

IN THE SUPREME COURT OF FLORIDA

ARTIS RYNARD LEWIS, :

Petitioner,

vs ■

DCA No. 88-1841

STATE OF FLORIDA,

Respondent.

74 364

FILED

JUN 22 1988

CLERK OF DISTRICT COURT
By: *[Signature]*

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

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, ARTIS RYNARD LEWIS, 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 appendix to this brief contains a copy of the decision rendered June 14, 1989.

STATEMENT OF THE CASE AND FACTS

On December 29, 1987, the State filed an information in the Circuit Court for Polk County charging Petitioner, ARTIS LEWIS, with Count One, possession of Cocaine in violation of section 893.13, Florida Statutes (1987); and Count Two, Purchase of Cocaine in violation of section 893.13, Florida Statutes (1987).

These offenses allegedly occurred on December 10, 1987 (R1-3) .

Petitioner filed a Motion to Dismiss Counts One and Two of the information based on the unconstitutionality of Chapter 87-243, Laws of Florida (R5-25). After a hearing held February 15, 1988, (R203) the court denied the motion (R204-207) .

On April 13 and 14, 1988, Petitioner was tried by jury, the Honorable E. Randolph Bentley, Circuit Judge presiding (R208-400). Petitioner was convicted of both counts (R431-432) .

On May 16, 1988, Petitioner was sentenced as follows: Petitioner **was** adjudicated guilty on Count One and sentenced to three and one half years incarceration (R437, 443-444) . Petitioner was adjudicated guilty on Count Two and sentenced to time served (R437, 441-442) . The recommended guidelines disposition indicated a presumptive sentence of 2 1/2 to 3 1/2 years incarceration (R445) .

On June 17, 1988, Petitioner filed a timely Notice of Appeal (R449) .

On appeal, Mr. Lewis raised the issue that section 893.13, Florida Statutes (1987) was unconstitutional as it violated the "one subject rule" of Article 111, Section 6 of the Florida Constitution. Mr. Lewis further argued that it was error to convict and sentence him for both possession and purchase of cocaine due to the double jeopardy provision of the constitution. The factual situation was that Mr. Lewis purchased a single piece of cocaine from undercover agents during a reverse sting operation.

The Second District affirmed Mr. Lewis' conviction for purchase of cocaine and found section 893.13, Florida Statutes (1987) to be constitutional. The Second District reversed Mr. Lewis' conviction for possession of cocaine, finding it to be in violation of double jeopardy.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeals relied upon two cases currently pending before this court upon certified questions, Blankenship v. State, Case No, **74,176** and Gordon v. State, Case No. 72,850 in determining that section **893.13**, Florida Statutes (1987) did not violate the single subject rule of the Florida Constitution and that double jeopardy provisions bar convictions **for** both purchase and possession of a single piece of cocaine. This court may exercise discretionary jurisdiction pursuant to Florida Rules of Appellant Procedure 9.030(2)(a)(i) and Florida Rules of Appellate Procedure 9.030(2)(a)(v). Fairness requires that the case, sub iudice be heard.

ARGUMENT

ISSUE I

WHETHER THE DECISION BELOW PASSES UPON THE CONSTITUTIONALITY OF A STATUTE AND WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISION .

The Second District specifically found section 893.13, Florida Statutes (1987) to be constitutional. In doing so it relied upon Blankenship v. State, Case No. 88-01349 (Fla. 2d DCA April 12, 1989)[14 FLW 9501 ~~review pending~~ Case No. 74,176. In Blankenship, the Second District certified the following question as one of great public importance:

Does section 893.13, Florida Statutes (1987) violate the one subject rule of the Florida Constitution?

This court may exercise jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(2)(a)(i) and Florida Rules of Appellate Procedure 9.030(2)(a)(v). This court has accepted jurisdiction in Blankenship.

District court opinions which cite as controlling authority a decision that is pending review in the Supreme Court constitutes prima facie express conflict and allows this court to exercise jurisdiction. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

It would be a gross miscarriage of justice to deny Petitioner review while affording review to those in Blankenship.

The Second District further relied upon Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988) ~~review pending~~ Case No. 72, 850

as authority for finding that double jeopardy had been violated. In Gordon the Second District certified the following question as one of great public importance.

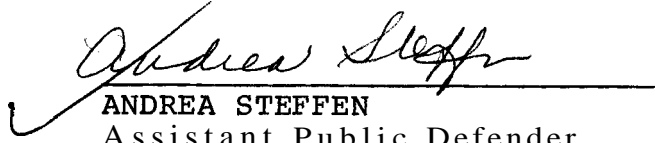
IN APPLYING CARAWAN V. STATE, 515 SO.2D 161 (FLA. 1987) TO THE FACTS OF THIS CASE, DO CONVICTIONS AND SENTENCES FOR THE SALE OF ONE ROCK OF COCAINE AND POSSESSION WITH INTENT TO SELL THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY PROTECTION PROVIDED BY THE STATE AND FEDERAL CONSTITUTIONS.

Just as in Blankenship, this court has accepted jurisdiction in Gordon. For the same reason as previously noted, this court should accept jurisdiction of the case sub iudice.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey, Jr., Assistant Attorney General at the Tampa Attorney General's Office, 1313 Tampa Street, Suite 804, Tampa, FL 33602, (813) 272-2670 on this 5th day of July, 1989.

Respectfully submitted,


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