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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

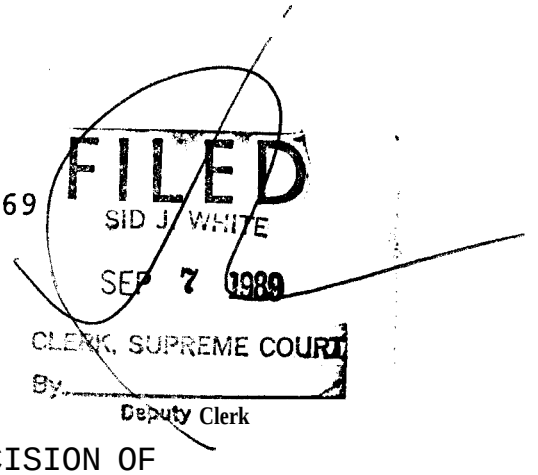
Petitioner,

vs. Case No. 74,169

JIMMIE DURAN HATTEN,

Respondent.

_____/



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

BRIEF OF PETITIONER ON MERITS

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SUMMARY OF THE ARGUMENT

The legislature previously intended and still intends separate convictions and separate sentences for separate offenses. Therefore respondent can be convicted for both offenses. There is no ex post facto violationsince the amendment to §775.021 did not substantively change the meaning of the law or change the punishments but rather merely clarified what the law always has been.

STATEMENT OF 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, filed 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 Court 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 (R22, 35, 40). The officers had the

transaction videotaped, and Mr. Hatten was arrested 23 days later (R23, 31). Mr. Hatten was identified by both officers (R30, 35). Mr. Hatten was convicted on both counts (R7, 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) approved, State v. Smith, No. 72,633, 14 F.L.W. 308 (Fla. June 22, 1989) 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. The state served its jurisdictional brief with this Court on May 24, 1989. This Court granted jurisdiction on August 9, 1989. The instant brief on the merits follows.

ARGUMENT

ISSUE

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

On June 22, 1989, this Court decided State v. Smith, ___So.2d___, 14 F.L.W. 308 [Fla. June 22, 1989]. This Court found that by enacting Chapter 88-131 Section 7, Laws of Florida, amending Section 775.021(4) Fla. Stat., the legislature intended that convictions and sentences for the crimes of sale and possession with intent to sale cocaine does not violate double jeopardy.

This Court also found that this amendment overrules Carawan v. State, 515 So.2d 161 (Fla.1987) but should not be applied retroactive to its effective date of July 1, 1988. Appellant committed the offenses of sale and possession of cocaine on January 6, 1987. However, Smith is not controlling. Respondent was not convicted of sale and possession with intent to sell cocaine as in Smith. (Both crimes prohibited by Section 893.13(1)(a), Fla. Stat.) Respondent was convicted of sale of cocaine (prohibited by Section 893.13(1)(a), Fla. Stat. and possession of cocaine (prohibited by Section 893.13(1)(f). Therefore this Court's holding in Smith does not apply to the instant case.

In Carawan v. State, 515 So.2d 161 (Fla.1987) this Court recognized that the "...sale of drugs can constitute a separate crime from possession..." Carawan at 170. The court in Carawan

also stated that the intent of the legislature is controlling. Carawan at 165.

The legislature has expressed its intent that separate statutes constitute separate offenses "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." Section 775.021(4), Fla. Stat. 1983) (in effect when appellant committed the crimes of sale and possession of cocaine).

Subsequent to the Carawan decision the legislature tried to convey its intent - rejecting Carawan's interpretation of the rule of lenity. Section 775.021(4) Fla. Stat. 1988 reads as follows with the changes underlined:

> (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 purposes 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 degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offenses. Id. 340.

This legislation clarifies the prior law - articulating the legislative intent that there be separate convictions and sentences for both possession and sale of a controlled substance.

Section 775.021 is entitled by the legislature as "Rules of Construction." The statute merely provides the explanation of terms and provisions in the statute and this necessarily includes explanations of sentences. The statute clarifies that when one commits an act or acts constituting one or more separate criminal offense, that person shall be sentenced separately for each criminal offense. This explanation and clarification does not transform this statute into something other than what the legislature intended it to be. Moreover, Justice Shaw in Barritt wrote in a footnote that "[t]he new §775.021(4)(b) does not change the substantive meaning of §775.021(4)(a). It simply explains the meaning..." Barritt at 341, n.1.

Further, the rule of lenity has not been abrogated by the amendment. The amendment clarified when the rule of lenity comes into play. Section 775.021(1), Fla. Stat. provides that:

> The provisions of this code and offenses defined by other statues shall be strictly construed; when the **language** is susceptible of differing constructions, it shall be construed most favorably to the accused.

The above language was not altered whatsoever by the amendment. However, the legislature clarified this principle of lenity in subsection (b) to 8775.021, supra. The rule of lenity still

would apply, as always, where the statutes in question are susceptible to differing constructions. In the amendment the legislature was attempting to further clarify the meaning of the statutes so there would be fewer differing constructions.

There is also no ex post facto violation by allowing appellant to be convicted and sentenced for possession and sale. The legislature provided separate subsections for these offenses and thus the legislature has always intended separate convictions and separate sentences for the offenses. Barritt, supra. For a statute to fall within the constitutional prohibition against ex post facto, two critical elements must be present: (1) the law must be retroactive, that is, it must apply to events occurring before its enactment, and (2) it must disadvantage the offender affected by it. Miller v. Florida, 482 U.S. ___, 96 L.Ed.2d 351, 360, 107 S.Ct. 2446 (1987). For a law to be retrospective it must change the legal consequences of acts completed before its effective date. Id. at 96 L.Ed.2d 360. As Justice Shaw wrote, the amendment to 8775.021 did not substantively change the meaning of the statute but simply explained what the legislature had previously intended as well as what it does intend. Barritt, at 341, n.1. Retroactiveness is not a factor here since the legislature merely clarified what its intent was all along.

The legieslature intended that the crimes of possession and sale of cocaine are separate offenses because they do not fall under any of the excceptions listed in Section 775.021(4)(b). Respondent's crimes do not fit the first exception of Section 775.021(4)(b), Fla, Stat. Section 775.021(4) states that offenses

are separate if each requires proof of an element that the other does not. The crime of possession of cocaine requires proof of an element not required in sale viz: possession. The Second District Court of Appeal in Gordon v. State, 528 So.2d 910 (Fla. 2nd DCA 1988) approved, State v. Smith, No. 72,633, 14 F.L.W. 308 (Fla. June 22, 1989) stated that it is not necessary to actually possess a controlled substance in order to sell it. Gordon at 912. The crime of sale of cocaine requires proof of an element not required in possession of cocaine; viz: sale. Therefore appellant's crimes of possession and sale of cocaine do not fall under the first exception of Section 775.021(4)(1b) Fla. Stat.

Respondent's crimes also do not fall under the second exception - offenses which are degrees of the same offense as provided by statute.

Further, Respondent's crimes do not fall under the third exception - offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. The statutory elements of possession of cocaine, the lesser offense, are not subsumed by the greater offense, sale of cocaine, because having possession of cocaine is not necessary in order to sell it, Gordon supra at 912.

Accordingly, this Honorable Court should find that the legislature has always intended that simple possession and sale of cocaine are two separate offenses. Thus, this Court should find that respondent can be convicted of both sale and simple possession of cocaine.

CONCLUSION

Based on the foregoing argument, citations of authority and references to the record, Petitioner would ask that this. Honorable Court reverse the order of the Second District Court of Appeal.

Respectfully submitted,

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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. Box 9000, Drawer PD, Bartow, Florida **33830** this 5th day of September, **1989.**

Brenda S. Taylor
COUNSEL FOR PETITIONER

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JIMMIE DURAN HATTEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 87-02319

Opinion filed May 5, 1989.

Appeal from the Circuit
Court for Lee County;
R. Wallace Pack, Judge.

James Marion Moorman,
Public Defender, and
Deborah K. Brueckheimer,
Assistant Public Defender,
Bartow, for Appellant.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Brenda S. Taylor,
Assistant Attorney General,
Tampa, for Appellee.

PER CURIAM.

Appellant Jimmie Hatten was convicted of both sale and possession of cocaine as the result of a single drug transaction involving a single, undivided quantity of cocaine. Accordingly, the judgment and sentence for possession of cocaine should be set aside. Gordon v. State, **528** So.2d **910** (Fla. 2d DCA **1988);** Blanca v. State, **532** So.2d **1327** (Fla. 3d **DCA 1988).** The judgment and sentence for sale of cocaine are affirmed.

Affirmed in part, reversed in part, and remanded with instructions.

RYDER, A.C.J., and LEHAN and PATTERSON, JJ., Concur.