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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

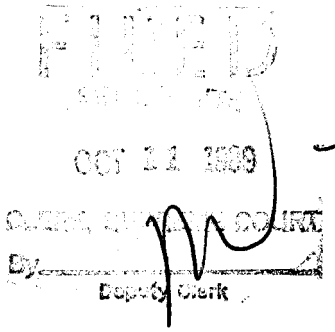
Petitioner,

vs.

JIMMIE DURAN HATTEN,

Respondent.

Case No. 74,169



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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent, Jimmie Hatten, accepts the Statement of the Case and Facts as set forth in Petitioner's Brief.

SUMMARY OF THE ARGUMENT

Convictions for both sale and possession of one rock of cocaine cannot be sustained as such a result violates double jeopardy. No matter what the analysis--legislative intent, Blockburger or rule of lenity--two convictions cannot be sustained. If this court finds double jeopardy under the rule of lenity analysis and that this rule has been overridden by a new amendment effective July 1, 1988, then it cannot apply the new amendment to the case sub judice. Any retroactive application of the new amendment would increase a defendant's punishment and would violate the ex post facto clause.

ARGUMENT

ISSUE I

WHETHER THE DOUBLE JEOPARDY CLAUSE PRECLUDES RESPONDENT'S CONVICTION OF SALE AND SIMPLE POSSESSION OF COCAINE.

Petitioner argues that this court's opinion in State v. Smith, 14 FLW 308 (Fla. June 22, 1989), is not controlling because the factual situations in Smith dealt with sale and possession with intent to sell as opposed to the factual situation sub judice where we are dealing with sale and possession. The slight factual difference is a distinction without a difference. Mr. Hatten clearly sold what he possessed, and this sole act constituted one crime. It doesn't matter that the State only charged Mr. Hatten with possession instead of possession with intent to sell; and State tactics to try to get around the decision in Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), should be rejected by this court. The Second District Court of Appeal rejected this same argument in Dukes v. State, 528 So.2d 531 (Fla. 2d DCA 1988), where the court held that a defendant could not be convicted for both possession and sale because both charges stemmed from possessing and selling the same piece of rock cocaine. The decision in Smith does not say on what basis it found sale and possession with intent to sell the same crime, but it approved the Gordon decision and found the crimes at issue the same for double jeopardy purposes. If this court found legislative intent to only have one conviction for the

one act of selling what one possessed, or if it applied the rule of lenity to reach this decision, the result is the same--one act, one conviction. It doesn't matter if the State charged mere possession or possession with intent to sell to go along with the sale. The end result is still the same--the defendant sold what he possessed.

There is, of course, one other possible reason for finding the crimes the same--using a Blockburger analysis as was done in Gordon and finding that possession is a lesser of sale. As noted in the motion for rehearing filed by Gordon in Smith, the opinion in Smith sets forth only a discussion of double jeopardy as affected by the July 1, 1988, amendment. There is no analysis of sale and possession with intent to sell in the opinion under Blockburaer; yet, the Second District Court of Appeal's decision in Gordon finding one act, one crime was based solely on a Blockburaer analysis. The Second District Court of Appeal found that possession with intent to sell had all of the elements of sale except one--sale. Although the State argues and this court has held in the past that sale and possession each contain separate elements as one can sell without possession [see State v. Daowhin, 533 So.2d 761 (Fla. 1988)], it is Respondent's argument that with the statutes pertaining to principals and conspirators, such a factual situation cannot exist. The prime example usually set forth is the broker, brokers as principals and conspirators are responsible for the acts of all the other dealers in a transaction. Thus, a broker is as guilty of possession as the person who

actually obtained the drugs merely by having participated in the conspiracy to buy and sell drugs. This is so even though the broker may never have actually touched the drugs and even if he never intended to touch the drugs. See Priestly v. State, 450 So.2d 289 (Fla. 4th DCA 1984). As was held in Gordon and not specifically rejected in Smith, possession does contain all of the elements of sale except one--sale. Under a strict Blockburger analysis, sale and possession are still only one crime when they result from the same act;[1] and the rule of lenity--even if it has been taken out of the Carawan[2] equation, does not come into play.

The State also argues that the new amendment can be applied retroactively and is not an ex post facto application of the law. Smith clearly rejected this argument. The change in the statute that has affected this court's decision in Carawan is a substantive one that vastly increases a defendant's punishment in that it provides multiple punishments for one act that would have resulted in only one punishment under Carawan prior to the change in the law. Miller v. Florida, 107 S.Ct. 2446 (1987). If, indeed, this court now finds possession and sale to be different

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[1] It is to be noted that the decision in Smith left many questions unanswered. Because Smith did not discuss the elements of sale and possession, the double jeopardy issue has been left undecided. This conclusion was reached in the recent case of Wheeler v. State, Case No. 87-1908 (Fla. 1st DCA Aug. 16, 1989)[14 FLW 1946], where the First District Court of Appeal certified questions to this court on the issue of possession being a lesser of sale. It is also to be noted that the State in its brief on page 8 has misread Gordon. Contrary to the State's interpretation, Gordon found possession to be an element of sale.

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

crimes with different elements due to the July 1, 1988, amendment, then such a finding cannot be applied to crimes committed before July 1, 1988, that would have been decided under the Carawan analysis.

The decision in Smith, supra, applies to this case. Thus, one of the convictions must be set aside.

CONCLUSION

Based on the above-stated facts, arguments, and authorities, Respondent asks this Honorable Court to uphold the order of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670 on this 3rd day of October, 1989.

Respectfully submitted,

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