IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 77,122

BOBBY CHARLES OLIVER,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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Preliminary Statement

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, BOBBY CHARLES OLIVER, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The state appeals that portion of the First District's decision in Oliver v. State, 569 So.2d 1039 (Fla. 1st DCA 1990), which reversed, based on Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1989), respondent's convictions for both possession with intent to sell and sale of the same cocaine.

On June 29, 1989 (R 1-2), deputy sheriffs monitored a controlled drug buy from respondent by an informant (R 195-97). This informant approached respondent at his trailer, seeking to buy $20.00 worth of crack cocaine (R 198, 242-44). Respondent sold him that amount. About one minute later, the informant bought another $20.00 piece (R 225, 244-47). Immediately after this purchase, the informant gave the two pieces of crack cocaine to the deputy sheriffs (R 199-200, 248).

The state charged respondent by information with two counts of possession of cocaine with intent to sell and two counts of sale of cocaine. The jury found respondent guilty as charged, and thereafter the trial court adjudicated him guilty and sentenced him to concurrent terms of 12 years' incarceration. Respondent timely appealed to the First District, raising two issues: (1) whether the trial court violated Wheeler by adjudicating him guilty of both possession with intent sell cocaine and sale of that same cocaine; and (2) whether the trial court imposed a departure sentence without providing

contemporaneous written reasons in violation of Ree v. State, 565 So.2d 1329 (Fla. 1990). The First District ordered reversal for one of the convictions as to each transaction and resentencing, but observed that the trial court had sentenced appellant properly, because application of Ree was prospective only.

The state timely filed its notice to invoke this Court's discretionary jurisdiction, and timely filed its jurisdictional brief. This court accepted jurisdiction, and this brief on the merits follows.

SUMMARY OF THE ARGUMENT

Both State v. V.A.A. and State v. McCloud make clear that the trial court correctly adjudicated respondent guilty of and sentenced him for both possession with intent to sell cocaine and sale of the same cocaine. Convictions for both crimes do not violate double jeopardy principles because these crimes constitute separate offenses as defined by Florida's legislature in Fla. Stat. §775.021(4) (Supp. 1988).

ARGUMENT

Issue

WHETHER FLA. STAT. §775.021(4) (SUPP. 1988) PERMITS CONVICTIONS AND SENTENCES FOR BOTH POSSESSION WITH INTENT TO SELL COCAINE AND THE SALE OF THE SAME COCAINE, WHEN THESE OFFENSES OCCURRED AFTER THE EFFECTIVE DATE OF THE AMENDMENTS OF SECTION 775.021.

Initially, the state asserts that the issue in this case was dispositively decided in its favor in this Court's decisions in State v. V.A.A., 16 F.L.W. S194 (Fla. 1991) and State v. McCloud, 16 F.L.W. S194 (Fla. 1991). In both decisions, this Court held that, 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 these offenses occurred after the effective date of Fla. Stat. §775.021 (Supp. 1988), a trial court may properly convict and sentence for both offenses.

In the interest of further argument, however, the state submits that Fla. Stat. §775.021(4) (Supp. 1988) clearly expresses the legislature's intent regarding multiple punishments:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more 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.
>
> (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 identical elements of proof.
>
> 2. Offenses 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.

Despite the fact that the amendments to this section became effective in July 1988, the First District failed to even refer to this statute in deciding Oliver, basing its reversal solely on its erroneous Wheeler decision. Wheeler is unpersuasive precedent for several reasons.

First, in failing to examine the elements of the two statutes to discern whether each crime required proof of an element that the other did not, the First District essentially declined to follow the express dictates of the statute and established Florida case law. See State v. Smith, 547 So.2d 613, 616 (Fla. 1989)[1] ("Section 775.021(4) should be strictly

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[1] This Court issued its Smith decision in June 1989, two months before the First District decided Wheeler.

applied without judicial gloss."); Williams v. State, 560 So.2d 311, 313 (Fla. 1st DCA 1990) (citation omitted) (by amending section 775.021(4), the legislature raised the Blockburger[2] test "in stature to become the 'controlling polestar' of intent in double jeopardy analysis."); see also Porterfield v. State, 567 So.2d 429 (Fla. 1990) (this Court found Wheeler to be "at odds" with this Court's decision in State v. Smith).

Instead, the Wheeler court inexplicably adopted an entirely new, legislatively unauthorized method of analysis which focused on whether the offenses were contained in the same or different subsections of a statute:

> The structure of section 893.13(1)(a) indicates that sale and possession with intent to sell are alternative ways of violating this particular subsection of the statute and that the legislature intended by this subsection to punish *either* the completed sale, manufacture or delivery of an illegal drug, *or* the frustrated sale, manufacture or delivery of the drug (by charging possession of the drug with the intent to sell, manufacture or deliver it), *but not both* when the same drug and the same transaction are involved. In other words, the legislature intended that in such a circumstance there has been only one violation of that subsection. It is logical to assume that if a contrary result had been intended, the legislature would have proscribed each offense in separate subsections of the statute, as it did with simple possession of a controlled substance in section 893.13(1)(e).

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[2] Blockburger v. United State, 284 U.S. 299 (1932).

> Given this clear indication in the statute itself of a legislative intent not to punish these offenses separately, statutory construction using the Blockburger test of separate offenses and the Carawan[3] rule of lenity becomes unnecessary.

549 So.2d at 689-90 (emphasis in original).

Second, based on the Wheeler court's language that retroactivity of the 1988 amendments to section 775.021(4) was not at issue in Wheeler, it is apparent that Wheeler's offenses predated the amendments to section 775.021(4) and that Carawan in fact applied. Similarly, the offenses in State v. Smith also occurred prior to the effective date of the 1988 amendments to section 775.021(4). See also Porterfield, 567 So.2d at 429 (footnote omitted) ("Because the convictions at issue here are based upon incidents which occurred prior to July 1, 1988, the effective date of chapter 88-131, separate conviction and sentences are not authorized."); State v. Burton, 555 So.2d 1210, 1211 (Fla. 1989) (this Court approved of the district court's decision that the defendant could not be convicted of both possession and delivery of the same cocaine because the convictions were based on an incident which occurred prior to the effective date of chapter 88-131); Leon v. State, 563 So.2d 825 (Fla. 2d DCA 1990) (because the defendant committed his offenses prior to the effective date of chapter 88-131, he could not be convicted of trafficking in, and delivery and possession

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[3] Carawan v. State, 515 So.2d 161 (Fla. 1987).

of the same cocaine); Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990) (because the defendant committed his offenses after the effective date of chapter 88-131, the defendant was properly convicted of both possession and delivery of the same cocaine). Although the state disagrees with Carawan and continues to consider it erroneous precedent, the state acknowledges that the result in Wheeler was correct in that it was mandated by both Carawan and State v. Smith. In the present case, however, there is no dispute that appellant committed his offenses more than 11 months after the amendments became effective, and that Carawan does not apply.

For these reasons, the state hopes that this Court will address, and disapprove of, Wheeler. Despite this Court's unequivocal holdings in Smith, Burton, and Porterfield, the First District still apparently believes that a question exists as to "whether separate convictions for possession with intent to sell and sale under 893.13(1)(a) can now be had for offenses occurring after the effective date of the 1988 amendment to section 775.021(4)." Kellam v. State, 16 F.L.W. D613 (Fla. 1st DCA 1991). Although the First District observed that "the supreme court is not impressed with the rationale adopted by this court in Wheeler and St. Fabre v. State, 548 So.2d 797 (Fla. 1st DCA 1989)," the Kellam court concluded:

> Because the supreme court has not clearly explicated its rationale for applying the 1988 anti-Carawan amendment to change its

> prior construction of these subsections of section 893.13(1), we continue to adhere to our decisions holding that the legislature's placement of the offenses of sale or delivery of contraband and simple possession of contraband in separate subsections of the statute constitutes a clear expression of its intent that they are separate offenses subject to separate punishments even though based on one act.

16 F.L.W. at D613. Because the First District continues to rely on Wheeler instead of precedent from this Court, namely Smith, Burton, and Porterfield, the state asks this Court to "clearly explicate" that section 775.021(4) is the sole mode of analysis for double jeopardy issues concerning multiple punishments.

Proper application of section 775.021(4) to this case requires an analysis of the elements of the charged offenses. Florida Standard Jury Instructions in Criminal Cases 219 (1987) enunciates three elements to the crime of sale of cocaine. First, respondent must have sold cocaine. Second, cocaine must be a controlled substance. Third, respondent must have had knowledge of the presence of the cocaine. The instructions also enunciate three elements to the crime of possession with intent to sell cocaine. First, respondent must have possessed cocaine with the intent to sell it. Second, cocaine must be a controlled substance. Third, respondent must have had knowledge of the presence of the substance. Florida Standard Jury Instructions in Criminal Cases 219 (1987).

Admittedly, these two offenses share two elements, but their respective first elements are different. Because the sale of cocaine does not require possession of the same cocaine, the elements of the crime of possession with intent to sell are not subsumed by the elements of the crime of sale. See State v. Burton, 555 So.2d at 1211 ("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 that substance with intent to sell."); Wheeler, 549 So.2d at 691 n.9 (it is clear that possession "is not a necessarily lesser included offense of sale because the definition of sale does not require proof of possession."); see also Crisel v. State, 561 So.2d 453, 453-57 (Fla. 2d DCA 1990) (Parker, J., concurring). In fact, in both Daudt v. State, 368 So.2d 52 (2d DCA), cert. denied, 376 So.2d 76 (Fla. 1979), and Elias v. State, 301 So.2d 111 (2d DCA 1974), cert. denied, 312 So.2d 746 (Fla. 1975), the defendants were convicted of the sale of controlled substances even though they did not possess those substances. See McCloud, 16 F.L.W. at S194-95.

In sum, both State v. V.A.A. and State v. McCloud make clear that the trial court correctly adjudicated respondent guilty of and sentenced him for both possession with intent to sell cocaine and sale of the same cocaine. Convictions for both crimes do not violate double jeopardy principles because these

crimes constitute separate offenses as defined by Florida's legislature in Fla. Stat. §775.021(4) (Supp. 1988).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to reverse the decision of the First District Court of Appeal and dispositively disapprove of Wheeler.

Respectfully submitted,

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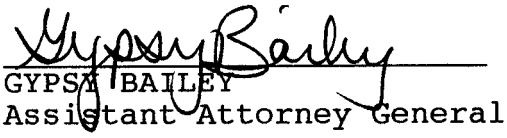
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. DOUGLAS BRINKMEYER, Deputy Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 30th day of April, 1991.



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Appendix

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