IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

vs. Case No. 76,183

MICHAEL CRISEL,

RESPONDENT.

_____/



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

# BRIEF OF THE RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN GIAMBALVO
Assistant Public Defender
Criminal Court Building
5100-144th Avenue North
Clearwater, Florida 34620

COUNSEL FOR RESPONDENT

## TABLE OF CONTENTS

## TABLE OF CITATIONS



OTHER AUTHORITIES

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## STATEMENT OF THE CASE AND FACTS

Respondent/ Appellee Michael Crisel, accepts Petitioner/Appellant's Statement of the Case and Facts taken from the opinion of the District Court of Appeal, Second District.

## SUMMARY OF THE ARGUMENT

There is no clear precedent as to whether the trial or appellate courts may look beyond the statutory elements to the pleadings and the proof in deciding questions of double jeopardy.

The holding of the District Court can and should be upheld on two distinct grounds. First, that the July 1, 1988, amendment to Florida Statute 775.021 is merely a rule of construction not a statement of intent to all penal provisions and is certainly not applicable to statutes enacted previously. Secondly, the rule of lenity is not merely statutory, but constitutionally based on due process and double jeopardy which in Florida protects one against not only successive prosecutions, but multiple punishments.

The offense of possession is "subsumed" by the offense of sale and therefore falls within one of the enumerated exceptions of Florida Statute 775.021 even as amended.

## ARGUMENT

### QUESTION CERTIFIED BY THE DISTRICT COURT

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

Despite the wording of the certified question presented herein, the real issue before this court is what constitutes a lesser included offense and what constitutes double jeopardy when the defendant is charged with multiple offenses. Looking at the consistency, or what might be better described as a consistency of inconsistency in cases previously decided, this question has apparently befuddled better legal minds than the undersigned's. It would also appear that in an attempt to harmonize their prior decisions with their subsequent decisions on double jeopardy, the courts have so muddied the waters, that short of scrapping all prior decisions on the subject and starting afresh, no clarity can be achieved.

As to whether the trial or appellate court is permitted to look behind the statutory elements to the pleadings and the facts of the case when deciding a question of double jeopardy, it would appear from a review of the applicable case law, that nothing is more consistent than the courts' inconsistency on this question. In Bradley v. State, 540 So.2d 185 (Fla. 5th DCA 1989); Newman v. State, 490 So.2d 197 (Fla. 3d DCA 1986); Houser v. State, 474

So.2d 1193 (Fla. 1985) and Vela v. State, 450 So.2d 305 (Fla. 5th DCA 1984),[1] these courts clearly went behind the mere statutory elements to determine double jeopardy issues. It should also be noted that the phrase, "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," was included in Florida Statute 775.021 even prior to the 1988 amendment, yet these courts did not find this portion of the statute prohibited them from reaching the decisions reached. On the other hand, in other decisions the courts have adhered strictly to the statutory element test of Blockburger. If any similar factor can be found in all this, it is that courts seem most willing to look behind the statutory elements to the pleadings and the proof in cases of homicide, ie. a single death = a single offense.

Petitioner's basic contention in this and all the other cases currently before this court on the same basic issue, is that by amending Florida Statue 775.021 (4) [Chapter 88-131] the legislature declared the crimes of possession and sale of an illegal drug to be separate offenses. However, if the legislature had specifically done so, in clear and unambiguous language, the instant case would not be before this court. But by including an

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[1] This listing is not all inclusive, as many opinions did not recite sufficient background facts showing whether they looked beyond the statutory elements. However, reading between the lines, it could be reasonably assumed from the offenses charged and those found to be lessers, that the court did so.

exception for "subsumed" offenses,[2] the legislature still left open the question of whether a possession charge is "subsumed" by a charge for the contemporaneous sale of the same substance. The District Court of Appeal, Second District, held in its opinion in the instant case that pursuant to its earlier opinion in the case of V.A.A. v. State, Case No. 88-3290 [15 F.L.W. D672] (Fla. 2d DCA March 9, 1990), the crimes of sale and possession committed by respondent after July 1, 1988, fell within the exception for "subsumed" offenses, therefore, respondent could only be convicted of and sentenced for the crime of sale.

Like Cassandra,[3] the warnings of Justice Barkett in her concurring/dissenting opinion in State v. Smith, 547 So.2d 613 (Fla. 1989) have come true. In her opinion Justice Barkett prophesied that by returning to the pre-Carawan [Carawan v. State, 515 So.2d 161 (Fla. 1987)] "standard" as to the propriety of multiple punishments for a single act the courts would once more be in a muddle as the pre-Carawan standard was far from consistent or coherent. As this court itself admitted in Carawan, supra., there were occasions when it had chosen to apply a strict Blockburger analysis [Blockburger v. U.S., 284 U.S. 299 (1932)] and other occasions when it had not. As predicted, the District Courts have applied whichever of the competing and inconsistent

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[2] (4)(b)(3). Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

[3] Cassandra, a daughter of King Priam of Troy was endowed with the gift of prophecy, however, for spurning the advances of the god Apollo, she was also fated by him that no one would ever heed her predictions.

pre-Carawan cases they saw fit resulting in this and other similar cases being before this court.

Respondent would urge this court to hold in accordance with Justice Barkett's reasoning that Florida Statute 775.021(4), even as amended, is still a rule of construction and, therefore, comes into play only when the intent to a specific enactment is unclear and not otherwise. Furthermore, such a rule of construction cannot be said to apply to every enactment of the criminal code, especially those enacted previously. Subsequent legislation which declares the intent of an earlier enactment is hardly conclusive as the present legislature may easily be wrong in its assessment of what the earlier legislative body actually intended. If the legislature wishes to express its own intent as to statutes already on the books, it must do so by amendment of the existing statute.

Most importantly, intent, once established must still be consistent with Constitutional principles. Carawan, supra., did not address any constitutional aspects, but merely attempted to resolve the seemingly apparent conflict between the rule of lenity and the Blockburger test both of which existed on equal footing at the time of that decision.

Respondent adopts Justice Barkett's view that the rule of lenity is more than merely statutory, it is based upon the constitutional principles of due process and double jeopardy as found in the Florida Constitution,[Art.I sec.9], therefore, trial courts must not impose punishments for offenses unless it has

been clearly and plainly authorized by the legislature. This is in accordance with due process principles that where ambiguous, statutes must be strictly construed against the government. In addition, double jeopardy in Florida has been held to protect one from the threat of multiple punishments for the same act as much as for successive prosecutions for the same offense.

A strict Blockburger analysis provides no limits on how many offenses the state may chose to charge someone with for a single criminal act. While pre-guidelines, a sentencing judge could take into account that numerous charges and the resulting convictions arose from a single criminal act when imposing sentence this is no longer possible or permissible under the existing guidelines, the court being required to assess points for all convictions.

Should this court chose to reject Justice Barkett's due process/double jeopardy rationale, respondent still contends that the District Court's holding should be affirmed based upon their finding that the offense of possession is "subsumed" in the offense of sale.It would be appropriate to first define what is meant by "subsume". Webster's Dictionary defines "subsume" as -to place in a larger, more comprehensive category or under a general principle.

The jury instructions for possession and sale both contain three elements. Of those three elements, #2 and #3 are identical. Element #1 of each offense has three "sub-elements": a noun, a verb and an object. Of those three sub-elements, the noun and object "sub-element" of each element #1 are precisely the same.

The verb "sub-element" of element #1 for "possession" requires possession. The verb sub-element of element #1 for "sale" is proven in one of six different ways.

Three of those verb-sub-elements expressly require proof of possession: possession with intent to sell, possession with intent to manufacture, or possession with intent to deliver. Because possession is expressly required for the inchoate crimes of possession with intent to sell, possession with intent to manufacture, or possession with intent to deliver, it is also impliedly required for the completed crimes of sale, manufacture or delivery of a controlled substance.

The completed offenses of sale, manufacture or delivery cannot occur spontaneously out of thin air; they must, of necessity, have been preceded by the inchoate crimes of possession with intent to sell, possession with intent to manufacture, or possession with intent to deliver. Since there is no logical reason to distinguish the two sets of alternate means of proving the verb-sub-element of possession and sale, etc.,there is no reason to assume or presume that the legislature enacting the statute intended such a distinction.

Petitioner argues that because the other alternate means of proving the verb sub-element of element #1 in "sale" do not expressly require possession and that sale can be proved without the defendant ever actually having the item in his possession, that possession is not implied and therefore the offense of possession is not "subsumed" by the offense of sale of the same

item despite the fact that possession would clearly be subsumed by greater charge of possession with intent to sell.

Because two of three elements of both charges are precisely the same, as are the noun and object sub-elements, and because possession is as implicitly required in three of the six verb sub-elements as it is expressly required in the other three verb sub-elements, the lesser charge is "subsumed" by the greater, in other words the specific is logically incorporated within the general, dual convictions for both possession and sale is impermissible.

The holding of the District Court of Appeal, Second District must be upheld.

## CONCLUSION

Based on the foregoing reasons, argument and authorities, Respondent respectfully requests that this Honorable Court uphold the decision of the lower court.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Peggy Quince, Assistant Attorney General, Westwood Center, 2002 North Lois Avenue, 7th Floor, Tampa, Florida 33607, and to Michael Crisel, 5225 - 88th Terrace North, Pinellas Park, Florida 34666, September 14, 1990.

RESPECTFULLY SUBMITTED,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Allyn Giambalvo
Allyn Giambalvo
Assistant Public Defender
Criminal Court Building
5100-144th Avenue North
Clearwater, Florida 34620
Florida Bar No: 239399