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APP reg

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,124

THE STATE OF FLORIDA,

Petitioner,

vs.

WILLIAM ZANGER,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON "HE MERITS

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PRELIMINARY STATEMENT

This is a petition for review from a decision by the Third District which has been certified to be in conflict with Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1981). Petitioner, the State of Florida, was the Appellee below and the prosecution in the trial court. Respondent, William Zanger, was the Appellant below and the defendant in the trial court. In this brief, the parties will be referred to as the "State" and the defendant. The symbols "R." and "T." will be used to refer to portions of the record on appeal and the transcripts of the lower court proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The state charged the defendant (along with nine others) with violation of the Florida Racketeering Influence and Corrupt Organization Action, criminal conspiracy to violate that act, armed robbery, armed burglary of a dwelling, burglary of a dwelling with assault, armed kidnapping, possession of a firearm in the commission of a felony, and trafficking in stolen property. (R. **33-54**).

A jury trial was conducted from October **23**, through November **6, 1987**. (R. **58-77**). The defendant was convicted of armed robbery with a firearm, three counts of false imprisonment, armed burglary of a dwelling with a deadly weapon, burglary of a dwelling with assault, and trafficking in stolen property. (R. **213-15**). The recommended sentence under the guidelines was **5 1/2** to **7** years. (R. **224**). The trial court gave two written reasons for departure and sentenced the defendant to concurrent terms of twenty five years as to the armed robbery, armed burglary and burglary with an assault convictions, (R. **220**) a fifteen year sentence as to the dealing in stolen property conviction to run concurrently with the other counts, and *two* concurrent terms of five years as to the three false imprisonment convictions. (R. 22, **225-26**).

On appeal, the Third District reversed the convictions for burglary of a dwelling with assault and for trafficking in stolen property. (R. 243-244) The court certified conflict with Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980) regarding the conviction for dealing in stolen property and remanded for resentencing within the guidelines. (R. 244) Only the convictions for armed robbery and trafficking in stolen property are relevant to this petition for review. This Court accepted jurisdiction on the basis of the certified conflict.

STATEMENT OF THE FACTS

At 9:00 p.m. on August 29, 1984, Jason Ambers noticed someone outside of his North Miami home fooling around with his stepfather's car. (T. 98). Shortly thereafter his stepfather John Buhler exited his home and asked the man what he was doing around his car. (T. 102). The man claimed he was looking for an address. (T. 102). The stepson asserted that when he heard the address which the defendant was asking for and the purported name at that address, he immediately became suspicious because he knew the person who lived at that address. (T. 271-74).

The stepson testified he confronted the defendant with that fact, whereupon a second man stepped out from bushes nearby to the front porch. (T. 274). The latter (identified as McCurry) had a weapon, told them to place their hands on their heads or he would "blow their fucking brains out", and forced the two inside the house. (T. 275).

While Mr. Buhler heard different voices inside the house he stated he did not see the defendant inside. (T. 106). McCurry had him lie down on the floor and place his hands behind his back so that they could be tied. (T. 105). Mrs. Buhler was told to lie down in the kitchen and had her hands tied behind her back with something like a venetian blind cord. (T. 178). Her

son, Jason Ambers, asserted the defendant actually tied his hands behind his back. (T. **280,281).**

The two robbers proceeded to take: some jewelry from the bathroom (T. 182), Mr. Buhler's pants which had **$1,200** or **$1,300** in cash in the pockets (T. 114), some coins and gold chains (T. **172**, 283), and Mrs. Buhler's rings. (T. **182, 282).** The Buhlers estimated they had taken from them and their home approximately one hundred thousand dollars in jewelry and cash. (T. **115, 147).** The two intruders took the keys to the Buhlers' car and drove away to the prearranged meeting place with the third cohort, Magnoli, who planned the home invasion robbery. (T. **666)**

Magnoli testified that he, McCurry and the defendant returned to his apartment where they split the cash evenly among the three of them. (T. **670).** The following day the defendant Zanger took the jewelry "to fence". (T. **670-672).** Several hours later the defendant met McCurry and Magnoli at a bar and gave them **$5000** in cash each, which was the proceeds from the "sale of the jewelry". (T. **672-73).** In reversing the conviction for trafficking in stolen property the district court held:

> First, it was error to convict the defendant of trafficking in stolen property when the property fenced was the same property that was taken from the victims and for which course of conduct the defendant was also convicted of robbery and burglary. In this case,

> the morning after the robbery, the defendant and his cohorts sold the jewelry taken from the victims and split the proceeds. Clearly, under the circumstances, this constituted a continuing deprivation of the victims' property which was "all a portion of the same scheme or course of conduct." Jones v. State, 453 So.2d 1192, 1194 (Fla. 3d DCA 1984). Consequently, under this court's holding in Jones and section 812.025, Florida Statutes (1987), the defendant's conviction for trafficking in stolen property must be reversed. Recognizing that this holding conflicts with that of the first district in Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980), we certify this issue to the supreme court.

(R. 244).

QUESTION PRESENTED

WHETHER SECTION 812.025, FLORIDA STATUTES IS EQUALLY APPLICABLE TO DUAL CONVICTIONS FOR ROBBERY AND DEALING IN STOLEN PROPERTY BASED ON ONE SCHEME OR COURSE OF CONDUCT.

SUMMARY OF THE ARGUMENT

The district court's decision which reversed the defendant's conviction for trafficking in stolen property where he was also convicted of armed robbery was error. Section 812.025 Florida Statutes (1983), which permits the jury to elect between returning a guilty verdict for theft and dealing in stolen property in connection with one scheme or course of conduct, is not equally applicable to robbery. First, unlike the earlier definitions of receiving stolen property, the new statutory definition of dealing in stolen property does not render the offenses of dealing in stolen property and robbery inconsistent offenses. Trafficking in stolen property requires the person to dispose of the stolen property and thus do more than just receive stolen property.

Second, based on principles of statutory construction, there is no reason to expand the statute to encompass robbery. If the legislature intended the statute to also prohibit guilty verdicts on robbery and dealing in stolen property, it would have said so.

Third, robbery is distinguishable from theft in that it requires the additional element of force or violence to precede or accompany the taking. Additionally, in a theft, unlike a robbery, the property need not be taken from the person.

Therefore, there is no reason based on section **812.025,** to prohibit convictions for both dealing in stolen property and robbery.

As a secondary matter, since the case sub judice fell within the period when Carawan v. State, **515** So.2d **161** (Fla. **1987)** controlled, the State has addressed whether the two convictions should be upheld. First of all, Carawan does not apply because there were multiple acts committed. However, even if only one act occurred, the two crimes have separate elements and separate evils. Accordingly, the cause should be reversed and remanded to the district court to affirm the conviction for dealing in stolen property.

ARGUMENT

SECTION 812.025, FLORIDA STATUTES IS NOT EQUALLY APPLICABLE TO PROHIBIT DUAL CONVICTIONS FOR ROBBERY AND DEALING IN STOLEN PROPERTY RASED ON ONE SCHEME OR COURSE OF CONDUCT.

The district court certified that its decision passed upon a question which is in conflict with the First District's decision in Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980).[1] The issue presented by this appeal is whether notwithstanding the statute's facial application to theft, as opposed to robbery, section 812.025 should be construed as equally applicable to robbery so as to prohibit dual convictions for'dealing in stolen property and robbery. The State submits the certified question should be answered in the negative on the basis of principles of statutory construction and public policy. The district court's decision should be reversed on this point.

Section 812.025, Florida Statutes (1983) which was enacted in Chapter 77-342, Laws of Florida as part of a broad revision of laws relating to theft and stolen property provides as follows:

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[1] The present case is also in conflict with Heselton v. State, 463 So.2d 275 (Fla. 2d DCA 1984).

> Notwithstanding any other provision of law, a single indictment or information **may,** under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts.

In a well-reasoned opinion the First District in Coley held inter alia, that it was not error to permit a jury verdict of guilty on charges of armed robbery and dealing in stolen property. Coley, 391 So.2d at 726. Under the common law, earlier statutes, and Florida case law when the same property, the same larceny and the same person as principal are involved, "larceny and receiving stolen property are inconsistent offenses so that one cannot at the same time commit both offenses as to the same property." Id. at 727, citing Adams v. State, 60 Fla. 1 53 So. 451 (1910); State v. Brooks, 384 So.2d 417 (Fla. 1st DCA 1977); Brizzie v. State, 120 So.2d 27 (Fla. 2d DCA 1960). The Court explained the reason for the rule prohibiting convictions of both larceny and receiving stolen property. Id. at 727. The reason "lies in the fact that the actions which constitute the taking or asportation of the property so far as the larceny is concerned are inseparable from those actions which constitute the receiving or concealment of the property." Id. Simply stated, the one who is guilty of the actual caption and asportation cannot be adjudged guilty of criminally receiving the thing

stolen, for the reason that he cannot receive from himself. 16 Fla.Jur.2d Criminal Law §1439 (1984).

However, the Court in Coley was wise to point out that this rule is no longer applicable because the statutory offense of "dealing" or "trafficking" in stolen property under Section 812.019, Florida Statutes (1983) differs substantially from the old common law offense of "receiving stolen property." The Court explained:

> The offense of dealing in stolen property is committed not merely by possessing stolen property knowing the same to be stolen, which was essentially the former offense of "receiving stolen property." The offense of "dealing" in stolen property is committed by one who "traffics" in such property, the term "traffic" as defined in Section 812.012(7)(a) meaning "To sell, transfer, distribute, dispense or otherwise dispose of property:, or, under subparagraph (7)(b), "To buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property." We conclude, therefore, that the actions which constitute the offense of dealing in stolen property encompass the sale, distribution or transfer of the property, or the receiving, possessing or obtaining control of the property with the intent to sell, transfer or distribute it. These additional elements, furthermore, are separate and distinct from the essential elements of the crime of theft.

Id, Accord Lancaster v. State, 369 So.2d 687 (Fla. 1st DCA 1979) (Defendant who bought engine and kept it for himself knowing it was stolen could not be convicted of trafficking in stolen property). Thus, to commit dealing in stolen property under the new statutory definition, the defendant must do more than simply receive or possess property known to be stolen. One must either dispose of it by transfer to another or receive, possess, obtain control of or use property with the intent to somehow dispose of the property to another. §§812.012(7)(a),(b), Fla. Stat. (1983).

As the Court also noted in Coley, there is no reason to expand the operation of the statute to any crime not specified by its terms. Coley, 391 So.2d at 727. The familiar canon of statutory construction, "the expression of one thing excludes another," which is simply to the effect that a statutory reference to particular items implies the exclusion of similar matters which are not mentioned, also supports the conclusion that if the legislature had intended the statute to apply to the offense of robbery it would have said so. Id, See E.g., State v. Diers, 532 So.2d 1271 (Fla. 1988) (adopting State v. Weston, 510 So. 2d 1001 (Fla. 3d DCA 1987); Thayer v. State, 335 So.2d 815 (Fla. 1976). The State maintains that Section 812.025 represents a conscious decision by the legislature to limit a guilty verdict to either a charge of theft or dealing in stolen property in order to incorporate the principle, although it is no longer necessary, that under the previous statutes, the two offenses

offenses were inconsistent at law. The statute was not intended to apply to robbery as well.

The third reason provided by the Coley decision not to construe section 812.025 so as to be applicable to the offense of robbery is that the additional element of force or violence precedes or accompanies the taking distinguishing it from a theft. Coley, 391 So.2d at 727. An additional distinction between theft and robbery is that unlike robbery, in a theft the property need not be taken from the person or in the presence of another. Williams v. Mayo, 126 Fla. 871, 172 So. 86 (1937).

Separate and apart from these reasons, one of the purposes of Section 812.025 is to allow the jury to elect between returning a guilty verdict for theft or dealing in stolen property. Dealing in stolen property is a second degree felony. 8812.019, Fla. Stat. (1983). The majority of theft's committed are either second or third degree felonies involving between $300 to $20,000 or $20,000 to $100,000. §§812.014(2)(b),(2)(c), Fla. Stat. (1983). Thus, when the jury elects between theft and dealing in stolen property, both crimes usually involve second degree felonies and similar punishments. §775.082(3)(c), Fla. Stat. (1983) However, the State cannot envision any reason which exists to give the jury an election for whimsical reasons between dealing in stolen property and robbery without any consideration as to whether first or second degree robbery is involved which,

unlike theft, requires the additional elements of force and the use of a firearm. Furthermore, an armed robbery conviction, which is a first degree felony, subjects the defendant to a greater penalty than dealing in stolen property or grand theft-second degree. §812.13(2)(a), 775.082(3)(b),(3)(c), Fla. Stat. (1983).

Moreover, the Third District in the case sub judice completely missed the mark by relying upon Jones v. State, 453 So.2d 1192, 1194 (Fla. 3d DCA 1984). In Jones the defendant was charged with, among other things, grand theft for stealing a car and dealing in stolen property for selling the stolen car stereo two days later. The State unsuccessfully tried to circumvent section 812.025 by limiting the grand theft count to the stolen car and limiting the dealing in stolen property count to the stereo component system. The court rejected the State's position and held:

> Since the theft of the car and the stereo and the sale of the stereo two days later were all a portion of the "same scheme or course of conduct", see Kelly v. State, 397 So.2d 709 (Fla. 5th DCA 1981), the convictions and sentences for both grand theft and dealing in stolen property cannot stand.

Id

The focus of the decision was on whether the two day time delay in pawning the stolen items constituted a different scheme or course of conduct. Here, the State does not dispute that the robbery and dealing in stolen property charges were "one scheme or course of conduct." There was no discussion in Jones regarding the applicability of Section 812.025 to robbery. Thus, Jones has no application to the issue in this case.

If this Court finds that the prohibition of Section 812.025, Florida Statutes is not applicable to the offense of robbery, since the case sub judice fell within the time period when Carawan v. State, 515 So.2d 161 (Fla. 1987) controlled the State will also analyze whether Carawan prohibits dual convictions for dealing in stolen property and armed robbery.[2]

First of all, the State submits that Carawan does not apply to this case because the defendant committed multiple acts or a transaction. Carawan, 515 So.2d 170, n.8 (Fla. 1987). Here, the defendant and another committed among other crimes, a home invasion robbery wherein they obtained jewelry and money by force and while armed with a hand gun. The victims estimated approximately $100,000 in jewelry and cash were taken during the robbery. The following day the defendant sold or otherwise disposed of the stolen jewelry which netted $5000 each for the

[2] Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980) preceded Carawan.

defendant and the two accomplices. Thus, the defendant committed a series of at least two acts warranting separate punishment.

Alternatively, even if this Court finds only a single act was committed since it cannot be said with certainty what the legislature intended regarding the penalties for these two offenses the first step in the Carawan analysis is to use the test established in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and compare the elements of the two crimes to determine whether each offense as defined in the statute requires proof of a fact that the other does not, without regard to the accusatory pleadings or proof adduced at trial. Carawan, 515 So.2d 165.

The elements of dealing in stolen property are: a) any person who traffics in, or endeavors to traffic in, b) property that he know or should know was stolen. g812.019, Fla. Stat. (1983). Traffic is defined as a) to sell, transfer, distribute, dispense, or otherwise dispose of property, or b) to buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property. §§812.012(7)(a),(b), Fla. Stat. (1983).

The elements of robbery are: a) the taking b) of money or other property ***c)*** which may be the subject of larceny d) from the

person or custody of another e) when in the course of the taking there is the use of force, violence, assault, or putting in fear. 8812.13, Fla. Stat. (1983).[3]

It is clear that each offense requires proof of a fact that the other does not since robbery requires the taking of property from a person with violence, while dealing in stolen property requires disposal of property after it has been stolen. A presumption has thus arisen that the offenses are separate which can be defeated by evidence of a contrary legislative intent. Carawan, 515 So.2d at 165.

However, both of these offenses address different evils. Robbery addresses the evil of the act of taking property without consent and through the use of violence. Carawan, 515 So.2d at 170. On the other hand, dealing in stolen property is directed against those who would make theft profitable. Adams v. State, 60 Fla. 1, 53 So. 451 (1910). The primary evil dealing in stolen property seeks to punish is the disposition of property which has already been stolen. Another evil dealing in stolen property addresses is that it punishes the "dealer" who seeks to circumvent the many laws regulating legitimate businesses that others abide by.

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[3] In this case the defendant was charged with §812.13(2)(a), Fla. Stat. (1983) which adds the additional element of the offender carrying a firearm or other deadly weapon.

In this case, since the two crimes address different evils, the presumption created by the Blockburger test prevails and it is unnecessary to resort to the rule of lenity. Carawan, 515 So. 2d 167-68. Thus, even utilizing a Carawan analysis, it is clear that multiple punishments for robbery and dealing in stolen property are authorized in Florida.

Accordingly, the decision below must be reversed on this point regarding the reversal of the conviction for dealing in stolen property.

CONCLUSION

Based on the foregoing, the question certified by conflict should be answered in the negative and the decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF ON PETITIONER ON THE MERITS** was furnished by mail to **OFFICE OF THE PUBLIC DEFENDER,** 1351 **N.W.** 12th Street, Miami, Florida 33128 on this 2nd day of January, 1990.

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