IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,124

THE STATE OF FLORIDA,

Petitioner,

vs.

WILLIAM ZANGER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, WILLIAM ZANGER, was the Appellant in the Third District Court of Appeal and the defendant in the trial court. The Petitioner, the State of Florida, was the Appellee in the lower court and the prosecution in the trial court. The parties will be referred to either as they stood in the trial court or as they stand before this Court. The decision of the Third District Court of Appeal is set forth in the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The operative facts pertinent to this Court's review are set forth in the decision of the Third District Court of Appeal (App. 1-3). The defendant was convicted in the trial court of armed robbery and burglary based on one incident involving an intrusion into one residence. Zanger v. State, 14 FLW 2590 (Fla. 3d DCA Nov. 7, 1989), slip opinion at 1. The defendant was also convicted of dealing in stolen property, for selling the jewelry which was taken from the victims and splitting the proceeds with the co-perpetrators. Slip opinion at 2.

On appeal, the Third District Court of Appeal held that the dual conviction for dealing in stolen property in addition to that for robbery was impermissible. The court stated:

> 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),[1] the defendant's conviction for trafficking in stolen property must be reversed.

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[1] **812.025. Charging theft and dealing in stolen property.** - 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.

Florida Statutes (1987).

Zanger v. State, slip opinion a+ 2.

The Third District certified conflict with the decision of Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980).

SUMMARY OF ARGUMENT

Through enactment of § 812.025, Fla.Stat. (1987), the legislature has spoken to the permissibility of dual convictions for theft and dealing in stolen property where the property involved is the same, and has authoritatively stated that dual convictions cannot stand. Because this court, in Carawan v. State, 515 So.2d 161 (Fla. 1987) (applicable to this pre-July 1, 1988 offense) has similarly concluded that a defendant cannot be convicted of both robbery and grand theft based on the same underlying act, on the basis "both of these offenses address essentially the same evil, i.e., the taking of property without consent(,)" the statute necessary applies to bar dual conviction for both dealing in stolen property and robbery involving the same property. Accordingly, the decision of the court below reversing the defendant's duplicative conviction for dealing in stolen property was entirely correct. The conflicting decision in Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980), is incorrect, resting on an analysis of robbery and theft which is inconsistent with this Court's subsequent decision in Carawan; Coley should therefore be disapproved.

ARGUMENT

THE THIRD DISTRICT PRGPERLY HELD THAT A DEFENDANT MAY NOT BE CONVICTED BOTH OF ROBBERY INVOLVING SPECIFIED PROPERTY AND TRAFFICKING IN STOLEN PROPERTY WHERE THE SAME PROPERTY TAKEN IS SOLD AND THE PROCEEDS DIVIDED AMONG THE PERPETRATORS OF THE ROBBERY. THE HOLDING OF THE THIRD DISTRICT SHOULD BE APPROVED, AND THE CONFLICTING DECISION OF THE FIRST DISTRICT IN Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980) DISAPPROVED BY THIS COURT.

The Petitioner's argument that a criminal defendant can be convicted of both robbery and dealing in stolen property for converting to cash the very proceeds taken in the robbery is fundamentally flawed: it rests upon a failure to give due effect to the legislative prohibition in § 812.025, Fla.Stat. (1987) of dual conviction for "theft and dealing in stolen property in connection with one scheme or course of conduct" and, further, places unjustifiable reliance on Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980), the analysis of the relationship between robbery and grand theft of which is unsustainable in light of this court's later decision in Carawan v. State, 515 So.2d 161 (Fla. 1987).1

Despite the Petitioner arguing at some length that the legislature ought not have so provided, see Petitioner's Brief at

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1 As the Petitioner properly concedes (Petitioner's Brief at 9, 16), because the instant case involves a pre-July 1, 1988 offense, Carawan applies. The overriding legislation, chapter 88-131, section 7, effective July 1, 1988, cannot be retroactively applied. State v. Smith, 547 So.2d 613 (Fla. 1989).

Therefore, whether the specified legis·ation overrides the Carawan holding of impermissibility of dual convictions for robbery and grand theft, the aspect of Carawan relied upon herein, need not be addressed in this case.

10-13, it is indisputable that the legislature has indeed prohibited dual convictions for dealing in stolen property and theft. Section 812.025, Fla.Stat. (1987) provides:

> Charging theft and dealing in stolen property. - 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.

The prohibitory effect of the statute has been repeatedly recognized by the courts of this state. ~~See~~, e.g., W.J. v. State, 485 So.2d 22 (Fla. 5th DCA 1986); Jones v. State, 453 So.2d 1192 (Fla. 3d DCA 1984); Daniels v. State, 422 So.2d 1024 (Fla. 1st DCA 1982); Victory v. State, 422 So.2d 67 (Fla. 2d DCA 1982); G.M. v. State, 410 So.2d 659 (Fla. 3d DCA 1982); Hudson v. State, 408 So.2d 224 (Fla. 4th DCA 1981); Kelly v. State, 397 So.2d 709 (Fla. 5th DCA 1981).

Unquestionably, § 812.025 prohibits conviction for both theft and dealing in stolen property with respect to one scheme or course of concuct. Resolution of the question of whether, with respect to the same property, convictions for both robbery and dealing in stolen property are permissible depends, then, upon the relationship between robbery and theft. The case which provides the sole support for the Petitioner's argument, Coley v. State, reasoned:

> [T]he offenses of robbery and theft are sufficiently distinguishable, the former encompassing the additional element of a taking of property frcm the person or possession of another person by means of

> force, violence, assault or putting in fear, so that the additional exception of "robbery" cannot be read into the statute by implication.

Coley, 391 So.2d at 725.

Significantly, however, Coley is a pre-Carawan case. In Carawan, this court receded from its prior holding in State v. Rodriguez, 500 So.2d 120 (Fla. 1986), and held that a defendant could not convicted of both grand theft and robbery based on the same underlying act. This court ruled, a holding which is conclusive in the instant case, that "both of these offenses address essentially the same evil, i.e., the taking of property without consent. Dual punishments were thus improper since reason dictated that the legislature's probable intent was only to provide for a more severe penalty when a single theft was accompanied by an additional aggravating factor, not to multiply punishments because other aggravating factors also occurred." Carawan, 515 So.2d at 170.

Therefore, because the legislature has conclusively spoken through § 812.025 -- prohibiting conviction for both theft of specified property and dealing in the same property -- and this court has authoritatively ruled that the offenses of robbery and theft both address the same evil, i.e., the taking of property without consent, and that dual convictions of punishments for those offenses are also prohibited, application of the statute to bar dual convictions for both robbery of specified property and dealing in that property as stolen necessarily follows. The Third District's holding was thus entirely correct.

CONCLUSION

Based on the foregoing argument and authorities cited, the decision of the Third District in Zanger v. State should be approved, and, accordingly, the decision in Coley v. State, 391 So.2d 725 (Fla. 1st DCA 1980) should be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy *of* the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 30th day of March, 1990.

BRUCE A. ROSENTHAL
Assistant Public Defender