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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,038

THE STATE OF FLORIDA,

Petitioner,

vs.

TROY MARTIN, ETC.,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Respondent was the defendant in the trial court below. The Petitioner, **THE STATE OF FLORIDA,** was the prosecution. In this brief, the Respondent will be identified as the "Defendant." Petitioner will be identified as the "State." The symbol "T" will be used to designate the transcript of the lower court proceedings. The symbol "R" will be used to designate the record on appeal. The symbol ST1. will be used to designate the supplemental transcript for voir dire on December 7, 1987. The symbol ST2. will be used to designate the supplemental transcript for voir dire on December 8, 1987. The symbol S.R. will be used to designate the supplemental record submitted by the State. All emphasis is supplied unless otherwise indicated.

The District Court of Appeal of Florida, Third District, paired the instant cause with Hollinger v. State, now State v. Hollinger, Case No. 76,438 before this court, as being in conflict with Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989). (Appendix) The State has already submitted its brief on the merits in Hollinger. The instant cause concerns an identical issue to that raised in State v. Hollinger. In the interest of judicial economy, the State's brief on the merits in the instant case is accompanied by a motion to consolidate the instant cause with State v. Hollinger.

STATEMENT OF THE CASE

Defendant was charged by Indictment with one (1) count of first degree murder; one (1) count of possession of a firearm while engaged in a criminal offense; and one (1) count of possession of a firearm by a convicted felon, which was severed prior to trial. (R.1-3, 6). He was found guilty by a jury of his peers of both counts as charged in the indictment. (R.34-35). He was sentenced to life imprisonment, with a twenty-five (25) minimum mandatory, for the first degree murder conviction. (R.38-41a). In addition, he received a fifteen year concurrent sentence for the firearm conviction. (R.38-41a).

The Third District affirmed Defendant's first degree murder conviction, but reversed the firearm conviction and resulting sentence on the authority of this Court's decision in Hall v. State, 517 So.2d 768 (Fla. 1988). (Appendix) It subsequently granted the State's motion to certify conflict with Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989). This was in keeping with a similar certification in Hollinger v. State, which is currently pending before this Court as State v. Hollinger, Case No. 76,438. The instant cause and Hollinger concern the same issue, and this brief is accompanied with a motion to consolidate this cause with State v. Hollinger, Case No. 76,438.

STATEMENT OF THE FACTS

Garth Dixon was an eyewitness to the murder. (T.210-247). He testified that he went to the aforementioned restaurant to "...pick a lady friend up from work." (T.212). As he sat in his parked car nearby, he observed 3 persons standing on the sidewalk in front of the restaurant. (T.214-215). The victim at one point had said hi to Garth and asked him how he was doing. (T.216).

Garth testified that approximately 15 to 20 minutes later, Defendant walked up to the victim. (T.217-218). At this point Garth apparently pointed at the Defendant as the man who walked up to the victim. (T.218). Defendant said something to the victim, and the other persons that were talking with him drifted away. (T.218-219). Garth had seen the Defendant a couple of nights before. (T.221).

Defendant and the victim exchanged words two or three minutes, and then Defendant said: "[Y]ou don't do that to me no more." (T.222). Defendant pulled a gun out from his waist and fired a shot. (T.222). After the first shot, the victim said: "[D]on't shoot me no more." (T.223). The victim started going down, and the Defendant fired several more shots. (T.223). While the victim was on the ground, Defendant bent down and fired the last shot into his head. (T.224).

As Garth viewed this, his car was directly behind the victim's body. (T.225). In fact some of the victim's blood splattered on his car's hood. (T.225). Garth was scared. (T.225). Curiously, he got out of his car to look at the victim. (T.225). He then backed up his car to the top of the street. (T.225). Despite being scared, he didn't leave because of his girlfriend. (T.225).

A police officer in a patrol car came up to him, and he told him that he would be able to tell him about the shooting. (T.226-227). He didn't want to talk about it on the scene because: "I was scared for my death that somebody would see me talk to the police." (T.227). He observed no one else cooperating or speaking with the police. (T.227). There was no question in his mind that Defendant was the shooter. (T.227).

POINTS ON APPEAL

WHETHER DUAL CONVICTIONS FOR FIRST DEGREE MURDER AND USE OF A FIREARM IN THE COMMISSION OF A FELONY ARISING OUT OF A SINGLE ACT CONSTITUTE A VIOLATION OF THE DOUBLE JEOPARDY PROVISIONS OF THE FLORIDA AND UNITED STATES CONSTITUTIONS?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal has applied an incorrect reading of the Blockburger and Carawan tests, which is inconsistent with prior decisions by this court and by other district courts. First Degree Murder and Use of a Firearm in the Commission of a Felony are two separate offenses which share no common elements. Furthermore, surrounding factors indicate that different ills are addressed by the two laws and that multiple punishments where intended. In doing a Blockburger analysis the court must look to the statutory criteria, and not to whether the charging document includes the mention of a firearm. So long as the defendant's First Degree Murder sentence has not been aggravated for use of a firearm, constitutional considerations do not overcome the presumptions created by statutory rules of construction. Accordingly, multiple sentences must be allowed, and the decision below must be reversed.

ARGUMENT

THE CRIMES OF FIRST DEGREE MURDER AND USE OF A FIREARM IN THE COMMISSION OF A FELONY ARE COMPOSED OF DIFFERENT STATUTORY ELEMENTS, ADDRESS SEPARATE EVILS AND ARE, THEREFORE, NOT VIOLATIVE OF EITHER STATE OR FEDERAL DOUBLE JEOPARDY CONSIDERATIONS.

"With respect to cumulative sentences in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359,366, 103 S.Ct. 673,678, 74 L.Ed.2d 535 (1983). The legislature retains the substantive power to define crimes and prescribe punishment. Jones v. Thomas, 109 S.Ct. 2522, 105 L.Ed.2d 322, 57 U.S.L.W. 4762 (1989). "[W]here the legislature has expressed its intent that separate punishments be imposed upon convictions of separate offenses arising out of one criminal episode, the Double Jeopardy Clause is no bar to such imposition." Borges v. State, 415 So.2d 1265,1267 (Fla. 1982).

The federal standard for evaluating whether a single act can result in multiple punishments was set forth by the Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether

there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." Id. at 304, 52 S.Ct. at 182. If either offense includes an element the other does not, the offenses are separate and discrete. Id. Moreover, if the statutory elements of one offense require proof of facts which the other does not, "the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crime." Iannelli v. United States, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284,1293 n.17, 43 L.Ed.2d 616 (1975)(citations omitted).

Florida courts, and in particular this Court, have recognized that the double jeopardy provision of the Florida constitution was intended to mirror the similar Federal provision. Carawan v. State, 515 So.2d 161,164 (Fla. 1987). This Court has therefore accepted the federal interpretation that "'[w]ith respect to cummulative sentences in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" State v. Smith, 547 So.2d 613 (Fla. 1989) quoting Missouri v. Hunter, 459 U.S. 359,366, 103 S.Ct. 673,678, 74 L.Ed.2d 535 (1983). Although its is possible that the legislature in fact passed a law which punishes the same offense twice in a contitutionally violative manner, it is presumed, that the legislature did not act in ignorance of the constitution and did not intend to punish the same act twice. As insightfully

noted by this Court, "the legislature can achieve the same result with greater economy by merely increasing the penalty for the single underlying offense." Carawan at 164.

For the purpose of determining legislative intent, Florida originally adopted a strict reading of the test set forth in Blockburger. Simply stated, the Blockburger test compares the elements of the crimes in question. If both have at least one element that the other does not, then a presumption arises that the offenses are separate. If all elements are shared, then the opposite presumption arises that the offenses are the same and that the legislature did not intend to punish them separately. This rule was codified by the legislature as follows:

> Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, 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.

§ 775.021(4) Florida Statutes (1985).

In applying this test, multiple convictions for first degree murder and use of a firearm in the commission of a felony have specifically been approved by this Court. In State v. Baker, 456 So.2d 419 (Fla. 1984), convictions for two such

charges where reviewed.[1] While initially conducting a "lesser included offense" analysis,[2] the Court promptly turned to an examination of the propriety of the sentences pursuant to a Blockburger analysis. This court concluded:

> Baker's indictment charged him with **first-degree premeditated murder**, section 782.04, Florida Statutes (1979), and with **use of a firearm during the commission of a felony**, section 790.07, Florida Statutes (1979). The statutory elements of first-degree murder are: (a) the unlawful (b) killing (c) of a human being (d) when perpetrated from a premeditated design to effect the death of the person killed or any human being. § 782.04(1). The statutory elements of use of a firearm during the commission of a felony are: (a) while attempting to commit a felony, (b) displaying, using or threatening or attempting to use any firearm or carrying a concealed firearm.

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1 As in the present case the indictment in Baker was titled "Murder in the First Degree," and only mentioned that a firearm was used in committing the murder in the body of the charge.

> CHARGE: Murder in the First Degree in violation of F.S. 782.04
>
> SPECIFICATION OF CHARGE: In that Charles L. Baker, did on or about the 31st day of August, 1979, in Volusia County, Florida, then and there unlawfully and from a premeditated design to effect the death of one Josephine Baker, a human being, did kill and murder Josephine Baker by shooting her with a firearm, to-wit: a pistol[.]

Baker v. State, 425 So.2d 36,37 n.1 (Fla. 5th DCA 1983).

2 In a similar lesser included offense analysis, this Court had already found that use of a firearm offenses are not lesser included offenses of first degree premeditated murder. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

> § 790.07(2). **These crimes have no elements in common.**

Baker, 456 So.2d at 422. (emphasis added)

With the anouncement of its new rule in Carawan, this Court again reviewed the decision in Baker and found it to be sound. In Carawan, this Court set out the following analysis: (1) a clear and specific statement of the legislature's intent to punish separately controls; (2) absent such a statement, the court must apply the Blockburger test as codified in § 775.021(4); (3) if the Blockburger test indicates that the offenses are equivalent, then separate punishment is presumed; (4) if the Blockburger test indicates that the offenses are separate, then multiple punishments are presumed unless there is evidence of contrary legislative intent; (5) if Blockburger suggests that the offenses are separate but a reasonable basis exists for concluding that there is a contrary intent, then the rule of lenity codified in 775.021(1) requires that the court find the multiple punishments are impermissible. Carawan, supra; Wheeler v. State, 549 So.2d 687, 689 (Fla. 1st DCA 1989). In applying this test to Baker, this Court concluded that in Baker, the Blockburger test was met and all surrounding factors indicated the propriety of multiple punishments:

> In [Baker], for instance, the accused had been convicted of first-degree murder and use of a firearm during the commission of a felony. Noting that legislative intent is the overriding

> issue, but finding none to guide us, we proceeded to analyze the facts of the case under the Blockburger test. Moreover, we found that the two crimes in question shared none of the same elements, tending to show that they addressed separate evils. **The rule of lenity was innaplicable 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. This conclusion was reinforced by the legislature's manifest concern over the proliferation of violent crimes involving the use of firearms.** On the basis of the Blockburger test, therefore, we concluded that separate punishments were permissible.

Carawan at 169. (emphasis added)

The Court never had to reach the question of lenity, and, therefore, the analysis survived untouched under both the strict Blockburger reading and the subsequent Carawan interpretation.

In the legislative session which followed the issuance of Carawan, the legislature amended section 775.021(4) to include "an act or acts which consitute one or more separate criminal offense". Ch. 88-131, § 7, Laws of Fla. Furthermore, the amendment included a specific statement of legislative intent:

> (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 indentical elements of proof.
>
> 2. Offense which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Ch. 88-131, § 7, Laws of Florida.

Based on this amendment, this Court in State v. Smith, 547 So.2d 613 (Fla. 1989), concluded that Carawan has been overriden for offenses that occur after the effective date of the amendment. Moreover, Smith determined that the amendment expressed the following intent by the legislature: (1) that multiple punishments be imposed for separate offenses, where appropriate, without distinction for act or acts; (2) that all criminal offenses containing separate unique statutory elements shall be separately punished (a strict Blockburger rule); (3) that the statute be applied without judicial gloss; (4) that multiple punishment only not be imposed where the three instances set forth in the statute arise. Smith, 547 So.2d at 616.

In the instant case, however, the crime was committed on October 1, 1987, which makes it subject to a Carawan analysis and to a still valid Baker.[3] The State is frankly confused as

[3] Since the Third District appears intent to continue finding these two crimes incompatible under the statutory amendment, this Court is urged to broadly address the propriety of dual sentences under both a Carawan and a post-amendment Blockburger context.

to the persistence with which the Third District has refused to allow the dual convictions for first degree murder, in which a firearm was used, and use of a firearm in the commission of a felony, in view of this Court's pronouncements in Baker and Carawan. See Reddick v. State, 554 So.2d 564 (Fla. 3d DCA 1989); Jones v. State, 547 So.2d 1278 (Fla. 3d DCA 1989); Perez v. State, 543 So.2d 386 (Fla. 3d DCA 1989); Gonzales v. State, 543 So.2d 386 (Fla. 3d DCA 1989). The entire line of cases seems to be based, without analysis or rationale to support their conclusion, on the initial opinion in Gonzales. Gonzales, however, was based, similarly without analysis, on a cite to Carawan, wich is particularly confusing since, as explained above, Carawan reaffirmed the validity of the analysis in Baker. The other cases cited as authority Gonzales, deal with use of a firearm in combination with other crimes for which a Carawan analysis could clearly come out differently than for the present two offenses. Mozqueda v. State, 541 So.2d 777 (Fla. 3d DCA 1989)(attempted first degree murder); Tunidor v. State, 541 So.2d 165 (Fla. 3d DCA 1989)(manslaughter); Smith v. State, 539 So.2d 601 (Fla. 3d DCA 1989)(second degree murder); Henderson v. State, 526 So.2d 743 (Fla. 3d DCA 1988)(second degree murder). Commonsense, and this Court's prior reasoning in Baker, should have guided the lower court to affirm the defendant's conviction and sentence.[4]

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[4] With passage of the statutory amendment the Third District and this Court may naturally address the issue anew making it

"In applying the Blockburger test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts alleged in a particular information." State v. Carpenter, 417 So.2d 986, 988 (Fla. 1982)(emphasis in original); See also Williams v. State, 15 F.L.W. 1049 (1st DCA, April 27, 1990); Borges v. State 415 So.2d 1265 (Fla. 1982); St.Fabre v. State 548 So.2d 797 (Fla. 1st DCA 1989). The State's mention of the word gun in the charging document, to describe the manner of commission of the first degree murder, does not constitute a common element between the two crimes. Such a case specific fact does not even enter into the Blockburger facet of a Carawan analysis. The analysis is totally limited to the statutory elements of the offense and these elements are totally dissimilar:

> The statutory elements of first-degree murder are: (a) the unlawful (b) killing (c) of a human being (d) when perpetrated from a premeditated design to effect the death of the person killed or any human being. § 782.04(1). The statutory elements of use of a firearm during the commission of a felony are: (a) while attempting to commit a felony, (b) displaying, using or threatening or attempting to use any firearm or carrying a concealed firearm. § 790.07(2). **These crimes have no elements in common.**

Baker, 456 So.2d at 422. (emphasis added)

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important for this Court to address the issue broadly in its opinion. See Smith at 616.

Another relevant factor is, that the defendant's sentence for first degree murder was not agravated as a result of the use of a firearm. See Hall v. State, 517 So.2d 678, 680 (Fla. 1988); Llabona v. State, 557 So.2d 66 (Fla. 3d DCA 1990). In fact, it could not have been so aggravated and the State is not suggesting that the defendant's sentence should be aggravated twice for the same offense. Based on the First Degree Murder conviction, the defendant receives no additional minimum mandatory sentence time for use of a firearm, no aggravation of the degree of the offense and, since the title of the count does not reflect use of a firearm, no additional stigma. See Florida Statutes § 775.087 (1989). In the absence of any aggravation for use of a firearm, the Third District's rationale, therefore, punishes the criminal who used a firearm no more than the one who did not. This outcome is clearly against the legislature's evident intent to dissuade the use of firearms in the commissions of crimes.

Unlike the Third District, the First District applied the appropriate analysis to this issue. In Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989), the court affirmed convictions for first degree murder and use of a firearm in the commission of a felony. The court specifically stated "[w]e find clear legislative intent in the statutes that multiple punishments for both crimes are permissible. The first-degree murder statute

neither requires use of a firearm as an element, nor can it be enhanced under § 775.087, Florida Statutes (1987)." Harper, at 1132. This holding is consistent with this Court's ruling in Baker, as well as with the observation in Carawan that "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. This conclusion was reinforced by the legislature's manifest concern over the proliferation of violent crimes involving the use of firearms." Carawan at 169.

Since the instant crimes, first degree murder and use of a firearm in the commission of a felony, share none of the same statutory elements, address separate evils, and do not cause multiple aggravation of convictions arising out of a single episode, such multiple convictions may be upheld and are permissible under the double jeopardy clauses of the state and federal constitution. Such a conclusion results from analysis under Blockburger, Carawan and the post-amendment statute. Therefore, the Third District's opinion below should be reversed and the matter remanded for further proceedings.

CONCLUSION

Based on the foregoing facts, authorities and reasoning, the State respectfully submits this Court render an opinion, which holds that multiple convictions and sentences for first degree murder, and use of a firearm in the commission of a felony, are consistent with double jeopardy clauses of both the Florida and United States Constitutions. The opinion below should be reversed, and the matter remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **TROY MARTIN,** Petitioner, Pro se, DC# 182204, Glades Correctional Facility, 500 Orange Avenue Circle, Belle Glade, Florida 33430 on this 7th day of January, 1991.

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