6-18

IN THE FLORIDA SUPREME COURT

74,169

STATE OF FLORIDA,

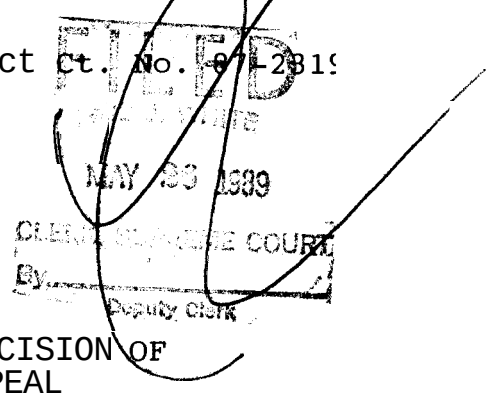
Petitioner,

vs.

Case No.
Second District Ct. No. 87-2819

JIMMIE DURAN HATTEN,

Respondent.
_____/



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

BRIEF OF PETITIONER ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BRENDA S. TAYLOR
ASSISTANT ATTORNEY GENERAL
PARK TRAMMELL BUILDING
1313 TAMPA STREET, SUITE 804
TAMPA, FLORIDA 33602
(813) 272-2670
COUNSEL FOR PETITIONER

/mad

TABLE OF CONTENTS

PAGE NO.

STATEMENT OF THE CASE AND FACTS

SUMMARY OF THE ARGUMENT

ARGUMENT

ISSUE

WHETHER THE DECISION BELOW IS IN CONFLICT WITH SMITH V. STATE, 430 SO.2D 448 (FLA. 1983), AND WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISION?

CONCLUSION

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

PAGE NO.

Blanca v. State. 532 So.2d 1327 (Fla. 3rd DCA 1988).....2

Carawan v. State. 515 So.2d 161 (Fla. 1987).....5

Gordon v. State. 524 So.2d 1047 (Fla. 2d DCA 1988).....6

Gordon v. State. 528 So.2d 910 (Fla. 2nd DCA 1988).....2

Payne v. State. 275 So.2d 261 (Fla. 4th DCA 1973).....5

Rottenberry v. State. 468 So.2d 971 (Fla. 1985).....5

Smith v. State. 430 So.2d 448 (Fla. 1983).....4

State v. Anderson. 370 So.2d 353 (Fla. 1973).....5

State v. Bobby Joe Burton. Fla. Supreme Court Case No. 73.700..... 6

OTHER AUTHORITY:

Section 775.021(4), Florida Statutes (1988).....3. 5. 6

APPENDIX

Hatten v. State. So.2d (Fla. 2nd DCA 1989) 14 F.L.W. 1118 (Fla. 2nd DCA. Opinion filed May 5. 1989)

STATEMENT TO THE CASE AND FACTS

The State of Florida will rely the pertinent facts set forth by the Respondent in his brief filed in the Second District Court of Appeal.

> On February 19, 1987, the State Attorney for the Twentieth Judicial Circuit in and for Lee County, Florida, field an information against the Appellant, Jimmie Hatten, charging Mr. Hatten with sale of cocaine and possession of cocaine in violation of section 893.13, Florida Statutes (1985), for a transaction that occurred on January 6, 1987 (R1, 2). On June 30, 1987, Mr. Hatten had a jury trial with Circuit Curt Judge R. Wallace Pack presiding (R10).
>
> At the trial two police officers testified that they were working undercover in order to make drug purchases on January 6, 1987. At that time, the officers were driving by Mr. Hatten when he yelled to them (R20-22, 35-37). The officers stopped and asked Mr. Hatten for $20 worth of cocaine. One officer handed Mr. Hatten $20, and Mr. Hatten gave the officer a white piece of chunky matter which was later determined to be cocaine (R 22, 35, 40). The officers had the transaction videotaped, and Mr. Hatten was

arrested 23 days later (R 23, 31). Mr. Hatten was identified by both officers (R 30, 35). Mr. Hatten was convicted on both counts (R 7, 60).

On August 10, 1987, Mr. Hatten was sentenced to seven years imprisonment on the sale charge and five years imprisonment on the possession charge, consecutive. The trial court also imposed eight years consecutive probation on the sale charge.

Relying on Gordon v. State, 528 So.2d 910 (Fla. 2nd DCA 1988) and Blanca v. State, 532 So.2d 1327 (Fla. 3rd DCA 1988), the Second District Court determined that Hatten's conviction for possession of cocaine should be set aside.

On May 15, 1989, the State filed its Notice to Invoke Discretionary Jurisdiction on the basis of alleged conflict of decisions; and the instant Brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

This Court needs to resolve the conflict between the Second District and this Court's opinion in Smith v. State, infra, as well as Section 775.021(4). As the decisions now stands, the trial courts of this district are left in the dark as to whether to rely on this Court's opinion in Smith v. State, and Section 775.021(4) or to follow the Second District's mandate that possession cannot be a separate offense from sale.

ARGUMENT

ISSUE

WHETHER THE DECISION BELOW IS IN CONFLICT WITH SMITH V. STATE, 430 SO.2D 488 (FLA. 1983), AND WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISION?

With its decision in the The Florida Star v. B.J.F., 530 So.2d 286, (Fla. 1988), this Court has established the standard for measuring jurisdictional conflict at the hypothetical level. Having done *so,* this Court recognized that it "...has subject matter jurisdiction to hear any petition arising from an opinion that establishes a point of law..." Id. at 288 - 289. This case certainly falls within that class as there is a written decision establishing a point of law.

The question thus becomes whether the court should exercise its discretion in a given case involving a written opinion establishing a point of law. B.J.F. recognizes that jurisdiction is appropriately exercised where the decision under review establishes a "...point of law contrary to a decision of this Court or another district court." Id. at 289.

The point of law established by the district court is that a defendant cannot be convicted of both sale of a controlled substance and simple possession (not possession with intent to sell) of the same substance. This position is in conflict with this Court's opinion in Smith v. State, 430 So.2d 448 (Fla. 1983). Smith, analyzed the offenses of sale and possession and found that each had an element of proof that the other did not.

This holding was not changed by Carawan v. State, 515 So.2d 161 (Fla. 1987), which held only that one could not be convicted of both sale and possession in addition to trafficking. Carawan appears to agree that they are separate offenses. In Carawan, this Court receded in part from Rottenberry v. State, 468 So.2d 971 (Fla. 1985), but continued to recognize that:

> "...sale of drugs can constitute as separate crime from possession..."

This Court has always understood that, simply because one offense may be "comprehended" State v. Anderson, 370 So.2d 353 (Fla. 1973) or "implied" within another, Payne v. State, 275 So.2d 261 (Fla. 4th DCA 1973), does not mean one is a lesser included to the other, Anderson, Payne nor that the implication makes it a necessary element under §775.021(4). As the court in Payne stated:

> While the state may be correct that an allegation of delivery implies possession or constructive possession, an implied allegation is insufficient to bring a secondary offense within the scope of the information where the secondary offense is not a necessarily included offense. Where the secondary offense is not necessarily included within the offense charged, the elements of the secondary offense must be specifically alleged -- not implied -- by the accusatory instrument.
>
> Id. at 263

Finally, sale and possession also remain separate crimes under the new statute effective July 1, 1988, for crimes occurring thereafter, because each has an element separate from the other. Section 775.021(4), Florida Statutes (1988). See

also State v. Doaphin, 533 So.2d 761 (Fla. 1988) [Simple possession is not a necessarily lesser included offense of trafficking by delivery].

The Second District's opinions fails to follow both this Court's opinion in Smith and the legislative intent expressed in Section 775.021(4) in failing to distinguish the requisite elements of possession and sale. In Gordon v. State, 524 So.2d 1047 (Fla. 2d DCA 1988) (review pending, State v. Gordon, Fla. S.Ct. #72,850) the court held that a defendant cannot be convicted and sentenced for both sale and possession with intent to sell. The charges before the court in the instant case, however, were sale and simple possession. Smith specifically holds that convictions can be had for both sale and possession.

This Court needs to resolve the conflict between the Second District and this Court's opinion in Smith v. State, supra, as well as Section 775.021(4), Florida Statutes. As the decisions now stand, the trial courts of this district are left in the dark as to whether to rely on this Court's opinion in Smith v. State and Section 775.021(4) or to follow the Second District's mandate that simple possession cannot be a separate offense from sale.

It should be noted that on May 15, 1989, this Court accepted jurisdiction on State v. Bobby Joe Burton, Fla. Supreme Court Case No. 73,700 in which the Second District held that convictions for delivery and possession of cocaine violated the defendant's double jeopardy rights.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, Petitioner respectfully requests this Court to exercise its discretionary jurisdiction in this case.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

Brenda S. Taylor
BRENDA S. TAYLOR
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0778079
PARK TRAMMELL BUILDING
1313 TAMPA STREET, SUITE 804
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 Deborah Brueckheimer, Assistant Public Defender, P. O. Drawer 9000, Drawer PD, Bartow, Florida 33830 this 24th day of May, 1989.

Brenda S. Taylor
COUNSEL FOR PETITIONER