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app #8

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

vs. Case No. 74,251

ROBERT L. JOHNSON,

Respondent.

_____/

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

BRIEF OF PETITIONER ON MERITS

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

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The State of Florida will rely the pertinent facts set forth by the Second District Court of Appeal in its opinion below:

> The state charged the defendant with sale and possession of cocaine, violations of sections 893.13(1)(a) and 893.13(1)(e), Florida Statutes (1987). The offenses occurred when the defendant sold cocaine "hand to hand" to a St. Petersburg undercover detective for twenty dollars. The jury found the defendant guilty of both charges. The court sentenced the defendant to seven years imprisonment.

Relying on Hatten v. State, 542 So.2d 1061, (Fla. 2nd DCA 1989), 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 Johnson's conviction for possession of cocaine should be set aside.

On May 26, 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 June 2, 1989. This Court granted jurisdiction on September 26, 1989. The instant brief on the merits follows.

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 sale and simple possession of cocaine. There is no ex post facto violation since the amendment to 8775.021 did not substantively change the meaning of the law or change the punishments but rather merely clarified what the law always has been.

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, 19891. 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 August 26, 1986. 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 Wheeler v. State, 14 F.L.W. 1946 (Fla. 1st DCA August 16, 1989), the First District indicated that simple possession of a controlled substance is a separate offense than the sale, purchase, or delivery of a controlled substance:

> The structure of section 893.12(1)(a) indicates that sale and possession with intent to sell are alternative ways of violating this particular subsection of the statute and that the legislature intended by this subsection to punish either the completed sale, manufacture or delivery of an illegal drug, or the frustrated sale, manufacture or delivery of the drug (by charging possession of the drug with the intent to sell, manufacture or delivery it), but not ~~both~~ when the same drug and the same transaction are involved. In other words, the legislature intended that in such a circumstance there has been only one violation of the subsection. It is logical to assume that if a contrary result had been intended, the legislature would have proscribed each offense in separate subsections of the statute, as it did with simple possession of a controlled substance in section 893.13(1)(e) [1985].

14 F.L.W. at 1946. The Wheeler court also noted that simple possession is not a necessarily lesser included offense of sale, according to the Florida standard jury instructions schedule of lesser included offenses, because the definition of sale does not require proof of possession. 14 F.L.W. at 1948, fn. 9.

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 §775.021, 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 legislature intended that the crimes of possession and sale of cocaine are separate offenses because they do not fall under any of the exceptions 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.

Therefore the legislature has always intended that simple possession and sale of cocaine are two separate offenses.

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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Brenda S. Taylor
BRENDA S. TAYLOR
Assistant Attorney General
Fla. Bar **0778079**
Park Trammell Building
1313 Tampa Street
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 Brad Permar, Assistant Public Defender, 5100-144th Avenue, Clearwater, Florida **33518** this 23rd day **of** October, **1989**.

Brenda S. Taylor
COUNSEL FOR PETITIONER