IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v. Case No. 76,183

MICHAEL CRISEL,
Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL SECOND DISTRICT

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 261041
2002 North Lois Avenue
Suite 700
Westwood Center
Tampa, Florida 33607-2366
(813) 873-4739

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The State of Florida is the Petitioner in this Court and was the Appellee in the Second District Court of Appeal. The State of Florida will be referred to in this brief as "Petitioner" or "State". The Respondent, Michael Crisel, was the Appellant in the Second District, and he will be referred to in this brief as "Respondent" or "Defendant". The record in this Court is the same record used in the district court, and it consists of one (1) volume. References to that record will be by the symbol "R" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Respondent, Michael Crisel, was charged by information in the Circuit Court for the Sixth Judicial Circuit in and for Pinellas County, Florida, with seven drug-related offenses; two counts of sale of marijuana, two counts of possession of marijuana, sale of cocaine, possession of cocaine and possession of drug paraphernalia, all counts arose during August and September, 1988. (R4-6) On November 2, 1988 counsel for Respondent filed and motion to dismiss one count of possession of marijuana and the possession of cocaine counts. (R9) That motion was denied (R12), and the defendant thereafter entered pleas of guilty to the sale counts and the possession of paraphernalia count. He pled *nolo contendere* to the three possession counts and reserved the right to appeal. (R13) Respondent received two years of probation on each count to run concurrently.

An appeal was taken to the Second District Court of Appeal. The Office of the Public Defender filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The one issue discussed in the brief was whether a criminal defendant could be convicted and sentenced of possession and sale of the same quantity of drugs. The Second District wrote an opinion indicating the trial court should have granted the motion to dismiss one count of possession of marijuana and the one count of possession of cocaine. *See,* Crisel v. State, 561 So.2d 453 (Fla. 2d DCA 1990). In the opinion the following question was certified to this Court as one of great public importance:

WHEN DECIDING A DOUBLE JEOPARDY ISSUE PURSUANT TO SECTION 775.021(4)(b), FLORIDA STATUTES (SUPP. 1988), IS THE TRIAL OR APPELLATE COURT PERMITTED TO EXAMINE THE FORMAL CHARGES OR THE FACTS OF THE CASE TO MAKE THE DETERMINATION?

A timely Notice to Invoke Discretionary Jurisdiction of this Court was filed.

SUMMARY OF THE ARGUMENT

When determining a double jeopardy claim under Section 775.021(4), Florida Statutes, the courts, both trial and appellate, should only look at the statutory elements. In the context of multiple punishments for the same offense, the *Blockburger* test of whether each offense contains an element that the other does not is all that is necessary to satisfy constitutional requirements.

ARGUMENT

WHEN DECIDING A DOUBLE JEOPARDY ISSUE PURSUANT TO SECTION 775.021(4)(b), FLORIDA STATUTES (SUPP. 1988), IS THE TRIAL OR APPELLATE COURT PERMITTED TO EXAMINE THE FORMAL CHARGES OR THE FACTS OF THE CASE TO MAKE THE DETERMINATION?

Section 775.021(4)(b), Florida Statutes, provides as followings.

> **775.021 Rules of construction**
>
> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offense, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. 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.
>
> (4)(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offense the statutory elements of which are subsumed by the greater offense.

The Second District in its opinion in Crisel v. State, 561 So.2d 453 (Fla. 2d DCA 1990), has asked this Court to resolve the issue of whether the courts, when making an analysis under this

subsection, may look to charging document and the facts to determine any double jeopardy allegations. Petitioner submits the answer to the question must be in the negative.

The wording of the statute itself is clear and unambiguous. It says, "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. (emphasis added) This underlined language, which was, as Judge Parker points out in his concurring opinion in Crisel, a part of the 1983 statute, and was reenacted in the 1988 version of Section 775.021

As this Court pointed out in Carawan v. State, 515 So.2d 161, 165 (Fla. 1987), a specific, clear and precise statement of legislative intent controls. The reenactment of the emphasized language is such a clear statement by the legislature that only the statutory elements need be considered when determining if offenses are separate crimes. This is the same approach taken by the courts to the sale and possession of controlled substances, *pre*-Carawan. *See,* Smith v. State, 430 So.2d 448 (Fla. 1983), Portee v. State, 447 So.2d 219 (Fla. 1984), and the cases cited in both.

The case now before this Court involves possession and sale of marijuana and cocaine. While possession and sale have some statutory elements in common; proof that the substance is a controlled substance and proof that the defendant had knowledge of the presence of the substance, each offense, however, requires proof of an additional element that the other does not. In order

to make a case for possession not only must the two elements listed above be demonstrated but the State must also prove the defendant possessed the substance, either actually or constructively. That is, the State must prove that the defendant had personal charge over or ability to control the substance. Such a requirement is not necessary for sale of a controlled substance.

In addition to the requirements that the substance be controlled and knowledge of the presence of the substance, a sale offense requires that the substance be exchanged to another person for money or other consideration. There is no requirement that the defendant have possession of the substance sold. And indeed, as the Second District discussed in Crisel and the Fifth District Court of Appeal discussed in Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990), possession is a not an subsumed in a sale since one can sale without possessing. The case often cited for this proposition is Daudt v. State, 368 So.2d 52 (Fla. 2d DCA 1979), *cert. denied,* 376 So.2d 76 (Fla. 1979). In Daudt the defendant was convicted of sale and possession. His conviction for possession was reversed, but his conviction for the sale was affirmed under the following scenario. The defendant in that case was asked about the purchase of marijuana. He contacted his source for the marijuana and arranged a meeting. At that meeting the defendant assured the source the money was there and was a lookout while the source took the buyer (an undercover officer) to the marijuana. The court opined that the defendant had been a principle to the sale of the drugs although he had not been in

possession of same. Thus, it is beyond dispute that the a sale can and does occur without the seller being in actual or constructive possession of the item sold.

The principle of double jeopardy as espoused in the Fifth Amendment, made applicable to the States by the Fourteenth Amendment, is intended to protect individuals against a second prosecution after acquittal, a second prosecution after conviction and multiple punishments for the same offense. *See,* North Carolina v. Pearce, 395 U.S 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The first two considerations are not applicable here. In the case *sub judice* we need only consider double jeopardy in the context of multiple punishments for the same offense. In this context the test outlined in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), requires only that each offense contain an element that the other does not.

The requirement of Blockburger v. United States, *supra.,* is the same requirement outlined in Section 775.021(4). This Court and the courts of this State need look no further than the statutory elements when dealing with the issue of double jeopardy in a single prosecution and on the issue of multiple punishments.

CONCLUSION

Based on the arguments and citations above, Petitioner submits the certified question should be answered in the negative. The opinion of the Second District Court of Appeal vacating respondent's convictions for possession of cocaine and possession of marijuana should be reversed, and the case remanded with instructions to reinstate the judgments and sentences.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar Number 261041
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607
(813) 873-4739

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief of Petitioner has been furnished by U.S. Mail to Allyn Giambalvo, Assistant Public Defender, Criminal Court Building, 5100-144th Avenue North, Clearwater, Florida 34620, this 31st day of August, 1990.

Of Counsel for Petitioner