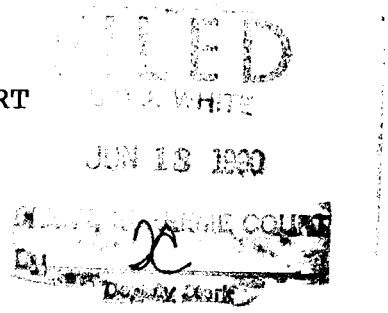
IN THE FLORIDA SUPREME COURT



STATE OF FLORIDA,

Petitioner/Appellant,

v.

CASE NO. 75,975

ANTHONY McCLOUD,

Respondent/Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

BRIEF OF PETITIONER/APPELLANT

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PRELIMINARY STATEMENT

Respondent/Appellee was the defendant before the trial court and the Petitioner/Appellant was the prosecution. The parties will be referred by their proper names or as they appeared before the trial court. The record on appeal consists of one (1) volume and will be referred to by the letter "R" followed by the appropriate page number.

NOTICE OF SIMILAR CASES

State v. V.A.A., Fla. S.Ct. #75,902 (lead case from the Second District Court presenting the instant certified question).

> WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES.

STATEMENT OF THE CASE AND FACTS

On November 17, 1988, the State Attorney for the Sixth Judicial Circuit, in and for Pinellas County, Florida, filed a two-count information against the defendant, Anthony McCloud, charging him with Sale of Cocaine (Count I) and Possession of Cocaine (Count II). Both offenses were alleged to have occurred on August 1, 1988. (R. 1-5) [Circuit Court Case No. 88-16326].

On January 26, 1989, the State filed a second two-count information against McCloud in Circuit Court Case No. 89-01185 charging him with Sale of Cocaine and Possession of Cocaine; these offenses were alleged to have occurred on June 9, 1988. (R. 12-16).

On March 8, 1989, the defendant entered pleas of guilty to Count I of each information, and he was sentenced to concurrent terms of twelve (12) years imprisonment on each conviction. (R. 25-33). On March 8, 1989, the trial court granted the defendant's motion to dismiss Count II, the possession charge, of each information, on the basis of Carawan v. State. (R. 49, 24). On March 23, 1989, the State timely filed its Notice of Appeal. (R. 34). Rule 9.140(c)(1), Florida Rule of Appellate Procedure, provides that the State may appeal an order dismissing an indictment or information or any count thereof.

On April 26, 1990, the Second District Court published its opinion affirming the dismissal of the drug charges in this case.

In its opinion sub judice, the Second District Court stated:

> Appellee Anthony McCloud was charged in two separate informations with one count each of sale and possession of cocaine. It is undisputed that each information involves a single transaction and a single quantum of cocaine. McCloud agreed to plead guilty to the sale charges but contended that conviction and sentence for the possession charged would constitute a double jeopardy violation. Carawan v. State, 515 So.2d 161 (Fla. 1987); Dukes v. State, 528 So.2d 531 (Fla. 2d DCA 1988). Over objection the trial court dismissed the possession charges.
>
> We affirm the dismissal with respect to Circuit Court Case No. 89-01185, wherein the offenses were alleged to have taken place June 8, 1988. Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), approved sub nom, State v. Smith, 547 So.2d 613 (Fla. 1989). We also affirm the dismissal of the possession charge in Circuit Court Case No. 88-16326 for offenses occurring on August 1, 1988, after the effective date of chapter 88-131, section 7, Laws of Florida. The statute in its amended version permits dual convictions and sentences for offenses based on one act unless the crimes fit into one of the three enumerated categories of section 775.021(4)(b). In Gordon, we discussed the elements of the crimes of sale and possession with intent to sell and the supreme court affirmed in Smith. Under that analysis, we find the crimes committed on August 1, 1988, do fit into the category of "subsumed elements," the third category of section 775.021(4)(b). Dual convictions would have been improper under the facts here, and the trial court also correctly dismissed the possession charge in Case No. 86-16326.
>
> We have recently directly addressed the effect of the amended statute on sale and possession crimes in V.A.A. v. State, No. 88-03290 (Fla. 2d DCA Mar. 9, 1990), and certified a question to the supreme court. The instant case presents the same concern with the effect of the dicta in State v. Burton, No. 73,700 (Fla. Dec. 7, 1989) [14 F.L.W. 592], which prompted the certified

question. Accordingly, we again certify the same question posed in V.A.A. as being one of great public importance.

Affirmed.

State v. McCloud, 15 F.L.W. D723 (Fla. 2d DCA Case #89-867, Opinion republished 4/26/90). [Appendix, A-1]

The following question was certified by the Second District Court in V.A.A. v. State, 15 F.L.W. D672 (Fla. 2d DCA Case # 88-03290, Opinion filed March 9, 1990)

> WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES.
>
> [Appendix, A-2]

SUMMARY OF THE ARGUMENT

The trial court erred in dismissing the possession of cocaine charges on the basis of Carawan. The Information filed in Circuit Court Case #88-16326 charged the defendant with sale of cocaine and possession of cocaine which occurred on August 1, 1988. Carawan v. State, 515 So.2d 161 (Fla. 1987), is applicable to crimes occurring before the effective date of chapter 88-131, section 7, Laws of Florida, but not to crimes occurring after that date. State v. Parker, 551 So.2d 1209 (Fla. 1989); State v. Smith, 547 So.2d 613 (Fla. 1989). The effective date of chapter 88-131, Laws of Florida, is July 1, 1988. Carawan has been overridden for offenses occurring after July 1, 1988, the effective date of Chapter 88-131, Section 7. As recognized by this Court in State v. Burton, 555 So.2d 1210 (Fla. 1989), the amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments.

The Information in Circuit Court Case #89-01185 charged McCloud with drug-related offenses which occurred on June 8, 1988. Under State v. Smith, 430 So. 2d 448 (Fla. 1983), there is no double jeopardy prohibition in imposing separate convictions for both sale and possession of cocaine.

CERTIFIED QUESTION

WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES.

Two separate charging documents are involved in the instant case. The first information filed by the State charged the defendant with Sale of Cocaine and Possession of Cocaine which occurred on August 1, 1988. In State v. Smith, Gordon, et. al., 547 So.2d 613 (Fla. 1989) this Court held that the decision in Carawan v. State, 515 So.2d 161 (Fla. 1987) has been overridden for offenses that occurred after the effective date of Chapter 88-131, section 7, i.e., July 1, 1988. Section 775.021, Florida Statutes (1988). Accordingly, Carawan does not apply to the offenses which occurred on August 1, 1988, and separate convictions are appropriate for both sale and possession of cocaine. In amending section 775.021(4), the legislature declared the crimes of possession and sale of an illegal drug separate offenses. In fact, in State v. Burton, 555 So.2d 1210 (Fla. 1989) this Court noted that Smith (547 So.2d 613), held that the amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments.

As of this date, the Second District Court apparently stands alone in holding that, for offenses occurring after July 1, 1988, a defendant may not be convicted and sentenced for both

possession and sale of the same contraband. The First District Court, the Fifth District Court, and Second District Judge Parker have authored opinions which have concluded that there is no double jeopardy bar to dual convictions for both sale and possession of the same contraband. In St. Fabre v. State, 548 So.2d 797 (Fla. 1st DCA 1989) [Appendix, A-5], the court found that possession of cocaine and sale of cocaine constitute separate offenses for double jeopardy purposes, even when they are both predicated on the same act or transaction. Sub judice, as in St Fabre, the defendant was charged with violating two separate subsections of the statute and, since possession of cocaine is not a necessarily lesser included offense of sale of the same cocaine, his double jeopardy claim must fail. In Davis v. State, 15 F.L.W. D880 (Fla. 5th DCA Case No. 89-1064, Opinion filed April 5, 1990) [Appendix, A-4], the Fifth District Court affirmed the defendant's conviction and sentence for two statutory offenses: possession of a controlled substance (a third degree felony under Section 893.13(1)(f)), and delivery of a controlled substance (a second degree felony under Section 893.13(1)(a)(1)). In Davis, the Appellant, pursuant to a negotiated drug deal, handed an undercover officer one piece of crack cocaine and in Davis, the court recognized that possession is not required for a sale and a sale is not required to possess contraband. In fact, in Carawan, this Court recognized that:

> ". . . Sale of drugs can constitute a separate crime from possession. . ."
>
> Id. at 176.

In Crisel v. State, 15 F.L.W. 1401 (Fla. 2d DCA, Case #89-0016, Opinion filed May 18, 1990), Judge Parker's concurring opinion sets forth a detailed analysis supporting his conclusion that there can be dual convictions for both the sale and possession of the same illegal drug under the amended statute, 775.021. [Appendix, A-3]. In his concurring opinion, Judge Parker notes, in pertinent part:

> ". . . I perceive the court's rationale in V.A.A. to be that a possession charge is always subsumed into a charge of sale based upon section 775.021(4)(b)(3), Florida Statutes (Supp. 1988). I disagree. As our supreme court unanimously recognized in State v. Burton, 555 So.2d 1210 (Fla. 1990):
>
> > *We held, in State v. Smith, 547 So.2d 613 (Fla. 1989), which applied chapter 88-131, section 7, Laws of Florida, that the legislature intended the following to be separate offenses subject to separate convictions and separate punishments: the sale or delivery of a controlled substance; and possession of the substance with intent to sell. We also held that although chapter 88-131 overrode Carawan v. State, 515 So.2d 161 (Fla. 1987), nevertheless, it is not to be applied retroactively.*
>
> Burton, 555 So.2d at 1211 (footnote omitted.) Therefore, I think the supreme court has recognized that the amended statute has overturned the Carawan court's analysis of double jeopardy and that pursuant to the amended statute, there now can be convictions for both the sale and possession of the same illegal drug.
>
> The Florida Standard Jury Instruction strengthens my position.
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> * * *
>
> Nowhere is the element of possession listed as an element in the crime of sale.
>
> * *
>
> Likewise, nowhere is the element of sale listed as an element of the crime of possession.

* * *

I would first note the legislature's following language in both acts:

For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the *proof adduced at trial*.

* * *

If a court cannot look to the proof to determine if the defendant can suffer multiple punishments, it seems to me that any scenario in which a defendant can be found guilty of sale and not guilty of possession of the same drug defeats the rationale of V.A.A.

* * *

This court, in *Elias v. State*, 301 So.2d 111 (Fla. 2d DCA 1974), cert. denied, 312 So.2d 746 (Fla. 1975), without any *Blockburger* analysis, recognized that a defendant, after receiving a verdict of acquittal from the court on a possession of heroin charge, can still be found guilty of sale of heroin, without any proof that the defendant ever posses the heroin. This court found the evidence legally sufficient to convict the defendant as an aider and abetter of the sale. Such a holding appears inconsistent with this court's conclusion in V.A.A. that the elements of possession are subsumed by the elements of sale.

* * *

The Fifth District recently acknowledged conflict with V.A.A. in Davis v. State, No. 89-1064 (Fla. 5th DCA April 5, 1990) [15 F.L.W. D880], and adopts my position that a delivery or a sale of an illegal drug can be accomplished without a possession of that drug. In reaching that position, the fifth district looked to a decision from this court and stated:

But consider an actual case, *Daudt v. State*, 368 So.2d 52 (Fla. 2nd DCA 1979) cert. denied, 376 So.2d 76 (Fla. 1979) in which the court found that a sale was accomplished without possession. In *Daudt* the defendant was convicted of sale and possession of marijuana. The defendant had, at the request of a prospective buyer (an undercover police officer), made a phone call to his "source' to obtain marijuana. Defendant and the undercover officer then drove to another location where they met "Mike". The defendant assured "Mike" that the money was right and, at Mike's insistence, remained as a lookout while Mike took the officer to the location of the marijuana. The sale went down and the arrest was made.

The *Daudt* court held:

> There is no evidence whatsoever that appellant ever had actual possession or control of the marijuana. Nor was constructive possession established. Although appellant knew of the presence of the marijuana, there is no evidence that it belonged to or was under the control of the appellant. At best, the evidence establishes that appellant brought the parties to the transaction together and expected to be paid for such service.
>
> . . .
>
> Appellant aided and abetted [Mike] in selling the marijuana, but not in possessing it. [Mike] already possessed the marijuana; there is no showing that appellant was of any help to [Mike] in either acquiring it or retaining possession of it. On the contrary, appellant aided [Mike] in divesting himself of it.

Daudt at 53-54.

Davis, 15 F.L.W. at D661.

> The bottom line of my reasoning is that the legislature, in amending section 775.021(4), has declared the crimes of possession and sale of an illegal drug separate offenses, without regard to the indictment or information and without regard to the proof offered at trial. Therefore, all analyses of double jeopardy questions must be made by a side-by-side comparison of the elements of the two crimes in question. If this comparison of the two crimes reflects that each offense contains an element that the other does not, then there is no double jeopardy unless the exceptions apply which are listed in section 775.021(4)(b), Florida Statutes (Supp. 1988). If none of the three exceptions under that section apply, then there can be two convictions and two sentences for the two crimes. . . "
>
> * * *
>
> Crisel, concurring opinion, Parker, J., 15 F.L.W. D1401-1402 [Appendix A-3]

In Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1981), approved, 447 So.2d 219 (Fla. 1984), the Court specifically stated that possession is not an essential aspect of sale, and in Daudt v. State, 368 So.2d 52 (Fla. 2d DCA 1979), cert. denied, 376 So.2d 76 (Fla. 1979), the Court reversed a conviction for possession of marijuana for insufficient evidence, but let stand a conviction for sale of the same drug. In addition, it is not a necessary element of delivery that the State prove possession, State v. Daophin, 533 So.2d 761, 762 (Fla. 1988). Separate evils have been addressed in the legislature's proscriptions in §893.13, Florida Statutes. The statutory provision prohibiting possession of a controlled substance is aimed at punishing the

individual possessor for his criminal activity which does not directly or necessarily involve persons other than the perpetrator. Sale necessarily includes the involvement of the citizens and the legislature has a legitimate interest in punishing not only those who engage in private, personal illegal conduct, but who also seek to include the participation of others in the society in proscribed conduct. Section 775.021(4), Florida Statutes, provides that whoever commits several offenses shall be sentenced separately for each. Offenses are separate if each offense requires proof of an element that the other does not "without regard to the accursatory pleading or the prove adduced at trial." Since sale does not necessarily include the element of possession, separate convictions and sentences are appropriate. Pursuant to §775.021, in the absence of an applicable exception, a defendant who commits an act which constitutes more than one offense shall, where each offense requires prove of an element that the other does not, be convicted and sentenced for each offense. The legislature may permissibly decide to punish separately those who seek to involve other persons in illegal activity as well as those who individually engage in proscribed conduct. Accordingly, the trial court erred in granting the motion to dismiss the possession charges, and the Second District Court erred in concluding that the double jeopardy clause would be violated by virtue of dual convictions for both sale and possession of cocaine.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Honorable Court should reverse the decision of the Second District Court of Appeal, approve the rationale set forth by Judge Parker, and the First and Fifth District Courts of Appeal, and clearly authorize dual convictions for both the sale and possession of contraband.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to The Public Defender's Office, 5100 - 144th Ave., Clearwater, Florida 33549 on June 11th, 1990.

OF COUNSEL FOR
PETITIONER/APPELLANT