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IN THE SUPREME COURT OF FLORIDA

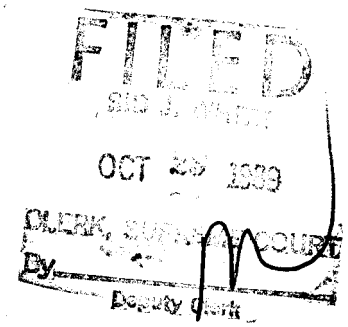
KENNETH SKEENS,

Petitioner,

vs. Case No. 74,211

STATE OF FLORIDA,

Respondent.



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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

Petitioner, Kenneth Skeens, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized at the District Court level and is contained in one volume, will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

In its information the State charged Mr. Skeens with one count of felon in possession of a firearm, contrary to section 790.23, Florida Statutes (1983), and one count of carrying a concealed firearm, contrary to section 790.01(2), Florida Statutes (1983) (R4, 5). The charges arose out of a single act occurring on February 14, 1985 (R4, 48).

On March 3, 1987, Mr. Skeens entered a plea of guilty to the charges (R24, 46). The court adjudicated Mr. Skeens guilty of both charges (R24, 29). On the charge of felon in possession of a firearm, the court imposed a two-year period of community control to be followed by a ten-year period of probation (R24, 35-38, 49). On the charge of carrying a concealed weapon, the court sentenced Mr. Skeens to time served (R26, 49). Mr. Skeens' guidelines scoresheet apparently called for a sentence of 12 to 30 months in prison or community control (R29, 41). Mr. Skeens reserved the right to appeal the legality of the sentences (R43, 49-50) and timely filed a notice of appeal on March 6, 1987 (R28).

On November 28, 1988, the Second District Court of Appeal issued an order to show cause why Mr. Skeens' appeal should not be dismissed in accordance with Counts v. State, 376 So.2d 59 (Fla. 2d DCA 1979). In response to the order to show cause, Mr. Skeens argued that his sentences were illegal. On the charge of felon in possession of a firearm, Mr. Skeens asserted that the imposition of community control in tandem with probation constituted an

illegal sentence, and the imposition of punishment on both charges, which arose out of a single act, violated constitutional protections against double jeopardy.

The Second District Court of Appeal rejected Mr. Skeens' arguments. The appellate court held that community control can be imposed in tandem with probation; and that separate sentences for convictions for possession of a firearm by a convicted felon and carrying a concealed firearm, which arose from a single act, did not violate Mr. Skeens' right not to be placed in double jeopardy. Based on conflict of decisions, Mr. Skeens sought discretionary review of the appellate court decision, and this Court accepted jurisdiction of the cause on September 29, 1989.

SUMMARY OF THE ARGUMENT

I. Under the statutory scheme of Chapter 948 and section 921.187, the Petitioner should not have been sentenced to community control followed by probation. A plain reading of the statutory provisions evinces a clear legislative intent that community control and probation are alternative forms of disposition. A court should not extend the meaning of the statutory scheme and should strictly construe the penal statutes. An amendment to Florida Rule of Criminal Procedure 3.701, Committee Note (d)(13), promulgated by the court and adopted by the legislature, allowing the imposition of community control and probation in tandem, constituted an amendment to substantive law. Notwithstanding the fact that the legislature adopted the new rule, the method of adoption must be scrutinized carefully. The lack of a clear legislative intent to overcome the statutory scheme of Chapter 948 and section 921.187 requires that the rule be stricken. In the event that the revised rule is deemed effective, application of the rule to the Petitioner violated the ex post facto doctrine. The rule change was effective after the date of Mr. Skeens' offense, altered the substantive law and Mr. Skeens personal rights, and imposed an additional punishment not previously allowed by statute.

II. Convictions for felon in possession of a firearm and carrying a concealed firearm violate double jeopardy protections. Section 790.23, Florida Statutes (1983) and section 790.01(2), Florida Statutes (1983) address essentially the same evil. They

evince an intent to punish a felon more harshly for the same criminal act, not to impose dual punishment.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CONTROL IN TANDEM WITH PROBATION ON THE CHARGE OF FELON IN POSSESSION OF A FIREARM?

The instant issue involves several aspects: (1) whether or not applicable Florida statutes prohibit the in-tandem imposition of community control and probation: (2) if so prohibited, whether or not a change to the committee notes to the Florida Sentencing Guidelines, promulgated by the Court and adopted by the legislature, now allows such a sanction, and (3) if allowed, whether the sanction imposed in the instant case constitutes a violation of the ex post facto doctrine.

In determining whether or not Florida statutes authorize in-tandem imposition of community control and probation, the court in Williams v. State, 464 So.2d 1218 (Fla. 1st DCA 1985), determined that community control and probation were alternative forms of disposition which could not be imposed in tandem. Williams reached this conclusion based upon an analysis of clear legislative intent pursuant to Chapter 83-131, Laws of Florida, Chapter 948, Florida Statutes (1983), and section 921.187, Florida Statutes (1983). The Williams rationale was adopted in Mitchell v. State, 463 So.2d 416 (Fla. 1st DCA), cause dismissed, 469 So.2d 750 (1985), and in Chessler v. State, 467 So.2d 1102 (Fla. 4th DCA 1985). Mitchell also cited former Florida Rule of Criminal

Procedure 3.701(d)(13) as a basis for its decision, stating that the then-effective rule provided that community control "is a sanction which the court may impose upon a finding that probation is an unsuitable disposition." Mitchell, 463 So.2d at 418.

The Williams rationale was rejected in Burrell v. State, 483 So.2d 479 (Fla. 2d DCA 1986). The Burrell court merely stated that community control did not represent an alternative disposition. Rather, without an analysis of legislative intent, the court held that community control presented an intermediate step between total incarceration and freedom in the chain of rehabilitation of the offender. Burrell, 483 So.2d at 481. In Petitioner's case, the Second District Court of Appeal relied on Burrell in holding that the imposition of community control and probation in tandem was a proper sentence. Skeens v. State, 542 So.2d 436 (Fla. 2d DCA 1989).

Tracing the statutory scheme concerning imposition of community control or probation, reliance can be placed on the analysis of legislative intent set forth in Williams:

> It is apparent to us that the legislative intent, in adopting the concept of "community control" in the Correctional Reform Act of 1983" (Chapter 83-131, Laws of Florida) was to provide an alternative to probation and incarceration. Among the legislative findings in the Correctional Reform Act were:
>
> > (2) State government can no longer afford an uncritical and continuing escalation in capital outlay for prison construction at the expense of other competing social and economic priorities.
> > (3) The effectiveness of incarceration of offenders as a means to reduce the likelihood that they will become useful

members of society, thereby reducing the threat of crime in our society, varies among individuals and types of offenders and is not conclusively positive.

(4) The increased use of noncustodial alternatives and nonprison custodial alternatives can alleviate prison overcrowding while still providing a sufficient measure of public safety and assuring an element of punishment.

Chapter 83-131, Section 2; see also Section 948.10(1), Florida Statutes (1983). The Act, among other things, created Section 921.187, Florida Statutes, which provides for alternative forms of disposition and sentencing. Among the permissible alternatives set forth in the section are:

(1) Place an offender on probation with or without an adjudication of guilt pursuant to s. 948.01.

* * * * * *

(3) Place a felony offender into community control requiring intensive supervision and surveillance pursuant to chapter 948.

* * * * * *

(7) Impose a split sentence whereby the offender is to be placed on probation upon completion of any specified period of such sentence, which period may include a term of years or less.

The Act further defined the terms "community control" and "probation" and are set forth in section 948.001, Florida Statutes (1983).

The Act also added subsection 4 to section 948.01 to provide for the circumstances under which the court may place the defendant in community control:

(4) If, after considering the provisions of subsection (3) and the offender's prior record or the seriousness of the offense, it appears to the court in the case of a felony disposition that probation is an unsuitable dispositional alternative to

> imprisonment, the court may place the offender in a community control program.. .
>
> That subsection also allows the court, with respect to previously committed offenders, to suspend further execution of the commitment and place the offender in community control. See also Section 948.01(3). Further, where the offender has completed "the sanctions" imposed in the community control plan before the expiration of the term previously ordered by the court, the court may grant an early discharge of the offender or transfer the defendant to probation supervision. See Section 948.01(7). We also note that where a probationer has violated the conditions of probation, the court may, instead of revoking probation, place him in community control. See Section 948.06.

Williams, 464 So.2d at 1219-1220.

The court reached the conclusion that under either statute the "front end" of the split sentence contemplates a sentence of incarceration, and not community control, even if community control is made a special condition of probation. The court stated that a contrary construction,"...would result in the mongrelization of the dispositional alternatives of community control and probation. We believe this would be manifestly contrary to the legislative intent as to the proper purpose and application of these alternative dispositions." Williams, 464 So.2d at 1220.

In support of the analysis of legislative intent set forth in William, the overriding consideration is that a statute should be construed and applied so as to give effect to the evident intent of the legislature. Ferre v. State ex rel. Reno, 478 So.2d 1077 (Fla. 3d DCA 1985), affirmed, 494 So.2d 214 (1986), cert.

denied, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed2d 814 (1986). A court cannot extend the meaning of a statute, and penal statutes are to be strictly construed. Where the language of a penal statute is clear, plain, and without ambiguity effect must be given to it accordingly; and the courts are without power to restrict or extend the meaning. Graham v. State, 474 So.2d 464, 465 (Fla. 1985), citing Fine v. Moran, 74 Fla. 417, 77 So. 533, 536 (1917).

This Court stated in Parker v. State, 406 So.2d 1089 (Fla. 1981), that one indicator of the legislature's intent is the title of the law enacting the statute. Chapter 83-131, Laws of Florida, created section 921.187, Florida Statutes (1983) and addressed portions of Chapter 948, Florida Statutes (1983). The title reads in pertinent part as follows:

> An act relating to corrections and parole;...creating s. 921.187, Florida Statutes, providing sentencing alternatives;...creating s. 948.001, Florida Statutes, providing definitions; creating s. 948.005, Florida Statutes, to provide for the implementation of a community control manual by the Department of Corrections; amending s. 948.01, Florida Statutes, providing for placement of certain offenders into community control as an alternative to probation; limiting the duration of supervision; providing for the applicability of workers' compensation benefits to offenders in certain work programs; authorizing discharge from certain programs;... amending s. 948.03, Florida Statutes, changing terms and conditions of probation and providing terms and conditions of community control;... amending s. 948.06(2), Florida Statutes, providing for placement of persons violating probation into community control; providing for revocation, modification, or continuance of community control;...

The title distinctly refers to sentencing "alternatives" and to

placement of certain offenders into community control "as an alternative to probation." The word "alternative" can be defined as "one or the other of two things; giving an option or choice; allowing a choice between two or more things or acts to be done." BLACK'S LAW DICTIONARY 72, (5th ed. 1979). Further support for the proposition that the legislature intended community control and probation to be alternative forms of disposition is apparent from the use of the disjunctive "or" in section 948.01. When used in a statute, the word "or" is generally construed in the disjunctive and normally indicates that alternatives were intended. Sparkman v. McClure, 498 So.2d 892 (Fla. 1986), citing United States v. Garcia, 718 F.2d 1528 (11th Cir.1983), affirmed, 469 U.S. 70, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984); Brown v. Brown, 432 So.2d 704 (Fla. 3d DCA 1983), review dismissed, 458 So.2d 271 (Fla. 1984). Additionally, neither section 921.187 nor section 948.01 specifically authorize a split sentence of community control and probation.

Based upon the language of these penal statutes, effect must be given to their plain meaning--that community control and probation were intended by the legislature to be alternative forms of disposition and were not intended to be imposed in tandem. If this court agrees with this proposition, then Petitioner's sentence was improper unless an amendment to Florida Rules of Criminal Procedure 3.701, Committee Note (d)(13), is determined to override the previously cited statutory provisions and arguments.

Despite the evident intent of the legislature to provide

for alternative forms of disposition by statute, in The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines 3.701, 3.988), 482 So.2d 312 (Fla. 1985), the Court added the following pertinent language to Florida Rules of Criminal Procedure 3.701, Committee Note (d)(13):

> It is appropriate to impose a sentence of community control to be followed by a term of probation. The total sanction (community control and probation) shall not exceed the term provided by general law.

The legislature adopted the Rule, as revised by the Court, effective October 1, 1986. Ch. 86-273, § 2, Laws of Florida.

In light of the new Committee Note, Reed v. State, 545 So.2d 891, 892 (Fla. 4th DCA 1989), held that the imposition of community control followed by probation was improper based upon Chessler, but certified the following question as one of great public importance:

> WHEN SENTENCING WITHIN THE GUIDELINES, MAY A TRIAL, COURT IMPOSE A SENTENCE OF COMMUNITY CONTROL TO BE FOLLOWED BY PROBATION IF THE TOTAL SENTENCE DOES NOT EXCEED THE TERM PROVIDED BY GENERAL LAW?

Most recently in Denson v. State, 14 F.L.W. 2053 (1st DCA September 1, 1989), the court adhered to its holding in Williams that the statutory provisions contemplate the use of community control or probation as mutually exclusive alternatives, notwithstanding the amended Committee Note.

Florida case law has held that Committee Notes are treated the same as sentencing guidelines which are part of the Florida Rules of Criminal Procedure. Slappy v. State, 516 So.2d

342, 344 (Fla. 1st DCA 1987). While the Supreme Court is authorized to adopt rules of procedure, only the legislature may enact substantive law. Johnson v. State, 336 So.2d 93 (Fla. 1976); Benvard v. Wainwright, 322 So.2d 473 (Fla. 1975). The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and as such is a matter properly addressed by the legislature. § 921.001(1), Fla. Stat. (1987).

Benvard involved a conflict between a rule of criminal procedure and a statute which addressed concurrent and consecutive sentences. The court held that the statute prevailed over the rule because the subject was substantive law. In so holding, the court observed:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions. See In re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204 (Fla. 1973); In re Florida Rules of Criminal Procedure, 272 So.2d 65, amended 272 So.2d 513 (Fla. 1973).
>
> The prescribed punishment for a criminal offense is clearly substantive law. State v. Garcia, 229 So.2d 236 (Fla. 1969). An argument can be made that the manner of the imposition of the sentence is procedural; however, it is our opinion that whether a sentence is consecutive or concurrent directly affects the length of time spent in prison and, therefore, rights are involved, not procedure.

Benvard, 322 So.2d at 475.

This Court has also explained the difference between substance and procedure as follows:

> As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.

Garcia, 229 So.2d at 238 (Fla. 1969) (citation omitted).

In promulgating the rule at issue, it cannot be said that the Court merely was adopting a rule of procedure to allow the imposition of a sentencing option already available to judges, because community control and probation were by statute alternative forms of disposition. Further, community control and probation are specifically prescribed punishments and directly affect personal rights by imposing intense supervision and surveillance, or community supervision. § 948.01(4), Fla. Stat (1985); § 948.001, Fla. Stat. (1983).[1] Thus, community control and probation are subjects of substantive law properly addressed by the legislature.

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[1]Section 948.001 defines community control and probation as follows:

> (1) "Community control" means a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced.
>
> (2) "Probation" means a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03.

This Honorable Court has held that the problem of substance versus procedure is overcome, with respect to the sentencing guidelines, when the legislature, as here, adopts new Supreme Court Rule changes. The rules then become a statute. Smith v. State, 537 So.2d 982, 987 (Fla. 1989). However, the issue of changes in substantive law should not be summarily put to rest by the Florida procedure of adopting sentencing rules. See Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.ED.2d 351 (1987), Patterson v. State, 513 So.2d 1263 (Fla. 1987) (amendments to the sentencing guidelines are not mere procedural changes insofar as they alter substantial personal rights such as changes in a presumptive sentence or changes in the method of scoring offenses); Smith, 537 So.2d at 986, n.2 (formulation of the grid schedules and the recommended range for sentencing is clearly substantive law).

Although the above cases dealt with application of the ex post facto doctrine in light of substantive law changes, it is apparent that the issue of substantive law in the Florida scheme of adopting amendments to the sentencing guidelines must be scrutinized carefully.

Here, the revised rule, even as a statute, should not be applied because it conflicts with the entire statutory scheme of Chapter 948 and section 921.187. Benvard, 322 So.2d at 476; Denson, 14 F.L.W. at 2054. Further, no substantive amendments have changed the statutory scheme of Chapter 948 and section 921.187 to allow in-tandem imposition of community control and probation. Nor does the title or body of Chapter 86-273, Laws of Florida, bespeak

a legislative intent to change the scheme of alternative dispositions.[2] Based on the foregoing, the Rule should be deemed void.

If this Court agrees with the stated proposition, then the trial court erred in sentencing Mr. Skeens to community control followed by probation. On the other hand, if this court finds that community control and probation can be imposed in-tandem, based upon the revised guidelines, then the question is whether or not Mr. Skeens can be so sentenced without violating the ex post facto doctrine.

The ex post facto prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (citations omitted). For a criminal or penal law to be ex post facto, it must be retrospective in application and it must disadvantage the offender affected by it. Weaver, 450 U.S. at 29; Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). No ex post facto violation occurs if a change in the law does not

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[2] The title reads:

> An act relating to sentencing, amending s. 921.001, F.S.; limiting appellate review of sentences imposed outside sentencing guidelines; providing legislative adoption and implementation of certain revisions to sentencing guidelines promulgated by the Florida Supreme Court in accordance with s. 921.001, F.S.; providing an effective date.

alter substantial personal rights, but merely changes modes of procedure which do not affect matters of substance. On the other hand, a change in the law that alters a substantial right can be ex post facto even if the statute takes a seemingly procedural form. Miller, 482 U.S. at 430 (citations omitted). If a prisoner is being treated under an ex post facto law, remand for application of the law in place when the crime occurred is the proper remedy. Weaver, 450 U.S. at 37, note 22.

In the instant case, Petitioner's crimes occurred on February 14, 1985. Effective October 1, 1986, Florida Rules of Criminal Procedure 3.701, Committee Note (d) (13), changed the law to allow the in-tandem imposition of community control and probation. The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines 3.701, 3.988), 482 So.2d 312 (Fla. 1985); Chapter 86-273, § 2, Laws of Florida. The Petitioner was sentenced to community control followed by probation on March 3, 1987. Retrospective application of the revised guidelines law changed the legal consequences of Mr. Skeens acts by imposing additional punishment of community control followed by probation. Further, application of the law disadvantaged Mr. Skeens and others by altering substantial personal rights, i.e., allowing a scheme of sentencing that changed the previously allowable statutory sentence of serving only community control if deemed appropriate by the court.

ISSUE II

WHETHER THE TRIAL COURT'S IMPOSITION OF PUNISHMENT ON BOTH THE CHARGE OF FELON IN POSSESSION OF A FIREARM AND THE CHARGE OF CARRYING A CONCEALED FIREARM, WHEN THE CHARGES AROSE OUT OF THE SAME ACT, VIOLATED PETITIONER'S RIGHT TO NOT BE PLACED IN DOUBLE JEOPARDY?

The present issue involves an analysis of section 790.23, Florida Statutes (1983), and section 790.01(2), Florida Statutes (1983). Section 790.23 provides that:

> (1) It is unlawful for any person who has been convicted of a felony in the courts or this state or of a crime against the United States which is designated as a felony or convicted of an offense in any other state, territory, or country punishable by imprisonment for a term exceeding 1 year to own or to have in his care, custody, possession, or control any firearm or electric weapon or device or to carry a concealed weapon, including all tear gas guns and chemical weapons or devices.
>
> * * *
>
> (3) Any person convicted of violating this section is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 790.01(2) provides that:

> (2) Whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Based on these statutory provisions, Florida courts previously have held that the imposition of separate sentences for the charges of possession of a firearm by a convicted felon and carrying a concealed firearm is improper where the acts alleged

were facets of a single crime. Young v. State, 330 So.2d 235 (Fla. 2d DCA), cert. denied, 341 So.2d 1085 (1976); Dotson v. State, 339 So.2d 693 (Fla. 2d DCA 1976); see also McPhall v. State, 320 So.2d 867 (Fla. 4th DCA 1975) (the charge of attempted carrying of a concealed firearm was simply a facet of the criminal act of possession of a firearm by a convicted felon).

Carawan v. State, 515 So.2d 161, 170-171 (Fla. 1987), held that where both charges are predicated on a single act and where the legislature did not intend multiple punishments as to the act, dual punishments are impermissible. On the basis of Carawan, Johnson v. State, 535 So.2d 651, 653-654 (Fla. 3d DCA 1988), held that convictions and sentences were proper for possession of a firearm by a convicted felon and carrying a concealed firearm, because each statutory provision addresses a different evil and seeks to remedy a different problem. Johnson applied Carawan because the case arose before July 1, 1988. Johnson, 535 So.2d at 653, n.3. See also Smith v. State, 14 F.L.W. 308 (June 22, 1989). Inasmuch as Petitioner's case arose before July 1, 1988, the Carawan analysis applies.

The Johnson court opined that the convicted felon statute is most clearly aimed at a different evil because it is aimed at particular persons namely, those who "by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities..." Johnson, 535 So.2d at 654 (citations omitted). In Petitioner's case, the Second District Court of Appeal relied on Johnson in disagreeing with Mr. Skeens' contention

that the imposition of separate sentences for convictions for possession of a firearm by a convicted felon and carrying a concealed firearm, which arose from a single act, violated his right to not be placed in double jeopardy. Skeens v. State, 542 So.2d 436 (Fla. 2d DCA 1989).

Carawan addressed offenses predicated on one single underlying act, as present here, and set forth a three-step analysis to be followed in such cases. Carawan, 515 So.2d at 170. The first step is that specific, clear, and precise statements of legislative intent control. Carawan, 515 So.2d at 165. Absent a specific statement of legislative intent in the statutes, a court is to apply the test enunciated in Blockburger v. United States, 284 U.S. 299 (1932) and codified at section 775.021(4), Florida Statutes (1985),[3] to the statutory elements of the offenses, in order to aid in determining legislative intent as to whether the two statutory offenses address the same evil. The third step is to apply the rule of lenity pursuant to section 775.021(1), Florida

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[3] That section provides:

> (4) Whoever, in the course of one criminal transaction or episode, commits 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.

Statutes (1985).[4] Carawan, 515 So.2d at 168.

A review of Chapter 69-306, Laws of Florida, does not provide a legislative statement as to whether or not separate punishments for the offenses at issue were intended. However, a plain reading of section 790.23 shows that the legislature intended to punish a felon found to have possessed or controlled a firearm or to have carried a concealed weapon by making him guilty of a second-degree felony. A plain reading of section 790.01(2) shows that the legislature intended to punish anyone found to have carried a concealed firearm by making him guilty of a third-degree felony.

Arguably, the language of the statutes shows an unambiguous legislative intent to punish the same crime of carrying a concealed weapon. Such a crime by a felon is subject to an enhanced punishment.

If the legislative intent is deemed unclear, application of the second analytical step, examining the elements of the offenses, should be applied. Section 790.23 addresses the possession or control or the carrying and concealment of a firearm by a felon. Section 790.01(2) addresses the carrying of a concealed firearm. Arguably, the statutes as applied here are designed to protect against the same evil, the carrying of a concealed firearm. Under Section 790.23, the carrying and

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[4] "(1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 7 75.021(1), Fla. Stat (1985).

concealing of a firearm would necessarily involve possessing or controlling the firearm. The harsher penalty for the charge of felon in possession of a firearm evinces an intent to punish a felon more harshly than others for committing the same evil. The enhanced penalty indicates that one punishment, not two punishments, should be applied to the offense. Carawan, 515 So.2d at 164. The Johnson analysis that the convicted felon statute is aimed at a different evil because it is aimed at particular persons is not convincing. While it is true that the statutes are directed at two different groups of people, the penalty under the felon statute simply evinces an intent to punish felons more harshly, not to impose dual punishments. Additionally, the charge of carrying a concealed firearm is a facet of the criminal act of possession of a firearm by a convicted felon. Even if the language of the statutes can be deemed susceptible of different constructions, it should be construed most favorably to the accused. Carawan, 516 So.2d 168; § 775.021(1), Fla. Stat. (1985).

This type of situation--carrying a concealed firearm which also results in a felon in possession of a firearm—is analogous to the situation in Hall v. State, 517 So.2d 678 (Fla. 1988). In Hall, this Court held that armed robbery and possession of a firearm, when both arose from the same act, constituted only one criminal act; and to convict of both violated double jeopardy provisions. Based on the foregoing, the Appellant's sentence on the charge of carrying a concealed weapon violated constitutional protections against double jeopardy and should be vacated.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Second District Court of Appeals' decision in Mr. Skeens' case should be reversed. Mr. Skeens should be resentenced on the charge of felon in possession of a firearm, and his sentence for carrying a concealed firearm should be vacated.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michelle Taylor, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670 on this 20th day of October, 1989.

Respectfully submitted,

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