

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,438

047
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THE STATE OF FLORIDA,

Petitioner,

-vs-

FLETCHER EMBREY HOLLINGER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This is an appeal by the State of Florida following a certified conflict by the Third District Court of Appeal with the First District's decision in Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989). In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "T" will be used to designate the transcripts of proceedings.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Facts and Case as a generally accurate account of the facts of the crime and the lower court proceedings. Because resolution of the issue of whether dual convictions for first degree murder and possession of a firearm in the commission of a felony are proper is not specifically influenced by the facts of the case, any discrepancy with the Statement of the Facts will not be addressed.

SUMMARY OF THE ARGUMENT

By arguing that the offense of first degree murder is not enhanced as a result of the display of a firearm, the state neglects to take into account the enhancement provision set forth in section 775.087(2) Florida Statutes (1989). Section 775.087(2) provides for enhancement of any sentence for a murder in which the defendant uses a firearm by requiring the imposition of a three year minimum sentence. As Hollinger's first degree murder conviction required the imposition of a three year minimum sentence, that enhancement precludes a separate conviction for possession of a firearm during the commission of a felony.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY HELD THAT DUAL CONVICTIONS FOR FIRST DEGREE MURDER WITH A FIREARM AND POSSESSION OF A FIREARM IN THE COMMISSION OF A FELONY VIOLATE THE DICTATES OF CARAWAN v. STATE

Following Carawan v. State, 515 So.2d 161 (Fla. 1987), this Court rendered its decision in Hall v. State, 517 So.2d 678 (Fla. 1988). In Hall v. State, this Court held that dual convictions for armed robbery and possession of a firearm in the commission of a felony were improper. Reasoning that the offense of armed robbery provided an enhancement by virtue of the fact that a firearm had been used during the course of the robbery, this Court held that allowing an additional conviction for possession of a firearm in the commission of a felony would permit double enhancement for carrying or displaying the same weapon.

We hold the legislature had no intent of punishing a defendant twice for the single act of displaying a firearm or carrying a firearm while committing a robbery. To hold otherwise would mean that, for every offense of robbery in which a defendant uses or carries or displays a firearm, in violation of section 812.13, there would also be a violation of section 790.02(2). Robbery, under section 812.13(1), becomes the enhanced offense of armed robbery under 812.13(2)(a) by reason of the element of carrying or displaying a firearm. Interpreting the statutes according to the state would mean the offense is enhanced twice for carrying or displaying the same weapon. It is unreasonable to presume the legislature intended this result. In accordance with Carawan, we find this would constitute a dual punishment for one single act, and would be contrary to the legislative intent under the principles set forth in our holdings in Carawan, Mills, Houser, and Boivin.

Carawan v. State, supra, at 680.

Following this Court's decision in Hall, courts have consistently held that a defendant accused of committing a single act cannot be convicted of possession of a firearm in the commission of a felony if the defendant is simultaneously convicted of an additional offense which has been enhanced as a result of the firearm. Gibson v. State, Case No. 89-158 (Fla. 1st DCA October 10, 1990) [15 FLW D2539] (Appellant's conviction and sentence for using a firearm during an offense not permitted where second degree murder conviction is enhanced as a result of the use of the firearm); Ahlberg v. State, 541 So.2d 775 (Fla. 3d DCA 1989) (conviction for possession of firearm in the commission of felony improper where defendant simultaneously convicted of robbery with a firearm, kidnapping with a firearm, burglary of a dwelling with an assault or battery with a firearm); Curry v. State, 539 So.2d 573 (Fla. 5th DCA 1989) (possession of firearm in commission of felony conviction improper where defendant also convicted of second-degree murder and shooting deadly missile into building for the same acts); Perez v. State, 528 So.2d 129 (Fla. 3d DCA 1988) (dual convictions improper where attempted first degree murder charge was reclassified as a result of possession of firearm); Cooper v. State, 524 So.2d 738 (Fla. 1st DCA 1988) (robbery with deadly weapon and display of a weapon during felony); McKinnon v. State, 523 So.2d 1238 (Fla. 1st DCA 1988) (manslaughter, reclassified based on display of a firearm, and use of a firearm during felony). Accord, Cox v. State, 552 So.2d 343 (fla. 5th DCA 1989); Joseph v. State, 547 So.2d 249 (Fla. 3d DCA 1989); Jones v. State, 546 So.2d 126 (Fla. 3d DCA

1989); Brown v. State, 538 So. 2d 116 (Fla. 5th DCA 1989); Burgess v. State, 524 So.2d 1132 (Fla. 1st DCA 1988).

Although these decisions have not dealt with offenses which were originally classified as life felonies, the precedent established by these cases, as well as the rationale of this Court's decisions in Hall and Carawan, clearly establish the principle that once the display of a firearm in the commission of a felony has been used to enhance an offense, the defendant cannot be simultaneously convicted of the possession of a firearm charge and the enhanced offense. The Third District Court of Appeal has recognized this principle in its holdings disallowing dual convictions for first degree murder with a firearm and possession of a firearm in the commission of a felony. Martin v. State, Case no. 88-827 (Fla. 3d DCA October 30, 1990) [15 FLW D2677]; Becerril v. State, Case No. 90-76 (Fla. 3d DCA October 23, 1990) [15 FLW D2641]; Reddick v. State, 554 So.2d 564 (Fla. 3d DCA 1989); Jones v. State, 547 So.2d 1278 (Fla. 3d DCA 1989); Gonzalez v. State, 543 So.2d 386 (Fla. 3d DCA 1989).

Although first degree murder is a life felony, prohibiting reclassification of the offense pursuant to section 775.087(1), enhancement of the offense, as a result of the use of the firearm during the commission of the murder, is provided for in section 775.087(2). Section 775.087(2) provides for the following enhancement:

(2) Any person who is convicted of:

(a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a

felony, or aircraft piracy, or any attempt to commit the aforementioned crime; or

(b) Any battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties and who had in this possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provisions of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.275, prior to serving such minimum sentence.

Subsection (2) is clearly a form of enhancement which provides for a mandatory minimum sentence to a selected list of felonies. Haywood v. State, 466 So.2d 424, 425 (Fla. 4th DCA 1984), approved, 482 So.2d 1317; Brown v. State, 460 So.2d 546 (Fla. 1st DCA 1984) approved, 475 So.2d 1243. The imposition of the minimum mandatory sentence is independent of the application of the reclassification subsection of the statute. State v. Whitehead, 472 So.2d 730 (Fla. 1985); State v. Smith, 470 So.2d 764 (Fla. 5th DCA 1985), approved, 485 So.2d 1284 (Fla. 1986); Haywood v. State, supra; Carter v. State, 464 So.2d 172 (Fla. 2d DCA 1985) affirmed, 479 So.2d 117 (Fla 1985); Perez v. State, 431 So.2d 274 (Fla. 5th DCA 1983), approved, 449 So.2d 818 (Fla. 1984). The imposition of the minimum sentence is mandatory giving the trial judge no discretion in deciding whether to enhance the defendant's sentence by virtue of the minimum mandatory provision of section 775.087(2). Perez v. State, 449 So.2d 818 (Fla. 1984); State v. Sesler, 386 So.2d 293 (Fla. 1980)

Thus, Hollinger's conviction for first degree murder

required the imposition of the minimum sentence in section 775.087(2).¹ The offense of first degree murder was therefore enhanced by virtue of the fact that a firearm was used during the commission of the murder. To permit an additional conviction for possession of a firearm in the commission of a felony would therefore allow for dual enhancement for the single act of carrying or displaying the firearm during the murder.

Respondent recognizes that this Court reviewed State v. Baker, 456 So.2d 419 (Fla. 1984) in Carawan, and concluded that a Carawan type analysis was not necessary since the statutes were different, tending to show that they addressed different evils, and the rule of lenity was inapplicable "since, if any reasonable inference could be drawn from the face of the statutes, it was that the legislature intended the two offenses to be treated as separate." Carawan v. State, supra, at 169. This Court then went on to state that "[t]his conclusion was reinforced by the legislature's manifest concern over the proliferation of violent crimes involving the use of firearms." Carawan v. State, supra. In reaching this conclusion however, this Court neglected to take into consideration that the imposition of the minimum mandatory under section of 775.087(2) addresses the "evil" of carrying a firearm during the commission of the murder. Similarly, in Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989), the First District Court of Appeal neglected to recognize

¹ In the instant case, the trial court did not impose a sentence for carrying a firearm in the commission of a felony because the prosecutor informed the court that although Mr. Hollinger could be convicted of the offense, he could not be sentenced for it. (T. 1757).

the dual enhancement provisions of section 775.087. Contrary to the Court's ruling in Harper, the murder conviction is enhanced under section 775.087.


CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent respectfully requests this Court to affirm the Third District Court of Appeal's decision disallowing dual convictions for first degree murder and possession of a firearm in the commission of a felony.

Respectfully submitted,

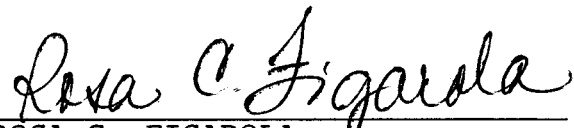
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 13th day of November, 1990.


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