IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,241

JAMES H. GILLETTE,

Respondent.

_____/

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

BRIEF OF PETITIONER

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NOTICE OF SIMILAR CASES

State v. McCloud, Fla. S.Ct. #75,975 and State v. V.A.A., a Child, Fla. S.Ct. No. 75,902 (identical certified question as Gillette).

> 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.

STATEMENT OF THE CASE AND FACTS

Defendant was charged with sale and possession of the same controlled substance, cocaine occurring on January 9, 1990. On April 16, 1990 Defendant's motion to dismiss one of the charges based on double jeopardy was heard and denied. Defendant then plead no contest to the charges on April 16, 1990 reserving his right to appeal the decision on the motion.

On December 28, 1990 the Second District Court of Appeal issued its opinion as follows:

We affirm appellant's conviction and sentence for sale of cocaine. We vacate his 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 V.A.A., we certify to the Florida Supreme Court the following question to 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 (1988 SUPP.), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES?

On January 8, 1991 the State of Florida filed a Notice to Invoke Discretionary Jurisdiction of this Court asserting that the Second District Court's decision passess upon a question certified to be a great public importance. Simultaneous with the submission of the notice to invoke discretionary jurisdiction, the State filed a Motion to Recall Issuance of the Mandate in this Court.

SUMMARY OF THE ARGUMENT

Respondent was charged with sale and possession of cocaine on January 9, 1990. 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.

Respondent was charged with sale of cocaine and possession of the same cocaine. This offense occurred on January 9, 1990. 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 1, 1988, 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.

As of this date, the Second District Court apparently stands alone in holding that, for offenses occurring after July 1, 1988, a defendant may not be convicted and sentenced for both possession and sale of the same contraband. 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) [Appendix, A-6], 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.2nd 1231 (Fla. 5th DCA 1990) [Appendix, A-5], 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. 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. 2nd 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. [Appendix, A-4]. 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.
>
> The Florida Standard Jury Instruction strengthens my position.
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> * * *
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> Nowhere is the element of possession listed as an element in the crime of sale.
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> * * *
>
> Likewise, nowhere is the element of sale listed as an element of the crime of possession.
>
> * * *
>
> 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.
>
> . . .
>
> 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, without regard to the indictment or information and without regard to the proof offered at trial. 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. . . "
>
> * * *
>
> Crisel, concurring opinion, Parker, J., at 453 [Appendix A-4]

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 accusatory pleading or the prove adduced at trial." 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 proof 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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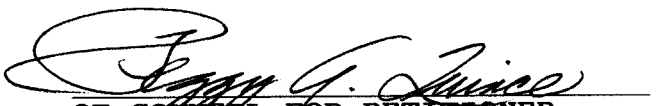
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Dwight M. Wells, Esquire, 501 Horatio Street, Tampa, Florida 33611 on this 22nd day of February, 1991.



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