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FILED
SID J. WHITE
JAN 16 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STEVE ANTON DAVIS,

Petitioner,

vs. CASE NO. 76,043

STATE OF FLORIDA,

Respondent.
_____/

**REPLY BRIEF OF PETITIONER**

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## POINT I

FLA. STAT. §775.021(4)(b)3 (SUPP. 1988) PROHIBITS DUAL CONVICTIONS AND SENTENCES FOR THE SIMULTANEOUS DELIVERY AND POSSESSION OF THE SAME QUANTUM OF CONTRABAND.

By its plain terms, Fla. Stat. §775.021(4)(b)1, 2, and 3 reflects the legislature's intent to prohibit multiple punishments for offenses which are: (1) offenses which require identical [statutory] elements of proof; (2) offenses which are degrees of the same crime; and (3) offenses which are lesser offenses in the sense that all the elements of one of the crimes are included or subsumed within the essential elements of the greater offense. Since the crimes of delivery and possession do not have identical statutory elements of proof, or stand in a "degree" relationship with each other, any statutory prohibition against dual punishments in the case at bar is necessarily focused on whether the lesser crime of possession is "subsumed" by the greater offense of delivery. Relying on the analysis utilized in *V.A.A. v. State*, 561 So.2d 314 (Fla. 2d DCA 1990), *review pending* Case No. 75,902, and its progeny out of the Second District, as well as Judge Cowart's dissent in the case at bar, the Defendant's position is that §775.021(4)(b)3 prohibits separate convictions and sentences for delivery (or sale) of cocaine and possession of cocaine as to a single factual event (single act) involving one quantum of contraband since possession is a lesser offense falling within the third "subsumed elements" category. The specific reason possession is integral to or subsumed by the greater offense of delivery (or sale) is that both offenses share the common element of possession

due to the legal concepts of constructive possession and the law of principals which imposes criminal liability on co-perpetrators and agents who are all deemed to be principals in the first degree by Fla. Stat. §777.011 (1989). In other words, a defendant cannot be convicted of delivery (or sale) unless he or she is deemed, at law, to have had some sort of possession of the contraband. In the context of a hand-to-hand, curbside transaction with an undercover cop involving a single act, a single defendant, and a single quantum of contraband, the possession element of the greater offense of delivery (or sale) is provided through actual possession. In the context of a delivery or sale arranged by a broker or middle man, whether present or not at the scene of the crime, the possession of the act of deliverer or seller becomes the act of the broker or middle man since the broker or middle man, as a principal is deemed under Chapter 777, Florida Statutes, to have the same possession as the actual deliverer or seller.

At page 5 of its brief, the State cites to *Gibson v. State*, 565 So.2d 402 (Fla. 1st DCA 1990), *review pending* Case No. 76,626, (possession of cocaine with intent to sell subsumed by crime of sale of cocaine precluding dual punishment), and correctly notes that the First District has adopted a position which would permit the Defendant's separate convictions and sentences to stand since the involved offenses are delivery and possession; rather than possession with intent to sell and sale. *See also, Williams v. State*, 15 FLW D2743 (Fla. 1st DCA Nov. 9, 1990), (separate convictions for possession and sale of cocaine upheld); *Oliver v.*

*State*, 15 FLW D2857 (Fla. 1st DCA Nov. 21, 1990), (error to impose dual punishments for possession of cocaine with intent to sell and sale of cocaine). The problem with the position taken by the First District (as well as the majority opinion of the Fifth District in the present case), in contrast to the Second District, is that it allows prosecutors to unjustly obtain multiple convictions based solely on a charging decision--a result this Court found totally unacceptable in *Bell v. State*, 437 So.2d 1057, 1061 (Fla 1983).

Several times in pages 5 through 7 of its brief, the State discusses this point on appeal as if the issue had already been decided by this Court in *State v. Burton*, 555 So.2d 1201 (Fla. 1990) and *State v. Smith*, 547 So.2d 613 (Fla. 1989). To this, the Defendant responds by noting that both *State v. Burton, supra* and *State v. Smith, supra* were decisions which dealt with offenses occurring prior to the July 1, 1988 effective date of §775.021(4)(b) (Supp. 1988), and accordingly, did not consider and apply the amendment to any particular criminal charges before the Court. Therefore, *State v. Smith, supra* and *State v. Burton, supra* do not have *stare decisis* authority in the present appeal.

The Defendant respectfully urges this Court to adopt the analysis and position expressed by the Second District in *V.A.A., supra*, and its progeny, and likewise expressed by Judge Cowart's dissent in the opinion below.

## POINT II

DEFENDANT'S SEPARATE CONVICTIONS AND PUNISHMENTS FOR THE CRIMES OF DELIVERY OF ONE ROCK OF COCAINE AND SIMPLE POSSESSION OF THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY PROTECTION PROVIDED BY ART. I, §9 OF THE FLA. CONSTITUTION.

In *State v. Cantrell*, 417 So.2d 260 (Fla. 1982) this Court elected to construe Art. I, §9 of the Fla. Const. in the same manner as its federal counterpart on the *Albernaz*[1] issue of whether the imposition of dual punishments for violations occurring during a single criminal episode violate Florida's Double Jeopardy Clause. The case at bar, however, does not present the *Albernaz* issue--and contrary to the sentiments of the majority panel of the Court below (*Davis v. State*, 560 So.2d 1231 (Fla. 5th DCA 1990), *review pending* Case No. 76,043) there are compelling reasons addressed in Petitioner's Initial Brief for this Court to give recognition to Florida's constitutional autonomy on the issue of whether Art. I, §9 precludes multiple punishments as to a single act involving one quantum of contraband. As in the instance of *State v. Glosson*, 462 So.2d 1082 (Fla. 1985), where this Court found it appropriate to secure to Florida citizens greater due process protection than would be afforded under the federal constitution, there is a great need for this Court to examine whether adoption of the federal direction[2] properly serves the

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[1] *Albernaz v. United States*, 450 U.S. 333 (1981)

[2] Represented by Fifth Amendment cases such *Missouri v. Hunter*, 459 U.S. 359 (1983) and *Ohio v. Johnson*, 467 U.S. 493 (1984) with their exclusive reliance on the test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932).

people of this state. In other words, does a strict *Blockburger* "analysis" provide any meaningful protection to the number of offenses that may be charged when the criminal conduct is unitary in nature, or does it allow prosecutors to obtain multiple convictions based solely on a charging decision?

One need examine no further than the case at bar, or perhaps a case such as *Williams v. State*, 560 So.2d 311, 315 (Fla. 1st DCA 1990), (dual punishments upheld for robbery with a firearm and for display of a firearm during the commission of a felony i.e., the robbery) to conclude that exclusive reliance on the *Blockburger* test provides no double jeopardy protection whatsoever in the single trial setting and foster's multiple convictions based on a charging decision. This latter aspect is a matter which this Court condemned in *Bell v. State*, *supra* at 1061 as an "unjust result which we decline to legitimize".

In the Initial Brief, at pages 25 through 29, one criticism the Defendant levels at the *Missouri v. Hunter*, *supra* approach to double jeopardy analysis (upon which §775.021(4) appears to be founded) is that it is unworkable, arbitrary, and illogical because of its strict reliance on the *Blockburger* test. As this Court considers the issue of whether Art. I, §9 should be construed as its federal counterpart, it is worthy of mention that last year in *Grady v. Corbin*, 110 S. Ct. 2084 (1990) the Supreme Court found exclusive reliance on the *Blockburger* test to be inadequate to provide meaningful double jeopardy protection in the context of successive prosecutions. There, the Court determined

that the Fifth Amendment's Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element, the government will prove conduct that constitutes an offense for which the Defendant has already been prosecuted. *Id*. at 2086, 2087. At the same time, the *Grady* Court reaffirmed strict reliance on the *Blockburger* test when dealing with the issue of whether cumulative punishments may be imposed in a single trial prosecution. The Court's stated rationale for using two (2) very different standards to determine what constitutes the "same offense" was that double jeopardy concerns in a single trial setting presented "merely the possibility of an enhanced sentence" in contrast to the dangers and burdens inherent in successive prosecutions. *Id*. at 2090, 2091.

In light of *Grady v. Corbin*, *Id*. the current state of Fifth Amendment double jeopardy analysis, if applied to the case at bar, would allow dual convictions and punishments to be obtained against Defendant in a single trial setting (since under *Blockburger* the test is satisfied),--yet successive prosecutions of Defendant for delivery of cocaine and for possession of cocaine would violate double jeopardy since the State would prove its second case by focusing on the same conduct already prosecuted on.

As the foregoing illustrates, if there is to be any meaningful limitation on the number of offenses flowing from the commission of a single criminal act, it must come from this Court's judicial construction and interpretation of the intent and meaning of Art. I, §9. Otherwise, the day has truly come where prosecutorial charging decisions alone dictate how many convictions

and punishments can arise from a single criminal act in a single trial setting, and the extent to which the convicted citizen is exposed to enhanced sentencing under habitual offender statues.

The Defendant respectfully urges this Court to hold that the Double Jeopardy Clause in Art. I, §9 of the Fla. Const. is defined by *Ex Parte Lange*, 21 L.Ed. 872 (1873), and not by *Missouri v. Hunter*, *supra*.

## POINT III

THE TRIAL COURT ERRED IN REQUIRING DEFENDANT TO STAND TRIAL BEFORE A JURY PANEL TAINTED BY EXPOSURE TO A JUDICIAL REMARK SUGGESTING THE STATE WOULD NOT BRING CRIMINAL CHARGES AGAINST AN INNOCENT PERSON, THEREBY DEPRIVING DEFENDANT OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. I, §16 OF THE FLA. CONSTITUTION.

In the case at bar, where Defendant's sole defense was that he was mistakenly arrested, the record shows that the trial judge told Defendant's jury venire that the State would not knowingly prosecute an innocent man immediately after telling the venire that the prosecutor's duty was to seek justice. (R-57, 58) Contrary to the State's claim, the Defendant has not taken the Court's comments out of context in making the point that it was reversible error to overrule Defendant's objections and try him before a panel exposed to comments which could have been interpreted by panel members as an expression of the judge's view on the integrity of the prosecutor, or the guilt of the accused, or both.

The State's reliance on the factually inopposite case of *Pope v. Wainwright*, 496 So.2d 798 (Fla. 1986) is misplaced. Its related observation that the trial court was "merely trying to make the jurors recognize the competing roles . . ." manages to both state the obvious and entirely miss the point that this issue turns on whether the comments were of such a nature as to be interpreted by the jury venire as an expression of the judge's view on Defendant's guilt, or the integrity of the prosecution. This issue

does not turn on what the trial judge's subjective intent was. *Hamilton v. State*, 109 So.2d 422, 425 (Fla. 3d DCA 1959); *Flicker v. State*, 374 So.2d 1141, 1142 (Fla. 5th DCA 1979).

The "invited error" doctrine applied in *Pope v. State*, 441 So.2d 1073 (Fla. 1983) has no application to the present case since the defense voir dire questions regarding such matters as the presumption of innocence and the concept of reasonable doubt (R-38, 40) cannot reasonably be said to have prompted the Court's comments.

The State next claims that any possible damage to Defendant's ability to receive a fair trial was "fixed" by the Court's curative instruction. The State's position in this regard might be well taken but for the fact that the sole issue for Defendant's jury to decide was whether he was mistakenly arrested by the take-down team that descended upon the persons located near the restaurant's entrance. As in the cases of *Flicker v. State*, *supra*; *Saint Jour v. State*, 534 So.2d 874 (Fla. 3d DCA 1988); *Weber v. State*, 501 So.2d 1379 (Fla. 3d DCA 1987) and *Whitfield v. State*, 452 So.2d 548 (Fla. 1984) the Defendant's ability to be tried by an impartial jury could not be restored by means of the curative instruction given.

Lastly, looking at the trial as a whole, it is specious for the State to now claim that the prejudice to Defendant was rendered harmless by the curative instruction when the prosecutor's closing argument shamefully exploited the prejudicial themes of the court's voir dire remarks by stating the State was only seeking

justice and would not prosecute an innocent person. (R-229, 230, 233, 252, 253, 255; Initial Brief at page 37).

The comment of the trial judge during voir dire warrants reversal. *Lester v. State*, 458 So.2d 1194 (Fla. 1st DCA 1984); *Hernandez v. State*, 538 So.2d 521 (Fla. 3d DCA 1989); *Pollard v. State*, 444 So.2d 561 (Fla. 2d DCA 1984).

## POINT IV

IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT CONSTITUTED FUNDAMENTAL ERROR IN LIGHT OF THE STATE'S TENUOUS CASE AGAINST DEFENDANT.

The Defendant relies on the argument and authorities set forth in his Initial Brief except to note there was nothing in Defendant's cross-examination of Deputy Chatman, or the defense case-in-chief, which "invited" the unethical argument engaged in by the attorney representing the State of Florida. (Page 39 through 41 of the Initial Brief)

Under the unique circumstances and facts of the case at bar, there is the substantial possibility that Defendant was deprived of a constitutionally fair trial. Accordingly, the interests of justice compel the application of the doctrine of fundamental error. *Smith v. State*, 521 So.2d 106 (Fla. 1988)

## POINT V

THE COMBINATION OF THE ERRORS DETAILED IN POINTS III AND IV RESULTED IN IMPROPER PREJUDICE TO DEFENDANT AND REQUIRE THE GRANTING OF A NEW TRIAL.

The Defendant relies upon the authorities and arguments expressed in his Initial Brief except to note that it is most interesting that the State is unwilling to concede (must less address) the obvious connection between the judicial comment made during voir dire and the prosecutor's despicable closing argument themes. A reversal of Defendant's convictions on the basis of cumulative error is highly appropriate inasmuch as his trial both began and ended with the jury receiving various assurances that the State would not bring an innocent man to trial. *Tyus v. Apalachicola Northern Railroad Company*, 130 So.2d 580 (Fla. 1961).

## POINT VI

THE DEFENDANT'S SEPARATE CONVICTIONS AND PUNISHMENTS FOR THE CRIMES OF SALE OF ONE ROCK OF COCAINE AND SIMPLE POSSESSION OF THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

The Defendant relies upon the argument and authorities set forth in his Initial Brief.

## CONCLUSION

Based upon the foregoing arguments and authorities, the following relief is respectfully requested. As to Points I, II, and VI, this Court should vacate Defendant's conviction for simple possession of cocaine, and remand the cause for sentencing. As to Points III, IV, and V, the Defendant requests that his convictions and order of probationary placement be vacated and the cause remanded for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to DAVID S. MORGAN, ASSISTANT ATTORNEY GENERAL, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 on this 14th day of January, 1991.

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