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SID J. WHITE
DEC 17 1990
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. 76,812
CURTIS WHITE,	:	
Respondent.	:	

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE AND FACTS

Respondent, CURTIS WHITE, accepts Petitioner's Statement of the Case and Facts taken from Appellant's brief filed in the Second District Court of Appeal.

SUMMARY OF THE ARGUMENT

Convictions for both sale of one rock of cocaine and possession of that same rock cannot be sustained as such a result violates the double jeopardy provisions of the United States and Florida Constitutions. A strict Blockburger analysis demonstrates that possession is a lesser of sale; the rule of lenity--which must be applied when there is doubt--requires a finding that possession is a lesser of sale; or the legislature has violated constitutional provisions of due process and double jeopardy with its recent legislative amendment to section 775.021, Florida Statutes (Supp. 1988), and such amendment must be stricken.

ARGUMENT

ISSUE I

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 SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES?

Petitioner's contention that by amending Florida Statute 775.021 (4) [Chapter 88-131] the legislature declared the crimes of possession and sale of an illegal drug to be separate offenses. If the legislature had specifically done so, in clear and ambiguous language, the instant case would not be before this court. But by including an exception for "subsumed" offenses,[1] 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 Second District held in its opinion in the instant case that 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.

In coming to this conclusion the Second District Court of Appeal upheld its analysis of the elements of possession and sale that it set forth in Gordon v. State, 528 So.2d 910 at 912-914:

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

In order for the crimes to be separate we must find that each crime contains an element not contained within the other. Id. We begin our discussion with the possession element of these two crimes. A defendant cannot be convicted of either crime unless he is deemed, at law, to have had some sort of possession of the contraband. As to the crime of sale, a defendant need not be the actual possessor of the contraband although such actual possession will naturally result in criminal sanctions as in the instant case. The possessory element can be shared by others legally responsible for the crime. For example, a person acting as a go-between or broker may arrange for or be the moving force in the sale of contraband, yet never have either actual nor constructive possession of the contraband. In such a case, the act of the seller who has actual possession of the contraband becomes the act of the broker. The broker is deemed to have the same possession as the seller and can be convicted as a principal of the crime of sale under Chapter 777, Florida Statutes. As to the crime of possession-with-intent-to-sell, we need not elaborate on the obvious, to wit, possession is an element of this crime. In the case before us, then where there is no question of a broker or others involved in the crime charged, but rather a single act with a single defendant, we conclude that the first element of the crime of sale of contraband as well as the crime of possession-with-intent-to-sell contraband is possession.

We turn now to the next element, intent. All criminal behavior requires proof of criminal intent, the means rea, which serves to distinguish such behavior from accidental (noncriminal) behavior or negligent behavior. See generally W. LaFave and A. Scott, Substantive Criminal Law section 3.5(e) (1986). There is no question that the intent element in the crime of possession-with-intent-to-sell is "intent to sell." Regarding the crime of sale, we discern also that the intent there is "intent to sell" because a person will not (or cannot) voluntarily effectuate a sale without desiring such result. "[A] man is to be taken to intend what he does, or that which is the necessary and natural consequence of his own act." R. Perkins, Perkins on Criminal Law 748

(2d ed. 1969), citing Harrison v. Commonwealth, 79 Va. 374, 377 (1884). We conclude, therefore, that the two crimes at issue here so far involve the same two elements: possession and intent. This is the point where the similarity between these two crimes ends.

The sum of the elements of the crimes of possession-with-intent-to-sell is two (2): the state must merely prove the defendant (a) possessed the contraband with (b) the intent to sell it. The crime of sale of contraband contains these two elements plus a third. This third element is the actual sale as defined in Florida Standard Jury Instructions in Criminal Cases (1987 ed.), page 219: "'sell' means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value." It will be evident that in contrasting the component elements of these two crimes that in proving the elements of sale, the prosecution cannot also help but prove the elements of possession-with-intent-to-sell. Two of our sister courts have reached this same conclusion. Fletcher v. State, 428 So.2d 667 (Fla. 1st DCA 1982), petition for review denied, 430 So.2d 452 (Fla. 1983) (a pre-Carawan decision), and Smith v. State, No. 87-0007 (Fla. 4th DCA Apr. 13, 1988) [13 F.L.W. 925], (a post-Carawan decision). The fourth district in Smith has acknowledged conflict on this question with our own pre-Carawan opinion in Dukes v. State, 464 So.2d 582 (Fla. 2d DCA 1985).

To the extent Dukes conflicts with Carawan, it, or course, does not survive. Dukes noted that the crime of possession-with-intent-to-sell does not include the element of sale. This is indeed true as we have concluded in the instant case. Our analysis in Dukes was correct so far as it went, but it was, as we learn in Carawan, incomplete. In Dukes we failed to continue on to the next step to delineate the unique element that the crime of possession-with-intent-to-sell contraband has that the crime of sale of contraband does not. Without this further inquiry the Blockburger analysis was incomplete as it regarded these two crimes. A complete Blockburger inquiry would have revealed that the crime of posses-

> sion-with-intent-to-sell contained no element not also contained within the crime of sale. *Dukes* was correct, however, in its disposition of the third case discussed in the opinion, 464 So.2d at 584 (Case No. 83-2369), because the factual circumstances showed that the appellant had placed a baggie or marijuana in a nearby window--thus committing the crime of possession marijuana with intent to sell--just after selling a completely different baggie of marijuana to a passenger in a passing car. Thus, the two crimes were predicated upon separate acts and the appellant was then properly convicted and punished for both. In summary, that part of *Dukes* finding no double jeopardy violation for two crimes predicated upon a single act, relying on the incomplete *Blockburger* test, is no longer viable after *Carawan*; thus, we today recognize the primacy of *Carawan* and find ourselves in harmony with our colleagues in the first and fourth districts on this issue.

The important aspect of this portion of the opinion is that the Second District Court of Appeal found possession to be an essential element of both sale and possession with intent to sell. In this day of convictions established by conspiracies and hearsay statements in which defendants are convicted and sentenced as principals even though they may never have actually touched the drugs or seen the drugs, or been near the drugs, it is impossible to imagine a situation where a defendant would be guilty of sale and not possession. With the aider and abettor section under principals and conspiracy exceptions to the hearsay rule, the concept of possession becomes much broader.

In addition, the State's argument that separate evils are being addressed by these two charges because possessing with intent to sell is aimed at punishing the individual while sale involves the participation of others is an argument that also cannot be

supported by factual examples. Possession with intent to sell must necessarily include the prospect of others being involved eventually or the charge would just be simple possession; and with police undercover operations, there are legions of cases where defendants sold--as in Gordon's case--to an undercover officer. That type of sale did not involve the arrest of anyone else.

As can be seen from the Gordon decision, the situation of sale and possession with intent to sell the same substance fits the Blockburger test--even under a strict analysis. If there is any doubt, however, the rule of lenity must be applied. This is true in spite of the legislature's recent changes to the rules of construction as set forth in section 775.021, Florida Statutes (Supp. 1988).

Carawan v. State, 515 So.2d 161 (Fla. 1987), only applies the rule of lenity when legislative intent cannot be determined and is equivocal on the issue of multiple punishments. It is a rule of last resort based not only on Florida's statutes but also on our common law. As pointed out in Carawan, Id. at 165, 166:

> The third rule is that courts must resolve all doubts in favor of lenity toward the accused. This "rule of lenity," a part of our common law, has been codified in section 775.021(1), Florida Statutes (1985):
>
> > The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorable to the accused.
>
> The United States Supreme Court, interpreting the federal rule of lenity, has characterized it as

> a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Quoting Ladner v. United States, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958), we stated: "'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.'"

Albernaz v. United States, 450 U.S. 333, 342, 101 S.Ct. 1137, 1144, 67 L.Ed.2d 275 (1981) (citation omitted). Our prior decisions also have described Florida's own rule of lenity as:

> a fundamental rule of statutory construction, i.e., that criminal statutes shall be construed strictly in favor of the person against whom a penalty is to be imposed. Ferguson v. State, 377 So.2d 709 (Fla. 1979). We have held that "'nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms.'" State v. Wershow, 343 So.2d 605, 608 (Fla. 1977), quoting Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927).

Palmer v. State, 438 So.2d 1, 3 (Fla. 1983).

Quite simply, if the courts cannot determine whether or not the legislature intended multiple punishments, then all doubts must be resolved in favor of the defendant. It would be a violation of due process to deprive a person of his liberty on the basis of pure guesswork in trying to determine legislative intent. And if the courts cannot determine legislative intent, how is the individual supposed to be aware of the legal consequences and possible

punishments for his acts? Doubts that directly affect an individual's liberty must be resolved in favor of the defendant.

The State argues and the majority in State v. Smith, 547 So.2d 613 (Fla. 1989), appears to conclude that the recent statutory changes in section 775.021 are a direct result of the legislature's dissatisfaction with Carawan and clearly states that the rule of lenity is not to be applied. If this is, indeed, the legislative intent of the changes to section 775.021, then the legislature's attempt to do away with the rule of lenity must be held unconstitutional as it violates due process. To do away with the rule of lenity would, in effect, require the law to be that any doubts on multiple punishments must be resolved in favor of the State. The State is entitled to no such presumption. The United States and Florida constitutions reject such a concept.

It is to be questioned, however, whether the new statute changes actually do try to eliminate the rule of lenity. The new changes try to restate a Blockburger test for what is the same criminal offense, but the courts will still be left with questions on legislative intent on a case-by-case basis. The general language set forth in sectin 775.021(4)(b) will not cure the problems discussed in Carawan, and the courts will be back to trying to figure out legislative intent in the absence of clear statutory language and in situations where the Blockburger test reaches absurd results. In spite of the legislature's desire not to use the rule of lenity, the courts have no other options when patchwork statutes leave all in the dark.

Should this court disagree and find the new statute to have done away with the rule of lenity, then the new rule should be found unconstitutional as in violation of due process and double jeopardy. The due process problems have already been discussed; and the double jeopardy problems would arise when, as in the case sub judice, the State tries to obtain multiple convictions and sentences for crimes arising from a single act. The legislature may have the power to delineate crime and punishment, but this power is limited by the double jeopardy provision of the United States Constitution.

In Carawan, 515 So.2d at 164, Justice Barkett noted that the Court was not reaching the constitutional issue of double jeopardy where "the legislature clearly, unambiguously and precisely stated an intent to punish the exact same offense under separate statutory provision...." The Court did not reach this issue because it was able to decide the case on statutory constructions. The Smith, supra, decision, however, makes it clear that legislative intent is to do away with the Carawan analysis and to impose multiple punishments for one act. If this Court continues to uphold its opinion in Smith, then it must reach the constitutional issues forced upon it by the legislature's amendment. Justice Barkett's dissent in Smith, 547 So.2d at 621, 622, should be adopted by this Court:

> I would hold that the rule of lenity arises not merely from section 775.021(1), Florida Statutes (1987), but also from the common law and the due process and double jeopardy clauses of the Florida Constitution. The rule of lenity, simply stated, is that the courts must

> decline to impose a punishment that has not plainly and unmistakably been authorized by the legislature. Carawan 515 So.2d at 165; Palmer v. State, 438 So.2d 1, 3 (Fla. 1983); Ferguson v. State, 377 So.2d 709 (Fla. 1979); State v. Wershow, 343 So.2d 605, 608 (Fla. 1977); Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927). Accord Ball v. United States, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); Albernaz v. United States, 450 U.S. 333, 342, 101 S.Ct. 1137, 1144, 67 L.Ed.2d 275 (1981); Prince v. United States, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957). This is the very heart of due process and the guarantee against double jeopardy.
>
> Under the due process clause, the government is strictly bound to adhere to forms and procedures designed to achieve justice. When there is no reasonable basis for ascertaining the intent of the legislature to impose multiple punishments, the statutes in question must be strictly construed against the government. Art. I, § 9, Fla. Const. Accord Albernaz, 450 U.S. at 342, 101 S.Ct. at 1144; Prince, 352 U.S. at 322, 77 s.Ct. at 403.
>
> Under the double jeopardy clause, the government is forbidden from punishing a person twice for the same offense. As we recognized in Carawan, the Florida double jeopardy clause was designed as much to prevent multiple punishments as multiple trials for the same offense. Carawan, 515 So.2d at 164; art. I, § 9, Fla. Const. Accordingly, there is, and must be, a limit to the number of offenses that may be charged when a person commits only a single criminal act. A "strict Blockburger" analysis affords no limiting principle at all, since it theoretically can result in a person's being charged with a dozen, a hundred, or a thousand offenses based on a single criminal act.

As noted by Justice Barkett in her concluding remarks in her dissent in Smith, "the analysis employed in Carawan arises from article I, section 9, of the Florida Constitution, and remains in force notwithstanding the 1988 amendments to section 775.021." The

Second District Court of Appeal's conclusion that a defendant cannot be convicted for both crimes of sale and possession arising from one act must be upheld.

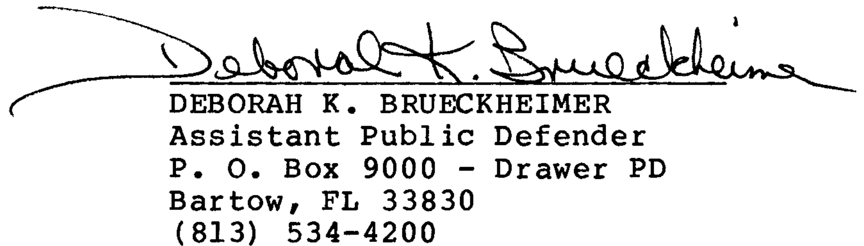
CONCLUSION

Based on the above-stated facts, arguments, and authorities, Respondent asks this Honorable Court to uphold the order of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 13th day of December, 1990.

Respectfully submitted,



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