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IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,607

THE STATE OF FLORIDA,

Petitioner,

vs.

ROY KENNETH FINNEY,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, the State of Florida, was the prosecution in the trial court and the Appellant on appeal. The respondent, Roy Kenneth Finney, was the defendant in the trial court and the Appellee in the Third District Court of Appeal. In this brief the parties will be referred to as they appear before this Court. The symbol "R" will be used to designate portions of the record on appeal. The symbol "T" will be used to designate portions of the transcript of the proceedings below.[1] The symbol "A" followed by a number will constitute a page reference to the appendix being filed by petitioner along with this brief. All emphasis is supplied unless the contrary is indicated.

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[1] The original transcript containing the argument by counsel to the trial court was replete with errors. The Third District granted the petitioner's motion to correct the record on appeal, and accepted the certified corrected portions of the transcript.

STATEMENT OF THE CASE AND FACTS

On August 23, 1978, the respondent was charged by amended information no. 78-3254, with four counts of robbery with a firearm in violation of Section 812.13, Florida Statutes (1977), one count of attempted robbery with a firearm, in violation of Sections 812.13 and 777.04(1), Florida Statutes (1977), and one count of unlawful possession of a firearm while engaged in a criminal offense, to wit: robbery, in violation of Section 790.07, Florida Statutes (1977). (R. 3-6A.) After a trial by jury, the respondent was convicted of three counts of robbery with a firearm, one count of attempted robbery with a firearm, and one count of unlawful possession of a firearm while engaged in a criminal offense. (R. 9.) The respondent was sentenced to life imprisonment on the three counts of robbery with a firearm, fifteen (15) years on the count of attempted robbery with a firearm, and five (5) years on the count of unlawful possession of a firearm while engaged in a criminal offense. All sentences were to run concurrently.

On May 22, 1984, the respondent filed his first motion for post-conviction relief. The motion was summarily denied on October 26, 1984. (R. 10); (T. 99-100.) On January 6, 1985, the respondent filed a petition for writ of habeas corpus in the Third District Court of Appeal. The Third District granted the petition and the respondent was permitted to file a belated direct appeal. (R. 10.); (T. 101). The respondent also appealed the denial of his motion for post-conviction relief. On

February 17, 1987, the Third District affirmed the respondent's convictions and sentences, as well as the denial of the motion for post-conviction relief. Finney v. State, 502 So.2d 519 (Fla. 3d DCA 1987). (R. 10.)

On March 23, 1988, the respondent filed his second motion for post-conviction relief. The motion was denied without prejudice on April 12, 1988. (R. 8.) On April 27, 1988, the respondent filed his third motion for post-conviction relief, He raised two grounds, 1) that he was denied effective assistance of counsel, and 2) that his conviction for unlawful possession of a firearm during the commission of a felony was illegal. (R. 29-48.)

On December 20, 1988, an evidentiary hearing was held on the respondent's motion for post-conviction relief. The trial court recessed the hearing in the middle of the testimony of the respondent's original trial counsel. (T. 116.) The trial court then considered the issue of the validity of the respondent's conviction for the unlawful possession of a firearm during the commission of a felony. (T. 121-126.) The petitioner argued that Hall v. State, 517 So.2d 678 (Fla. 1988), was not retroactive and did not apply to motions for post-conviction relief, citing Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988), review denied, 536 So.2d 244 (Fla. 1988), and Love v. State, 532 So.2d 1133 (Fla. 4th DCA 1988). (T. 121-123.) The trial court agreed with and felt it was bound by the Third District's opinion in Henderson v. State, 526 So.2d 743 (Fla. 3d DCA 1988), in which the Third District reversed a summary denial

of a motion for post-conviction relief and on the basis of Hall v. State, supra, and vacated the defendant's conviction for possession of a firearm in the commission of a felony. The trial court then granted the respondent's motion for post-conviction relief in part by vacating the respondent's conviction for unlawful possession of a firearm while engaged in a criminal offense. (T. 124.) On January 4, 1989, the trial court rendered its written order granting the motion for post-conviction relief in part. (R. 50.) On January 6, 1989, the petitioner filed its notice of appeal. (R. 51.)

On August 1, 1989, the Third District Court of Appeal filed its opinion affirming the trial court's order, but certified that its holding that Carawan v. State, 515 So.2d 161 (Fla. 1987), and Hall v. State, 517 So.2d 678 (Fla. 1988), apply retroactively in post-conviction proceedings, was in conflict with the decisions in Love v. State, 532 So.2d 1133 (Fla. 4th DCA 1988), and Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988). (A. 1-2.) The petitioner timely commenced this proceeding on August 15, 1989, by filing a Notice of Intention to Invoke Discretionary Jurisdiction of this Court. On August 24, 1989, this Court issued its briefing schedule for the briefs on the merits.

QUESTION PRESENTED

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT's ORDER GRANTING THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF IN PART BY VACATING THE DEFENDANT'S CONVICTION FOR THE UNLAWFUL POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, WHERE Hall v. State, 517 So.2d 678 (Fla. 1988), SHOULD NOT BE APPLIED RETROACTIVELY?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal's decision in the instant case applied Carawan v. State, 515 So.2d 161 (Fla. 1987), and Hall v. State, 517 So.2d 678 (Fla. 1988), retroactively to the respondent's motion for post-conviction relief. This Court's decisions in Carawan and Hall are evolutionary refinements in the law and do not represent a major constitutional change that is required for retroactive application under Witt v. State, 387 So.2d 922 (Fla. 1988). Furthermore, the petitioner submits that Hall v. State, supra, should be reconsidered as it misapplied Carawan, in that it effectively repealed Section 790.07(2), Florida Statutes, where there was no indication of legislative intent to do so.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S ORDER GRANTING THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF IN PART BY VACATING THE DEFENDANT'S CONVICTION FOR THE UNLAWFUL POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, WHERE Hall v. State, 517 So.2d 678 (Fla. 1988), SHOULD NOT BE APPLIED RETROACTIVELY.

The issue before this Court is simply whether Hall v. State, 517 So.2d 678 (Fla. 1988), which holds that a defendant cannot be convicted for both armed robbery and possession of a firearm while committing that robbery, is to be applied retroactively to cases in which the issue is raised for the first time in a motion for post-conviction relief. The Third District in the instant case applied this Court's decisions in Carawan v. State, 515 So.2d 161 (Fla. 1987), and Hall v. State, 517 So.2d 678 (Fla. 1988), retroactively to the respondent's motion for post-conviction relief, thereby vacating the respondent's conviction for unlawful possession of a firearm during the commission of a felony. (A. 1-2); State v. Finney, ___ So.2d ___, 14 F.L.W. 1811 (Fla. 3d DCA August 1, 1989). See also Pastor v. State, 536 So.2d 356 (Fla. 3d DCA 1988), review granted, Case No. 73,780 (Fla. June 6, 1989); Henderson v. State, 526 So.2d 743 (Fla. 3d DCA 1988). The petitioner recognizes that the Second District Court of Appeal has also held Carawan and

Hall to be retroactive to post-conviction motions. See, e.g., Merckle v. State, 541 So.2d 1312 (Fla. 2d DCA), review granted, Case No. 74,106 (Fla. June 30, 1989); Jenson v. State, 538 So.2d 540 (Fla. 2d DCA), review granted, Case No. 73,828 (Fla. June 5, 1989); Glenn v. State, 537 So.2d 611 (Fla. 2d DCA 1988), review granted, Case No. 73,496 (Fla. May 3, 1989).

However, contrary to the holdings of the Second and Third Districts, the First District Court of Appeal in Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988), review denied 536 So.2d 244 (Fla. 1988), held that there was nothing discernible in Hall v. State, supra, which would make those decisions apply retroactively or to constitute fundamental error under the reasoning in Witt v. State, 387 So.2d 922 (Fla. 1980). 520 So.2d at 640. The Fourth District, in Love v. State, 532 So.2d 1133 (Fla. 4th DCA 1988), review granted, Case No. 73,401 (Fla. Mar. 17, 1989), likewise held that Hall was not retroactive and refused to apply the case upon the defendant's appeal from resentencing. In addition, the Fifth District in Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988), held that Carawan v. State, supra, did not apply retroactively to a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. Thus, as the Third District recognized and certified in the instant case, there exists a conflict among the district courts of appeal on this issue which must be definitively resolved by this Court.

In Witt v. State, 387 So.2d 922 (Fla. 1980), this Court recognized the importance of finality in the criminal justice

system, in that the "absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole." Id. at 925. Thus, this Court held that the post-conviction relief procedures as offered by Rule 3.850 of the Florida Rules of Criminal Procedure allow a defendant to challenge a once final judgment and sentence only in limited instances, and for limited reasons. Id. Those limited circumstances which are cognizable under Rule 3.850 are those which constitute "major constitutional changes in the law." Id. at 929. (Emphasis original.)

Most major consitutional changes in the law are either (1) those changes which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties, i.e., Coker v. Georgia, 433 U.S. 584 (1977), which prohibited the imposition of the death penalty for the crime of rape; or (2) those changes which meet the three prong test for retroactivity as set forth in Stovall v. Denno, 388 U.S. 293, 297 (1967), i.e., (a) the purpose to be served by the new rule, (b) the extent of reliance on the old rule, and (c) the effect on the administration of justice of a retroactive application of the new rule. 387 So.2d at 929. This Court in Witt then went on to state:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these

> categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.
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> Id. at 929-30 (footnote omitted.)

The petitioner submits that in applying the principles of Witt, this Court must conclude that the decision in Carawan v. State, supra, and its progeny, Hall v. State, supra, were evolutionary refinements of the law and not ones which should have retroactive application. In McCuiston v. State, 534 So.2d 1144 (Fla. 1988), this Court held that its decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986), holding that finding a defendant to be an habitual offender was not a legally sufficient reason for departing from the recommendation of the sentencing guidelines, was not to be applied retroactively to motions for post-conviction relief. This Court held that Whitehead was an evolutionary refinement of the law because of the conflicting decisions of the district courts of appeal as to what constituted proper reasons for departing from the guidelines. 534 So.2d at 1146.

Like Whitehead, supra, Carawan, supra, and Hall, supra, reflect the same kind of evolutionary refinement of the law. In Carawan, this Court recognized that in double jeopardy cases, prior decisions of this Court attempting to divine the

legislative intent behind penal statutes was confusing. 515 So.2d at 163. In fact, this Court accepted jurisdiction in Carawan "to elaborate the constitutional and statutory rationale upon which our prior decisions [were] grounded." Id. Similarly in Hall, supra, this Court noted the development of analysis from the strict Blockburger[2] test applied in State v. Gibson, 452 So.2d 533 (Fla. 1984), to a broader analysis of legislative intent applied in Mills v. State, 476 So.2d 172 (Fla. 1985); Houser v. State, 474 So.2d 1193 (Fla. 1985), and State v. Bolvin, 487 So.2d 1037 (Fla. 1986). 517 So.2d at 679. Thus, the decisions in Carawan and Hall are simply evolutionary developments in the law.

Furthermore, in determining whether Carawan and Hall should be applied retroactively, this Court should consider the three prong test of Stovall v. Denno, supra. While the purpose behind the rule of construction announced in Carawan is to prevent perceived double jeopardy violations for crimes occurring out of a single act, that purpose has been significantly diluted by the legislature's recent amendment to Section 775.021, Florida Statutes (1988), which not only served to clarify its intention to allow separate convictions for the respondent's crimes, but also to override Carawan. See State v. Smith, So.2d ___, 14 F.L.W. 308 (Fla. June 22, 1989). As to the remaining two prongs of Stovall, clearly there was great reliance on the prior interpretation of Section 775.021 as delineated in State v.

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[2] Blockburger v. United States, 284 U.S. 299 (1932).

Gibson, supra. Furthermore, a retroactive application of Carawan and Hall in post-conviction motions would have a detrimental effect on the administration of justice. As noted by Justice Shaw in his concurring and dissenting opinion in State v. Smith, supra, there have "already been numerous, and will no doubt be many more, petitions for post-conviction relief granted on Carawan." 14 F.L.W. at 310. These petitions put a great strain on an already overwhelmed judicial system. Thus, for these reasons this Court should not apply Carawan and Hall retroactively to post-conviction motions.

The petitioner would further submit that this Court should reconsider Carawan and Hall, particularly in its determination of legislative intent. In Hall, this Court held that it was unreasonable to presume that the legislature intended to double the enhancement of the crime of robbery committed while carrying a firearm, under both Sections 812.13(1) and (2)(a), Florida Statutes, and Section 790.07(2), Florida Statutes (carrying a firearm while committing a felony). 517 So.2d at 680. However, what this Court failed to consider in Hall and the district courts in their interpretation of Hall[3] is that these decisions had effectively repealed Section 790.07(2) for all cases except first degree murder[4] because first degree murder

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[3] See, e.g., McKinnon v. State, 523 So.2d 1238 (Fla. 1st DCA 1988).

[4] However, the Third District in Gonzalez v. State, 543 So.2d 386 (Fla. 3d DCA 1989), incorrectly applied Carawan to dual convictions for first degree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense.

cannot be reclassified under Section 775.087(1)(b), Florida Statutes. This is because under Hall once a defendant is convicted of the felony, he cannot also be convicted under Section 790.07(2), and if a defendant is acquitted of the felony, then he also must be acquitted of the charges under Section 790.07(2). See Redondo v. State, 403 So.2d 954 (Fla. 1981).(5) It is absurd to believe that the legislature intended to repeal Section 790.07(2), except for first degree murder where the penalty is death or life imprisonment. Rather, it is clear that the legislature intended that a defendant who uses a firearm to commit a felony receive separate punishments for the crimes.(6)

("Except in cases where it is possible due to jury instructions for the jury to find the defendant not guilty of the complete felony but could have found him guilty of an attempt. See Pitts v. State, 425 So.2d 542 (Fla. 1983).

(6) In addition, the petitioner submits that this Court should reconsider its application of Carawan's rule of lenity as it determines whether the two statutory provisions manifestly address the same evil. In State v. Crumley, 512 So.2d 183 (Fla. 1987), this Court held that a defendant could not be separately convicted for the offenses of aggravated battery and battery on law enforcement officers because the statutes were both enhancements of battery and thus did not address separate evils. What this Court overlooked is that each enhancement represented a different evil, i.e., protection of law enforcement officers, and to punish one for using a deadly weapon. Under Crumley, the conviction for battery of a law enforcement officer would be vacated, and the defendant would be treated in the same manner as anyone who commits an aggravated battery on any person. The law enforcement officer loses the protection that the legislature clearly intended for him to receive.

(FOOTNOTE CONTINUED)

Thus, the petitioner submits that this Court should hold that Carawan and Hall are not to be applied retroactively to post-conviction motions. It is clear that Carawan was a misinterpretation of the legislature's intent, an interpretation which was promptly corrected by amending Section 775.021. This Court should not compound the problem and give relief to persons whose conviction and sentences were clearly permissible and legal at the time they were entered and which would be permissible today. This Court should reverse the Third District Court's opinion in the instant case, and affirm the holdings of Harris v. State, supra, and Love v. State, supra.

(FOOTNOTE (6) CONTINUED)

Similarly, the district courts have not always properly applied Carawan's rule of lenity. For example, in Adams v. State, ___ So.2d ___, 14 F.L.W. 1895 (Fla. 5th DCA August 10, 1989), the Court held that a defendant could not be convicted for both burglary with a battery and aggravated battery. That decision treats a person who commits a burglary and simply hits a person within the structure in the same manner as a person who commits a burglary and uses a deadly weapon to strike the person. Again, the legislature's desire to deter someone from using a deadly weapon is for naught. See also Rivera v. State, ___ So.2d ___, 14 F.L.W. 1021 (Fla. 4th DCA April 26, 1989), where court held that the defendant could not be convicted for both attempted first degree murder and aggravated child abuse. This decision is in direct conflict with Carawan itself which reaffirmed this Court's prior holding in Scott v. State, 453 So.2d 798 (Fla. 1984), upholding dual convictions for manslaughter and child abuse. 515 So.2d at 169.

CONCLUSION

For the foregoing reasons, the petitioner submits that the Third District Court of Appeal's opinion affirming the trial court's order granting in part the respondent's motion for post-conviction relief and vacating the respondent's conviction for unlawful possession of a firearm during the commission of a felony should be reversed by this Court and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded to Marti Rothenberg, Assistant Public Defender, 1351 Northwest 12th Street, Miami, Florida

33125, and Giselle Lylen, Assistant Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, on this the 14 day of September, 1989.

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