IN THE SUPREME COURT OF FLORIDA

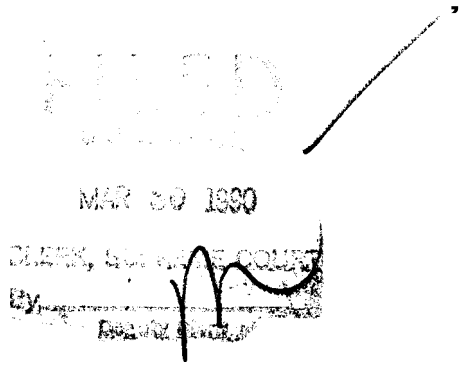
WILLIE FRED POLLARD,

Petitioner,

v. CASE NO. 75,223

STATE OF FLORIDA,

Respondent.



PETITIONER'S BRIEF ON THE MERITS

BARBARA M. LINTH CUI.
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. MCGINNES
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 S. MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR #230502

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PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Willie Fred Pollard was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "petitioner", "defendant", or by his proper name.

Reference to Volume I of the record on appeal, containing the pleadings and orders filed in this cause, will be by use of the symbol "R" followed by the appropriate page number in parentheses. Reference to Volume II of the record on appeal, containing transcripts, will be by use of the symbol "T" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing a copy of the opinion issued by the district court in this case, Pollard v. State, So.2d (Fla. 1st DCA Dec. 19, 1989). Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with possession of cocaine, contrary to Section 893.13(1)(e), Florida Statutes (1987)(Count I), and with sale or delivery of cocaine, contrary to Section 893.13(1)(a)1, Florida Statutes (1987)(Count II)(R-5). At petitioner's trial by jury, the evidence revealed that both charges arose out a single act of petitioner when, on September 18, 1987, petitioner handed some cocaine to another person in exchange for money (T-28-33). Counsel unsuccessfully argued to the trial court that principles of double jeopardy precluded the imposition of judgment and sentence for both of these offenses (R-18-21, T-219-221). The trial court imposed judgment and sentence for both offenses (R-22-28), and petitioner timely instituted an appeal to the District Court of Appeal, First District (R-30).

On appeal petitioner argued that the trial court had erred in imposing judgment and sentence for both possession, and sale or delivery, of the same cocaine, relying upon, inter alia, this Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987), and that of the second district in Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988). The district court rejected this position and affirmed petitioner's convictions in a opinion issued December 19, 1989, which reference this Court's decision of Smith v. State, 430 So.2d 448 (Fla. 1983) and that of the first district in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989)(A-1).

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court on December 20, 1989. This Court, by order dated March 22, 1990, accepted jurisdiction and ordered the filing of briefs on the merits. This initial brief of petitioner on the merits follows.

III. SUMMARY OF ARGUMENT

Petitioner argues in this appeal that the district court erred in affirming the decision of the trial court to impose judgment and sentence for possession of cocaine, and sale or delivery of the same cocaine, where both offenses were predicated upon a single act. Accordingly, the district court's decision should be quashed.

Although Smith v. State, **430** So.2d **448** (Fla. **1983)** holds contrary to petitioner's position, petitioner urges here that the result in Smith is different when the analytical approach employed in Carawan v. State, 515 So.2d 161 (Fla. **1987)** is applied to the facts of this case. Petitioner urges that the offense of possession of cocaine is necessarily included within the offense of sale or delivery of cocaine, because it is impossible for one to effect a sale or delivery of contraband without also being legally deemed to be in possession of that contraband. Even if a seller is does not have actual possession of the contraband, as in the case of a broker, the possession of the individual who actually has the contraband is legally imputed to the broker. In addition, it appears that the intent of the legislature was not to allow separate punishments for possession and sale of the same contraband, particularly in light of holdings that the legislature did not intend multiple punishments for sale and possession with intent to sell of the same contraband. Petitioner also urges that the "same subsection" versus "different subsection" distinction

employed by the district court in this case finds no support in the case law and leads to illogical results.

IV. ARGUMENT

ISSUE PRESENTED

THE OPINION ISSUED BY THE DISTRICT COURT IN PETITIONER'S CASE MUST BE QUASHED, SINCE THE TRIAL COURT ERRED IN IMPOSING JUDGMENT AND SENTENCE FOR BOTH POSSESSION OF COCAINE AND SALE OR DELIVERY OF THE SAME COCAINE, THEREBY VIOLATING PETITIONER'S RIGHT TO NOT BE TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE GUARANTEED BY BOTH THE STATE AND FEDERAL CONSTITUTION

Both the trial court and the district court have ruled it proper to impose judgment and sentence for sale or delivery of cocaine, and for the possession of that same cocaine. Since it was improper for the trial court to impose judgment and sentence for both of these offenses, petitioner urges the Court to quash the district court's opinion.

Petitioner recognizes that the decision of Smith v. State, 430 So.2d 448 (Fla. 1983)(Smith I), holds contrary to the position he takes here. The district court here expressly relied upon Smith I (A-1). Petitioner urges, however, that the analytical approach taken by the Court in Smith I has been materially modified by the later decisions in Carawan v. State, 515 So.2d 161 (Fla. 1987), and State v. Smith, 547 So.2d 613 (Fla. 1989)(Smith 11), which approved the decision of the second district in Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988). Applying the analytical approach of Carawan, Smith 11, and Gordon to the facts of this case (and those of Smith I) leads to a different result than that reached in Smith I.

In Smith I, the Court held that a person may be convicted and sentenced for both possession and sale of the same

controlled substance. In reaching this result, the Court applied only the test for ascertaining lesser included offenses set forth in Blockburger v. United States, 284 U.S. 299 (1932), and concluded that possession was not a lesser offense of sale, or vice versa. The Blockburger test compares the elements of the crimes in question and, if both have one element the other does not, it is presumed that the offenses are separate.

Carawan teaches, however, that "...confusion has arisen from a misguided tendency to give ...[the Blockburger test] the force of constitutional law, to be applied blindly, mechanically, and exclusively to every multiple-punishments problem.'' 515 So.2d at 166 (emphasis in original). The Court also noted "...that unreasonable results sometimes may be achieved by applying no rule of construction other than Blockburger to determine the intent behind a facially ambiguous penal statute." 515 So.3d at 167. Thus, the Court in Carawan recognized that Blockburger creates a mere presumption of legislative intent, and that other tests designed to ascertain legislative intent exist.

The Carawan Court erected a somewhat more detailed analytical approach that the singular Blockburger-based test employed in Smith I. First, if the legislative intent is clear, then there is no occasion to even apply Blockburger or any other test of legislative intent. Second, in the event legislative intent is not clear, courts must apply Blockburger. If one offense is lesser than another under Blockburger, then it is presumed that multiple punishments are not intended. On

the other hand, if two offenses are not the same under Blockburger, it is presumed that multiple punishments are intended. The last step of Carawan requires application of the rule of lenity, namely, that ambiguous penal statutes must be construed in favor of the accused, "...where there is a basis for concluding that the legislature intended a result contrary to that achieved by the Blockburger test...." 515 So.2d at 168.

In Gordon, the second district utilized the Carawan approach in a case where the defendant sold some cocaine, and was convicted of both sale, and possession of the same cocaine with intent to sell. Both "sale" and "possession with intent to sell" were proscribed by Section 893.13(1)(a), Florida Statutes (1985), which provides "...it is unlawful...to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance...."

In the instant case, petitioner was convicted of sale of cocaine contrary to Section 893.13(1)(a), Florida Statutes (1985). Unlike the defendant in Gordon, petitioner was not also convicted of possession with intent to sell, but rather was convicted of "simple" possession (i.e., no element of intent to sell), in violation of Section 893.13(1)(e), Florida Statutes (1985) which provides: "It is unlawful for any person to be in actual or constructive possession of a controlled substance.. .."

In Gordon, the court applied the first step of Carawan and concluded that the legislature had not clearly expressed its intent over whether one can be punished for both sale of

cocaine, and possession of the same cocaine with intent to sell. Thus, the Gordon court proceeded to the next step of Carawan, which is application of the Blockburger test. Applying that test, the court concluded that the offense of possession with intent to sell is a lesser offense of sale, and therefore it is presumed that multiple punishments were not intended.

Gordon is relevant to the instant case since its conclusion that possession with intent to sell is a lesser offense of sale under Blockburger is fully applicable to the facts here. In Gordon, the court opined that it is impossible for one to sell contraband without also being legally deemed to be in possession of that same contraband, even in cases where the accused was not in actual physical control of the contraband:

> Because we lack an indication of legislative intent on this issue, we proceed to the second step of the analysis: application of the Blockburger test to the elements of the two crimes. In order for the crimes to be separate we must find that each crime contains an element not contained within the other. Id. We begin our discussion with the possession element of these two crimes. A defendant cannot be convicted of either crime unless he is deemed, at law, to have had some sort of possession of the contraband. As to the crime of sale, a defendant need not be the actual possessor of the contraband although such actual possession will naturally result in criminal sanctions as in the instant case. The possessory element can be shared by others legally responsible for the crime. For example, a person acting as a go-between or broker may arrange for or be the moving force in the sale of contraband, yet never have either actual or constructive possession of the contraband. In such a case, the act of the seller who has actual possession

> of the contraband becomes the act of the broker. The broker is deemed to have the same possession as the seller and can be convicted as a principal of the crime of sale under Chapter 777, Florida Statutes. As to the crime of possession-with-intent-to-sell, we need not elaborate upon the obvious, to wit, possession is an element of this crime. In the case before us, then, where there is no question of a broker or others involved in the crime charged, but rather a single act with a single defendant, we concluded that the first element of the crime of sale of contraband as well as the crime of possession-with-intent-to-sell contraband is possession.

528 So.2d at 912.

[Note: the Gordon court went on to conclude that the intent element of the offense of possession with intent to sell is also an element of the crime of sale. This portion of Gordon does not bear upon the instant case because, as noted, in petitioner's case he was convicted of "simple" possession and sale, not possession with intent to sell and sale].

Based upon the above-quoted portion of Gordon, petitioner asserts that application of Blockburger to the facts of the instant case leads to the conclusion that "simple" possession is included within the offense of sale, and thus multiple punishments are not presumed. Gordon was approved in Smith 11.

In this regard, it appears that Smith I and Gordon seemingly conflict with one another as Smith I applied the Blockburger test and concluded that possession of contraband was not a lesser offense of sale, whereas Gordon held that possession was a lesser offense of sale under Blockburger. With all due respect, petitioner feels it prudent to note at this juncture that the Court in Smith I did not appear to consider

the effect of Chapter 777, Florida Statutes, which in effect imputes the actions of two or more persons who help each other commit a crime to all of the persons involved.

After applying Blockburger, the court in Gordon went on to assess whether the legislature had provided some contraindication that it intended multiple punishments imposed, despite the presumption which arose out of the Blockburger portion of the Carawan analysis. After making this assessment, the court found "...no contraindication, consistent with constitutional double jeopardy protection, that the legislature untended to impose multiple punishments on component parts of the two crimes defined in this statute, both of which address the same evil of drug abuse." 528 So.2d at 915.

The same conclusion is compelled here. If the offenses of possession with intent to sell and sale both address the same evil, Gordon, it necessarily follows that the offenses of "simple" possession and sale each address the same evil, since there can be no question but that "simple" possession is included in the offense of possession with intent to sell.

Since Smith I applied only Blockburger, it did not go further and assess the presence of any contrary legislative intent, as now required by Carawan. As Gordon points out, and for the reasons there stated, petitioner asserts the legislature did not intend multiple punishments since both offenses are directed at the same evil of drug abuse. Thus, assuming arguendo that Smith I correctly applied the Blockburger test (which would mean the Gordon court did not),

there exists a contrary legislative intent to the effect that multiple punishments were not intended.

Because the Gordon court concluded that application of Blockburger resulted in the conclusion that multiple punishments were not intended with respect to the offenses of sale and possession with intent to sell, and there is was not otherwise a contrary legislative intent, it found it unnecessary to apply the last step of Carawan, namely, application of the rule of lenity where there is a basis for concluding that the legislature intended a result contrary to Blockburger. Had the Gordon court reached this third step, it opined in dicta that "...had we found doubt regarding legislative intent, application of the rule of lenity would achieve the same result we reach today." 528 So.2d at 915. Petitioner contends the same is true here.

Based upon the foregoing discussion of Gordon, and the fact that Gordon was approved in Smith II, petitioner asserts that application of all the various tiers or steps of Carawan leads to the view that the trial court erred in imposing judgment and sentence for both possession and sale of the same cocaine. The singular Blockburger-based test employed in Smith I is deficient for the very reason that it is singular. In light of the analytical changes or modifications discussed and employed in Carawan, and Smith II (which approved Gordon), petitioner requests the Court to answer quash the district court's opinion.

The district court in this case affirmed petitioner's dual convictions on authority of Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989)(A-1). Wheeler, as did Gordon and Smith II, involved the offenses of possession with intent to sell and sale, both of which are proscribed by a single subsection of the same statute, Section 893.13(1)(a), Florida Statutes (1985). Wheeler holds that since both offenses were contained in the same subsection of the statute, the legislature intended to punish either the sale, or the possession with intent to sell, but not both when the same drug and transaction is involved. But where, as is true in the instant case, the possession offense is "simple" possession contained in a different subsection, Section 893.13 (1)(e), Florida Statutes, than the sale offense, the Wheeler court concluded, solely because of the fact of existence of the two subsections, that the legislature intended multiple punishments for both "simple" possession and sale of the same contraband.

The Wheeler court went on to criticize the Gordon court's application of Blockburger. In doing so, the Wheeler opinion refers to Smith I, and opines that possession is not a necessarily lesser included offense of sale as the definition of sale does not include possession. In reaching this conclusion, the Wheeler court failed to even discuss the effect of Chapter 777, Florida Statutes, or tell us why it is inapplicable.

Petitioner argues that nothing in Carawan or in any other case of this Court supports the "same subsection" versus

"different subsection" dichotomy erected in Wheeler. Indeed, the Wheeler analysis appears to be directly contrary to the reference made by this Court in Carawan to "...the constant patchwork revisions of Florida's criminal code...." 515 So.2d at 168.

Petitioner notes the Wheeler rationale has already been rejected by this Court, albeit implicitly. In State v. Burton, 14 F.L.W. 592 (Fla. December 7, 1989), referencing Smith 11, this Court approved the decision of the second district in Burton v. State, 541 So.2d 1203 (Fla. 2d DCA 1988) that had held that the defendant could not be properly convicted of both delivery and possession (not possession with intent to sell) of the same contraband. "Delivery" is proscribed by Section 893.13(1)(a), Florida Statutes (1985), whereas "possession" is proscribed by a different subsection, Section 893.13(1)(f), Florida Statutes (1985).

Petitioner next wishes to point out that to adopt the Wheeler approach would lead to a curious situation in which one could not be separately punished for possession of contraband with intent to sell, and sale of the same contraband, Smith II and Wheeler, while one could be separately punished for "simple" possession and sale of the same contraband. What makes the situation curious is the fact that "simple" possession is an offense that is considered both less serious than possession with intent to sell, for its penalties are less, and one which is a necessarily lesser offense than possession with intent to sell. Even the Wheeler court

recognized that "...simple possession under subsection (1)(e) is a necessarily lesser included offense of possession with intent to sell under subsection (1)(a)...." 549 So.2d at 691, note 9.

Petitioner would lastly note that the second, third, and fifth district courts of appeal have ruled contrary to the holding of the instant case: Choctaw v. State, 547 So.2d 726 (Fla. 2d DCA 1989); Kocol v. State, 546 So.2d 1159 (Fla. 5th DCA 1989); Jelks v. State, 546 So.2d 738 (Fla. 5th DCA 1989)(A-1); Grant v. State, 15 F.L.W. D213 (Fla. 3d DCA January 16, 1990); and, Joseph v. State, 541 So.2d 796 (Fla. 3d DCA 1989).

V. CONCLUSION

Based upon the foregoing, petitioner requests the Court to quash the decision of the district court in Pollard v. State, supra, and remand the cause to the trial court with directions to vacate the judgment and sentence imposed for possession of cocaine.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. MCGINNES
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida **32301**
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, WILLIE FRED POLLARD, James I. Montgomery Correctional Institution, Route **3**, Box **599**, Jacksonville, Florida, **32218**, on this 30th day of March, **1990**.

CARL S. MCGINNES