, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 26th day of June, 1989.

MICHAEL J. MINERVA