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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 77,006

WILLIAM DUKES,

Respondent.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Respondent was the defendant before the trial court and the Petitioner was the prosecution. The parties will be referred by their proper names or as they appeared before the trial court. The record on appeal consists of one (1) volume and will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On September 28, 1989, the State Attorney for the Twentieth Judicial Circuit in and for Lee County, Florida filed an information charging the defendant, William Dukes, with sale and possession of cocaine. The offenses occurred on August 18, 1989 (R. 9). On February 5, 1990, the defendant moved to dismiss one of the charges based on double jeopardy; and the State and Court contended that the Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988) decision did not apply after the July 1, 1988, amendment to the statute. The trial court denied the defendant's motion and the defendant entered a plea of no contest, preserving his dispositive motion. He was then placed on 5 years concurrent probation on each charge in accordance with the plea and guidelines (R. 1-8, 13,-17, 22-24). The defendant filed a Notice of Appeal on February 7, 1990. (R. 18).

On November 21, 1990, the Second District Court affirmed the defendant's conviction and sentence for one count of sale of cocaine and vacated the defendant's conviction and sentence for possession of cocaine on the authority of V.A.A. v. State, 561 So.2d 314 (Fla. 2d DCA 1990) (Appendix).

SUMMARY OF THE ARGUMENT

The lower court erred in dismissing the possession of cocaine charge in this case. The Information charged the defendant with sale of cocaine and possession of cocaine which occurred after July 1, 1988. Carawan v. State, 515 So.2d 161 (Fla. 1987), is applicable to crimes occurring before the effective date of chapter 88-131, section 7, Laws of Florida, but not to crimes occurring after that date. State v. Parker, 551 So.2d 1209 (Fla. 1989); State v. Smith, 547 So.2d 613 (Fla. 1989). The effective date of chapter 88-131, Laws of Florida, is July 1, 1988. Carawan has been overridden for offenses occurring after July 1, 1988, the effective date of Chapter 88-131, Section 7. As recognized by this Court in State v. Burton, 555 So.2d 1210 (Fla. 1989), the amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments.

CERTIFIED QUESTION

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

In State v. Smith, Gordon, et. al., 547 So.2d 613 (Fla. 1989) this Court held that the decision in Carawan v. State, 515 So.2d 161 (Fla. 1987) has been overridden for offenses that occurred after the effective date of Chapter 88-131, section 7, i.e., July 1, 1988. Section 775.021, Florida Statutes (1988). Accordingly, Carawan does not apply to the offenses which occurred on August 18, 1989, and separate convictions are appropriate for both sale and possession of cocaine. In amending section 775.021(4), the legislature declared the crimes of possession and sale of an illegal drug separate offenses. In fact, in State v. Burton, 555 So.2d 1210 (Fla. 1989) this Court noted that Smith (547 So.2d 613), held that the amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments.

The First District Court, the Fifth District Court, and Second District Judge Parker have authored opinions which have concluded that there is no double jeopardy bar to dual convictions for both sale and possession of the same contraband. In St. Fabre v. State, 548 So.2d 797 (Fla. 1st DCA 1989), the court found that possession of cocaine and sale of cocaine constitute separate offenses for double jeopardy purposes, even

when they are both predicated on the same act or transaction. *Sub judice*, as in St Fabre, the defendant was charged with violating two separate subsections of the statute and, since possession of cocaine is not a necessarily lesser included offense of sale of the same cocaine, his double jeopardy claim must fail. In Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990), the Fifth District Court affirmed the defendant's conviction and sentence for two statutory offenses: possession of a controlled substance (a third degree felony under Section 893.13(1)(f)), and delivery of a controlled substance (a second degree felony under Section 893.13(1)(a)(1)). In Davis, the Appellant, pursuant to a negotiated drug deal, handed an undercover officer one piece of crack cocaine and in Davis, the court recognized that possession is not required for a sale and a sale is not required to possess contraband. See also, McIntyre v. State, 564 So.2d 243 (Fla. 5th DCA 1990) [Because the sale and possession of the controlled substance occurred on July 1, 1988, the effective date of Chapter 88-131, section 7, Laws of Florida, Appellant can be separately convicted of both offenses.] In fact, in Carawan, this Court recognized that:

> ". . . Sale of drugs can constitute a separate crime from possession. . ."
>
> Id. at 176.

In Crisel v. State, 561 So.2d 453 (Fla. 2d DCA 1990), Judge Parker's concurring opinion sets forth a detailed analysis supporting his conclusion that there can be dual convictions for

both the sale and possession of the same illegal drug under the amended statute, 775.021. In his concurring opinion, Judge Parker notes, in pertinent part:

> ". . . I perceive the court's rationale in V.A.A. to be that a possession charge is always subsumed into a charge of sale based upon section 775.021(4)(b)(3), Florida Statutes (Supp. 1988). I disagree. As our supreme court unanimously recognized in State v. Burton, 555 So.2d 1210 (Fla. 1990):
>
> > *We held, in State v. Smith, 547 So.2d 613 (Fla. 1989), which applied chapter 88-131, section 7, Laws of Florida, that the legislature intended the following to be separate offenses subject to separate convictions and separate punishments: the sale or delivery of a controlled substance; and possession of the substance with intent to sell. We also held that although chapter 88-131 overrode Carawan v. State, 515 So.2d 161 (Fla. 1987), nevertheless, it is not to be applied retroactively.*
>
> Burton, 555 So.2d at 1211 (footnote omitted.) Therefore, I think the supreme court has recognized that the amended statute has overturned the Carawan court's analysis of double jeopardy and that pursuant to the amended statute, there now can be convictions for both the sale and possession of the same illegal drug.
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> The Florida Standard Jury Instruction strengthens my position.
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> Nowhere is the element of possession listed as an element in the crime of sale.
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> * * *
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> Likewise, nowhere is the element of sale listed as an element of the crime of possession.
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> * * *
>
> I would first note the legislature's following language in both acts:

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*.

* * *

If a court cannot look to the proof to determine if the defendant can suffer multiple punishments, it seems to me that any scenario in which a defendant can be found guilty of sale and not guilty of possession of the same drug defeats the rationale of V.A.A.

* * *

This court, in *Elias v. State*, 301 So.2d 111 (Fla. 2d DCA 1974), cert. denied, 312 So.2d 746 (Fla. 1975), without any *Blockburger* analysis, recognized that a defendant, after receiving a verdict of acquittal from the court on a possession of heroin charge, can still be found guilty of sale of heroin, without any proof that the defendant ever posses the heroin. This court found the evidence legally sufficient to convict the defendant as an aider and abetter of the sale. Such a holding appears inconsistent with this court's conclusion in V.A.A. that the elements of possession are subsumed by the elements of sale.

* * *

The Fifth District recently acknowledged conflict with V.A.A. in Davis v. State, No. 89-1064 (Fla. 5th DCA April 5, 1990) [15 F.L.W. D880], and adopts my position that a delivery or a sale of an illegal drug can be accomplished without a possession of that drug. In reaching that position, the fifth district looked to a decision from this court and stated:

But consider an actual case, *Daudt v. State*, 368 So.2d 52 (Fla. 2nd DCA 1979) cert. denied, 376 So.2d 76 (Fla. 1979) in which the court found that a sale was accomplished without possession. In *Daudt* the defendant was convicted of sale and possession of marijuana. The defendant had, at the request

of a prospective buyer (an undercover police officer), made a phone call to his "source' to obtain marijuana. Defendant and the undercover officer then drove to another location where they met "Mike". The defendant assured "Mike" that the money was right and, at Mike's insistence, remained as a lookout while Mike took the officer to the location of the marijuana. The sale went down and the arrest was made.

The *Daudt* court held:

> There is no evidence whatsoever that appellant ever had actual possession or control of the marijuana. Nor was constructive possession established. Although appellant knew of the presence of the marijuana, there is no evidence that it belonged to or was under the control of the appellant. At best, the evidence establishes that appellant brought the parties to the transaction together and expected to be paid for such service.
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> . . .
>
> Appellant aided and abetted [Mike] in selling the marijuana, but not in possessing it. [Mike] already possessed the marijuana; there is no showing that appellant was of any help to [Mike] in either acquiring it or retaining possession of it. On the contrary, appellant aided [Mike] in divesting himself of it.

Daudt at 53-54.

Davis, 15 F.L.W. at D881

The bottom line of my reasoning is that the legislature, in amending section 775.021(4), has declared the crimes of possession and sale of an illegal drug separate offenses, <u>without regard to the indictment or information and without regard to the proof offered at trial.</u> Therefore, all analyses of

> double jeopardy questions must be made by a side-by-side comparison of the elements of the two crimes in question. If this comparison of the two crimes reflects that each offense contains an element that the other does not, then there is no double jeopardy unless the exceptions apply which are listed in section 775.021(4)(b), Florida Statutes (Supp. 1988). If none of the three exceptions under that section apply, then there can be two convictions and two sentences for the two crimes. . . "
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> * * *
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> Crisel, concurring opinion, Parker, J.

In Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1981), approved, 447 So.2d 219 (Fla. 1984), the Court specifically stated that possession is not an essential aspect of sale, and in Daudt v. State, 368 So.2d 52 (Fla. 2d DCA 1979), cert. denied, 376 So.2d 76 (Fla. 1979), the Court reversed a conviction for possession of marijuana for insufficient evidence, but let stand a conviction for sale of the same drug. In addition, it is not a necessary element of delivery that the State prove possession, State v. Daophin, 533 So.2d 761, 762 (Fla. 1988). Separate evils have been addressed in the legislature's proscriptions in §893.13, Florida Statutes. The statutory provision prohibiting possession of a controlled substance is aimed at punishing the individual possessor for his criminal activity which does not directly or necessarily involve persons other than the perpetrator. Sale necessarily includes the involvement of the citizens and the legislature has a legitimate interest in

punishing not only those who engage in private, personal illegal conduct, but who also seek to include the participation of others in the society in proscribed conduct. Section 775.021(4), Florida Statutes, provides that whoever commits several offenses shall be sentenced separately for each. Offenses are separate if each offense requires proof of an element that the other does not "without regard to the pleading or the prove adduced at trial."

In Dukes v. State, 464 So.2d 582, (Fla. 2d DCA 1984), the Court clearly demonstrated that possession and sale have separate elements and the state may have conviction for both even if the same drugs are involved. The state recognizes that the court receded from Dukes in Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), *approved sub nom.*, State v. Smith, 547 So.2d 613 (Fla. 1989). But, the recision from Dukes was solely a product of Carawan which is only controlling for crimes that happened before the effective date of chapter 88-131, Laws of Florida. Since the crimes at issue in this case do not fall into the Carawan window, the reason for the court's receding from *en banc* Dukes no longer apply and it should be considered good law.

Since sale does not necessarily include the element of possession, separate convictions and sentences are appropriate. Pursuant to §775.021, in the absence of an applicable exception, a defendant who commits an act which constitutes more than one offense shall, where each offense requires prove of an element that the other does not, be convicted and sentenced for each offense. The legislature may permissibly decide to punish separately those who seek to involve other persons in illegal

activity as well as those who individually engage in proscribed conduct. Accordingly, the Second District Court erred in concluding that the double jeopardy clause would be violated by virtue of dual convictions for both sale and possession of cocaine.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Honorable Court should reverse the decision of the Second District Court of Appeal, approve the rationale set forth by Judge Parker, and the First and Fifth District Courts of Appeal, and clearly authorize dual convictions for both the sale and possession of contraband.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to The Public Defender's Office, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830 on this 11th day of December, 1990.

OF COUNSEL FOR PETITIONER

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,006

WILLIAM DUKES,

Respondent.

_____/

APPENDIX

Dukes v. State, ___ So.2d ___, 15 F.L.W. D2849 (Fla. 2d DCA Case No. 90-00510, Opinion filed November 21, 1990)

(CAMPBELL, Acting Chief Judge.) The state argues in this appeal that the trial court erred when it suppressed the firearm and drug paraphernalia found in appellee, Richard James Barnett's, car. We reverse on the basis of *State v. Arnold*, 475 So.2d 301 (Fla. 2d DCA 1985) and *Davis v. State*, 461 So.2d 1361 (Fla. 2d DCA), *rev. denied*, 471 So.2d 43 (Fla. 1985).

When Barnett was stopped, Polk County sheriff's deputies were looking for Ronnie Presley, the subject of several outstanding warrants. A detective had advised the deputies that Presley might be found in a certain silver Buick. The deputies knew that Presley and Barnett often rode together in that silver Buick, with Barnett driving and Presley riding along as a passenger.

When the deputies spotted the car, they pulled the car over, assuming Barnett would be driving and that Presley would be a passenger. The car had tinted windows so that the deputies could not see who was in the car until they pulled it over. When Barnett got out, Deputy Taylor looked inside and determined that Presley was not a passenger. Deputy Taylor asked Barnett where Presley was and Barnett said he did not know.

Deputy Taylor then asked Barnett for his driver's license and vehicle identification. When Barnett failed to produce a valid driver's license, the deputies ran a license and warrants check on him and discovered outstanding warrants against Barnett.

In the course of Barnett's subsequent arrest, the deputies found ammunition on Barnett's person and a firearm and drug paraphernalia in the car.

The trial court suppressed the firearm and drug paraphernalia, finding that law enforcement was not entitled to detain Barnett while awaiting the results of a computer check. The court found that once the officers determined that Presley was not in the car, Barnett should have been allowed to leave without further questioning.

This case turns on whether the officers, having already determined that Presley was not in the car, were justified in asking Barnett for identification. We find that they were. Citing the United States Supreme Court and the Florida Supreme Court, this court found in *Davis v. State*, 461 So.2d 1361 (Fla. 2d DCA), *rev. denied*, 471 So.2d 43 (Fla. 1985), that the mere questioning of an individual, including a police request for identification, does not amount to a Fourth Amendment detention. 461 So.2d at 1363. *See also State v. Arnold*, 475 So.2d 301 (Fla. 2d DCA 1985). "[E]ven though most citizens will respond to a police request without being told they are free not to respond, this does not eliminate the consensual nature of the response." 461 So.2d at 1361.

We must conclude that the deputies' request for Barnett's driver's license was not a continuation of the stop, but constituted a consensual encounter. The evidence gained as the result of this encounter was, therefore, not the product of an illegal detention and should not have been suppressed.

Reversed and remanded for proceedings consistent with this opinion. (HALL and PARKER, JJ., Concur.)

* * *

Criminal law—Imposition of costs and attorney's fees and costs in written judgment where those items were not mentioned at sentencing hearing

NELSON RAMOS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 88-00194. Opinion filed November 21, 1990. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, and Stephen Krosschell, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Charles Corces, Jr., Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm appellant's conviction and sentence for robbery with a weapon. However, we agree with appellant that attorney's fees and costs were improperly imposed against him in the final judgment after not being mentioned at the sentencing hearing. Because the written order does not properly conform to the oral pronouncement, we strike the fees and costs without prejudice to reimpose if the court follows proper procedures. (CAMPBELL, A.C.J., and THREADGILL and PATTERSON, JJ., Concur.)

* * *

Criminal law—Separate convictions for sale of cocaine and possession of cocaine improper—Question certified whether, when double jeopardy violation is alleged based on crimes of sale and possession or possession with intent to sell of same quantum of contraband and the crimes occurred after effective date of § 775.021, Florida Statutes (Supp. 1988), it is improper to convict and sentence for both crimes

WILLIAM DUKES, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-00510. Opinion filed November 21, 1990. Appeal from the Circuit Court for Lee County; William J. Nelson, Judge. James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Katherine V. Blanco, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm appellant's conviction and sentence for one count of sale of cocaine. We vacate the conviction and sentence for possession of cocaine on the authority of *V.A.A. v. State*, 561 So.2d 314 (Fla. 2d DCA 1990). As in *V.A.A. v. State*, we certify to the Florida Supreme Court the following question of great public importance:

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

(FRANK, A.C.J., and PATTERSON and ALTENBERND, JJ., Concur.)

* * *

Criminal law—Costs—Absence of notice and opportunity to be heard

GEAN EVERETT, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-02033. Opinion filed November 21, 1990. Appeal from the Circuit Court for Collier County; Ted Brousseau, Judge. James Marion Moorman, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Dell H. Edwards, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm appellant's judgment and sentence, but order stricken the imposition of court costs without prejudice to the state to seek reimposition after proper notice and opportunity to be heard. (FRANK, A.C.J., and PATTERSON and ALTENBERND, JJ., Concur.)

* * *

Contracts—Alleged agreement to rescind sale of used boat—Deposition testimony created issue of material fact as to whether plaintiffs' forbearance to sue defendant for unsatisfactory condition of boat constituted consideration and mutuality for agreement—Summary judgment improperly entered on ground of absence of consideration and mutuality

HABIB (PHIL) ASCHI and CAROL ASCHI, Appellants, v. CLEARWATER BAY MARINE WAYS, INC., a Florida Corporation, Appellee. 2nd District. Case No. 90-00435. Opinion filed November 21, 1990. Appeal from the Circuit Court for Pinellas County; John S. Andrews, Judge. Frank Quesada, Clearwater, for Appellant. Robert M. Petrillo of Bauer, Mariani, Petrillo & Robinson, Clearwater, for Appellee.

(LEHAN, Judge.) We reverse the summary judgment in favor of