IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

Case No. 78,106

Second District Court #89-233

ARDEN M. MERCKLE,

Respondent.

DISCRETIONARY REVIEW OF THE DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 327832
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

/aoh

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee in the Florida District Court of Appeal, Second District, and the prosecution in the trial court. Respondent, Arden M. Merckle, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. The Appendix to this Brief contains a copy of the decision of the Second District Court of Appeal filed on April 12, 1989 in Merckle v. State, 541 So.2d 1312 (Fla. 2d DCA 1989) and a copy of the trial Court's Order denying Merckle's Rule 3.850 Motion for Post-Conviction Relief.

NOTICE OF RELATED CASES

The following cases raise the same issue presented in the instant Brief; i.e. Whether the Florida Supreme Courts decision in Carawan v. State, 515 So.2d 161 (Fla. 1987), which modified the law regarding double jeopardy, applies retroactively in collateral proceedings for post-conviction relief. State v. Roosevelt Glenn, Fla. S.Ct. #73,469; State v. Roberto Pastor, Fla. S.Ct. #73,780; State v. Etlinger, Fla. S.Ct. #73,955; Gonzalez-Osario v. State, Fla. S.Ct. #73,677, (Review denied May 4, 1989).

STATEMENT OF THE CASE AND FACTS

The following Statements of the Case and Facts is taken verbatim from the opinion of the Florida District Court of Appeal, Second District:

> Arden Merckle appeals the summary denial of his motion for postconviction relief. We reverse.
>
> Merckle was convicted of bribery,[1] receiving unlawful compensation,[2] extortion by a state officer,[3] and misbehavior in office.[4] He was sentenced to five years in state prison for the first offense and placed on consecutive terms of probation for the remaining offenses. The convictions and sentences were affirmed on appeal. Merckle v. State, 512 So.2d 948 (Fla. 2d DCA 1987), approved, 529 So.2d 269 (Fla. 1988). Merckle now argues that the multiple punishments

---

1 §838.015(1), Fla. Stat. (1981).

2 §838.016(2), Fla. Stat.

3 5839.11, Fla. Stat. (1981)

4 A common law crime. See §775.01, Fla. Stat. (1981)

constitute a double jeopardy violation because all four of his convictions stem from a single act requiring the same proof.

The trial court determined that this issue could have been raised on direct appeal and denied the motion without addressing the merits of Merckle's double jeopardy claim. However, Merckle relies primarily upon Carawan v. State, 515 So.2d 161 (Fla. 1987), which had not been decided at the time of his appeal. This court has held that Carawan, which substantially modified the law regarding double jeopardy, may be applied retroactively in proceedings initiated under rule 3.850, Florida Rules of Criminal Procedure. Glenn v. State, 537 So.2d 611 (Fla. 2d DCA 1988).

We find that Merckle's motion presents a prima facie showing of his entitlement to relief. Accordingly, the order of the trial court is reversed and this case remanded for further proceedings pursuant to rule 3.850.

Reversed.

541 So.2d 1312

Although Carawan v. State, 515 So.2d 161 (Fla. 1987) was decided after the trial and direct appeal in the defendant's case, the Second District held that Carawan should be applied retroactively to convictions which were obtained prior to the rendition of Carawan.

SUMMARY OF THE ARGUMENT

The purpose of a Rule **3.850** Motion for Post-Conviction Relief is to provide for inquiry into the alleged constitutional infirmity of a judgment and sentence. In **1985,** Merckle raised a double jeopardy claim in the Circuit Court and his claim was rejected prior to trial. Merckle did not raise any double jeopardy argument on direct appeal in the Second District Court or during the discretionary review proceedings before this court. Carawan, which was decided in 1987, was not the law at the time of the defendant's convictions and is not the law now. The fact that the Carawan decision was not a development of fundamental significance is conclusively demonstrated by the fact that it was immediately repudiated by the legislature in the very next legislative session following the court's decision. Carawan did not represent a fundamental change in the law requiring retroactive application in collateral proceedings.

ARGUMENT

ISSUE

CARAWAN-BASED DOUBLE JEOPARDY CLAIMS MAY NOT BE RAISED VIA RULE 3.850 MOTIONS FOR POST-CONVICTION RELIEF.

The purpose of a 3.850 motion is to provide for inquiry into the alleged constitutional infirmity of a judgment or sentence. McCrae v. State, 437 So.2d 1388 (Fla. 1983). A 3.850 motion cannot be utilized for a second appeal to consider issues that either were raised or could have been raised in the initial appeal. Herring v. State, 501 So.2d 1279 (Fla. 1986); Sireci v. State, 469 So.2d 119 (Fla. 1985); Jones v. State, 446 So.2d 1059 (Fla. 1984). Matters that could have been remedied by objection at trial and argument on appeal may not be considered by means of a Rule 3.850 motion. Straight v. State, 488 So.2d 530 (Fla. 1986).

The defendant, Arden Merckle, was indicted by the Hillsborough County Grand Jury for Bribery in violation of §838.015(1), Florida Statutes (1981); receiving unlawful compensation, in violation of §838.016(2), Florida Statutes (1981); extortion by a state officer in violation of 5839.11, Florida Statutes (1981), and misbehavior in office, in violation of 5775.01, Florida Statutes (1981). Merckle was tried by a jury and convicted on all counts on September 8, 1985. The defendant was adjudicated guilty on the four separate criminal offenses and sentenced to a 5-year term of incarceration on the bribery

conviction and consecutive terms of probation on the remaining convictions. The defendant filed an appeal of his convictions, raising the following claims: (1) that his conviction could not be sustained because the circumstantial evidence did not exclude every reasonable hypothesis of innocence, (2) that he was denied due process of law by the trial court's exclusion of the testimony of certain witnesses, (3) that the trial court deprived him of his right to a fair trial by denying his motion to interview jurors and (4) that the trial judge erred in deviating from the recommended guideline sentence. *See*, 512 So.2d at 949. The Second District court affirmed the defendant's convictions and sentences, Merckle v. State, 512 So.2d 948 (Fla. 2d DCA 1987), and the defendant pursued a certified question to the Florida Supreme Court, which approved the decision of the District Court. Merckle v. State, 529 So.2d 269 (Fla. 1988). The defendant could have, but did not, raise the double jeopardy argument presented in his direct appeal. The Defendant's Blockburger analysis concerning multiple punishments was available to defendant during his appeals but he chose not to raise such an argument. In denying Merckle's Rule 3.850 Motion, the trial court found that the Defendant's claim is no different from that raised in his pre-trial Motion to Dismiss and concluded tht Merckle "exhausted his remedies in the course of pretrial and trial proceedings, and upon appeal. He cannot again address these issues pursuant to F.R.Cr.P. Rule 3.850." [Order at page 2]. Under the facts of this case and the case law of this State, the trial judge properly determined that Merckle

could not credibly rely on the provisions of Rule 3.850, Florida Rules of Criminal Procedure. A post-conviction motion is not a substitute for direct appeal nor a vehicle for raising, in piecemeal fashion, claims which were previously rejected at trial and not pursued on direct appeal. Any purported right to rely on this double jeopardy claim is waived and consideration of this issue on collateral review is procedurally barred. Wainwright v. Skyes, 433 U.S. 72, 87 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Aldrich v. Wainwright, 777 F.2d 630, 638 (11th Cir. 1985). Carawan v. State, 515 So.2d 161 (Fla. 1987), upon which the defendant now relies, was decided on September 3, 1987, nine months before this Court decided the defendant's appeal. In his appeal to the Florida Supreme Court, Merckle also raised the issue of sufficiency of circumstantial evidence presented at his trial to convict him, however, this court refused to consider this issue which was adequately addressed by the Second District Court.

Merckle's reliance on Carawan as a basis for his collateral attack of his convictions is misplaced. Carawan was not the law at the time of defendant's convictions and is not the law now. In response to Carawan, the legislature specifically amended Section 775.021(4) to approve multiple convictions for crimes arising out of a "single evil". Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988). Nothing in Carawan makes it applicable to this case because it was not specifically retroactive to prior convictions. Id. at 520. Most recently, in State v. Smith, et. al., ____ So. 2d ____, 14 F.L.W. 308 (Fla. Case Nos. 72,633 and 72,850, Opinion filed June 22, 1989), confirmed that Carawan was

grounded on the Court's interpretation of legislative intent in enacting §§775.021(1) and (4), Florida Statutes and held that Carawan has been overridden for offenses which occur after the effective date of Chapter 88-131, section 7.

The non-retroactivity of Carawan to a defendant's convictions is comparable to appellate decisions determining the non-retroactivity of Hall v. State, 517 So.2d 678 (Fla. 1988), which held that the legislature did not intend dual punishments for a single criminal act of displaying a firearm and of committing a robbery while armed. In Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988), the Court held that a defendant was not entitled to post-conviction relief based on Hall for his dual convictions. The Court stated, at page 640:

> "We do not discern anything in ~~Hall~~, at 679, 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. . . "

520 So.2d at 640, Accord Love v. State, 532 So.2d 1133 (Fla. 4th DCA 1988)

In Witt v. State, 387 So.2d 922 (Fla. 1980), cert. den. 449 U.S. 1067 (1980), the Supreme Court of Florida rejected, in the context of an alleged change of law, the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections, in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding. In Witt, a capital case, the Court held that an alleged change of law will not be considered under Rule 3.850 unless the change (1) emanates from the Supreme Court of Florida or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. See also, Henderson v. Dugger, 522 So.2d 835 (Fla. 1988); McCuiston v. State, 534 So.2d 144 (Fla. 1988) [Whitehead v. State, 498 So.2d 863 (Fla. 1986) which determined that a defendant's habitual offender status is not a legally sufficient reason for departure from the guidelines, does not apply retroactively in post-conviction proceedings.1

While Carawan emanated from this Court, it is neither constitutional in nature nor of fundamental significance. The language of Carawan is grounded in a statutory construction analysis, balancing the dictates of Section 775.021(4) with the

lenity provision. Statutory construction, while it may have some constitutional trappings, as does any matter brought before a court, is not fundamentally a constitutional issue. Carawan is not a major constitutional change nor development of fundamental significance under Witt which requires retroactive application. To the contrary, Carawan was merely a brief evolutionary decision on legislative intent concerning the issue of multiple punishments. As a result of the Carawan decision in 1987, the legislature promptly amended Section 775.021(4), Florida Statutes, to make clear its intent to permit multiple convictions for crimes arising out of a "single evil". Chapter 88-131 section 7, Laws of Florida (1988); Clark, supra. The fact that the Carawan decision was not a development of fundamental significance is conclusively demonstrated by the evidence that it was immediately repudiated by the legislature in the very next legislative session following the Court's decision. Thus, it is clear that Florida's legislature intends, and previously intended, that separate offenses, as defined by the state legislature, are subject to separate convictions and sentences. As this Court stated in Witt, supra, at pages 928-929:

> ". . . To allow non-constitutional claims as bases for post-conviction relief is to permit a dual system of trial and appeal, the first being tentative and nonconclusive. Our justice system could not accomodate such an expansion; our citizens would never tolerate the deleterious consequences for criminal punishment, deterrence and rehabilitation. . . "

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 evil, it is clear that prior to Hall all cases based on similar facts are 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 immediate amendment to F.S. 775.021 which served to clarify its intention to allow separate convictions.

The purpose of Carawan was to balance potentially conflicting rules of construction, so that the courts may determine legislative intent regarding similar crimes. The old rule of law was heavily relied upon, ad the law of multiple offenses went through various transformations during most of this decade. The grounds upon which the defendant's 3.850 motion was based, multiple punishments arising out of a single act, were never raised on appeal by the defendant but could indeed have been presented. Additionally, the change of law represented by Carawan is not now the law and was not the law at the time of defendant's conviction and initial appeal. Further, Carawan is not retroactive and it would be a miscarriage of justice to apply the brief, non-fundamental change of law to this defendant's criminal convictions and sentences extensively reviewed on appeal. The finality of decisions in many cases would be brought into doubt, forcing the courts to reconstruct the underlying facts of particular offenses many years later in order to address the merits of the defendant's claim on collateral review. Finally, the state would urge that relief is inappropriate in the instant case for a more fundamental reason. Smith, supra, makes it abuntantly clear that Carawan has been overridden and the legislature intended that separate punishments be imposed and that the law in effect at the time of commission of a crime controls as to the offenses for which the perpetrator can be convicted as well as the punishments which may be imposed.

CONCLUSION

Based on the foregoing reasons, arguments and authorites, the decision in Carawan should not be applied retroactively in post-conviction proceedings.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Katherine 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 ARDEN M. MERCKLE, 1341 Eudora Street, Denver, Colorado 80220 this 25th day of July, 1989.

K Blanco

OF COUNSEL FOR PETITIONER