IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,252

TWONDY GAIL HENDERSON,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Twondy Gail Henderson, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecutor in the Circuit Court. In this brief, the symbol, "R" will be used to designate the record on appeal and the symbol, "T" will be used to designate the transcripts of proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Twondy Gail Henderson was charged with thirty (30) counts of grand theft, twenty-six counts of petit theft, fifty-six (56) counts of uttering a forged instrument, and nine (9) counts of forgery. (R. 1-122). The offenses occurred between August 31st, 1986 and March 9th, 1987. (R. 1-122). The jury trial commenced on January 2nd, 1990. At the conclusion of the evidence Ms. Henderson was found guilty of two (2) counts of grand theft, twelve (12) counts of petit theft, three (3) counts of forgery, and fourteen (14) counts of uttering a forged instrument. (R. 343-354).

Ms. Henderson appealed the dual convictions and sentences for theft and uttering a forged instrument. (R. 365-366). Ms. Henderson contended that imposition of convictions for both offenses violated the principles of Carawan v. State, 515 So.2d 161 (Fla. 1987). The District Court of Appeal, Third District, affirmed the dual convictions. Henderson v. State, 16 FLW D14 (Fla. 3d DCA December 18, 1990). The court reasoned that the charged offenses were the result of two distinct acts thus giving rise to the dual convictions:

> We take a different view. Carawan proscribes dual penalties for the same act, but where there are separate acts, then separate penalties can be imposed, even though the separate acts are part of the same criminal transaction. Carawan, 515 So.2d at 170 n.8; see also State v. Reddick, 15 FLW S430 (Fla. Sept. 6, 1990).
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> The crime of uttering a forged instrument is committed when the defendant "utters and publishes as true a . . . forged . . . instrument . . . knowing the same to be . . . forged . . . , with intent to injure or

> defraud any person . . . ." §831.02, Fla.Stat. (1985). The crime is complete by presentation of the forged instrument for payment, regardless of whether or not the bank actually makes any payment to the defendant. See Hazen v. Mayo, 90 So.2d 123, 124 (Fla. 1956). If, for example, the bank teller detects the forgery, refuses to pay, and summons the police, the defendant has already committed the offense of uttering the forged instrument. The actual obtaining of money by means of the forged instrument is not an element of the crime. Id.
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> The crime of theft is committed if, among other things, the defendant "knowingly obtains or uses . . . the property of another with intent to, either temporarily or permanently . . . (a) [d]eprive the other person of a right to the property or a benefit therefrom [or] 9b) [a]ppropriate the property to his own use or to the use of any person not entitled thereto." § 812.014(1), Fla.Stat. (1985). In the present case, in each of the fourteen instances the defendant committed the additional act of obtaining the funds from the victims; bank account. In some instances, the teller paid cash to the defendant and the defendant carried the funds away with her. In other instances, the defendant directed that the funds be deposited in her bank account, by which means the defendant obtained the money of the victims. In each instance the act of uttering the forged instrument was followed by a separate act of theft: obtaining the victims' funds. The convictions were imposed for separate acts and are consistent with Carawan. The convictions are therefore affirmed. We certify direct conflict with Sikora v. State, 551 So.2d 613 (Fla. 4th DCA 1989).

16 FLW at D14 (footnotes omitted). Based on the trial court's certification of conflict, a notice to invoke discretionary jurisdiction was filed on January 7th, 1991.

STATEMENT OF THE FACTS

The relevant facts are set forth in the decision of the district court of appeal as follows:

> Defendant served as a private nurse for an elderly couple. As part of her responsibilities, she made bank deposits for the couple and had access to their checks and financial records. Insofar as pertinent here, the jury found that defendant had forged personal checks and endorsements of the victims and presented forged instruments for payment at the bank on fourteen occasions. The forgeries were not detected. On some occasions the teller accepted the instrument and paid cash to the defendant. On other occasions the defendant directed the bank to deposit the proceeds of the instrument in her personal checking account, which the bank did. Defendant was convicted of uttering forged instruments on each of the fourteen occasions, and for theft of the funds which she obtained by means of the same forged instruments.

Henderson v. State, 16 FLW at D14. (Footnotes omitted).

SUMMARY OF THE ARGUMENT

The petitioner, Twondy Henderson, was convicted of several counts of theft and uttering a forged instrument. Each of the counts of uttering a forged instrument pertained to one of the theft counts. The criminal conduct forming the basis for each of the convictions of theft and uttering a forged instrument was the single act of depositing a forged instrument to a bank teller. Dual convictions for uttering a forged instrument and theft under these circumstances violates the dictates of Carawan v. State, 515 So.2d 161 (Fla. 1987). Sikora v. State, 551 So.2d 613 (Fla. 4th DCA 1989); Monier v. State, 539 So.2d 1195 (Fla. 4th DCA 1989).

ARGUMENT

THE DEFENDANT'S DUAL CONVICTIONS FOR THEFT AND UTTERING A FORGED INSTRUMENT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION WHERE BOTH OFFENSES AROSE FROM THE SAME CRIMINAL CONDUCT.

The double jeopardy clauses in the state and federal Constitution not only prohibit successive trials for the same offense, but also prohibit subjecting a defendant to multiple punishments for the same offense. Carawan v. State, 515 So.2d 161, 163 (Fla. 1987). In the instant case, the defendant, Twondy Henderson, was convicted of fourteen counts of uttering a forged instrument, two counts of grand theft, and twelve counts of petit theft. (R. 343-354). Each of the convictions for uttering a forged instrument pertained to one of the theft counts. (R. 343-354).[1] The criminal conduct which formed the basis for the convictions was the single act of depositing a forged check into one of Henderson's bank accounts. (T. 160-162, 163-164, 165-171, 178-221, 227-251). Henderson was adjudicated and sentenced on all counts. (R. 359-363).

In Sikora v. State, 551 So.2d 613 (Fla. 4th DCA 1989) and Monier v. State, 539 So.2d 1195 (Fla. 4th DCA 1989), the Fourth District Court of Appeal held that dual convictions for theft and uttering a forged instrument violated the double jeopardy clauses

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[1] The crimes for which Ms. Henderson was convicted occurred between August 31st, 1986 and March 9th, 1987. (R. 1-122). Thus the amendment to section 775.021(4) Florida Statutes (1987) which became effective July 1, 1988, does not affect Henderson's convictions. State v. Smith, 547 So.2d 613 (Fla. 1989); Jones v. State, 546 So.2d 126 (Fla. 3d DCA 1989).

of the state and federal constitutions. The Fourth District relied on this Court's decision in Carawan v. State, supra, as well as Ghent v. State, 536 So.2d 285 (Fla. 3d DCA 1988).

Ghent v. State, supra, held that a defendant could not be convicted of attempted burglary and possession of burglary tools. Following the principles set forth by this Court in Carawan, the court compared the elements of both crimes and then concluded that "dual punishments are improper since reason dictates that the legislature's probable intent was only to provide for a more severe penalty when a single attempted burglary was accompanied by an additional aggravating factor, not to multiply punishments because other aggravating factors also occurred." Ghent v. State, 536 So.2d at 285.

Similarly, a defendant cannot receive dual convictions for theft and uttering a forged instrument. In order to sustain a conviction for uttering a forged instrument, the state must prove that the accused possessed a forged check and cashed the check with knowledge that is was forged and an intent to defraud. Heath v. State, 382 So.2d 391 (Fla. 1st DCA 1980); §831.02 Fla.Stat. (1985). In order to sustain a conviction for theft, the state must simply prove an intent to deprive another person of a right to, or benefit from their property. Council v. State, 442 So.2d 440 (Fla. 3d DCA 1984); §812.014 Fla.Stat. (1985). Thus §812.014 criminalizes the intent to take someone else's property, while §831.02 criminalizes the intent to take someone else's property which is discerned by the presentation of a forged check with knowledge of it's forgery and an intent to

defraud. Heath v. State, 382 So.2d at 392. Thus an accused cannot be convicted of both of these crimes for the single act of cashing a forged check.

The decision of the district court affirming the dual convictions is based upon the view that the defendant, Twondy Henderson, committed two distinct acts when she obtained the victim's money by presenting a forged instrument to a bank teller. In order to support this conclusion, the district court defined uttering a forged instrument as the presentation of the check and theft, as the actual taking of the funds.

> The crime of uttering a forged instrument is committed when the defendant "utters and publishes as true a . . . forged . . . instrument . . . knowing the same to be . . . forged . . . , with intent to injure or defraud any person . . . ." §831.02, Fla.Stat. (1985). The crime is complete by presentation of the forged instrument for payment, regardless of whether or not the bank actually makes any payment to the defendant. See Hazen v. Mayo, 90 So.2d 123, 124 (Fla. 1956). If, for example, the bank teller detects the forgery, refuses to pay, and summons the police, the defendant has already committed the offense of uttering the forged instrument. The actual obtaining of ##?money by means of the forged instrument is not an element of the crime. Id.
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> other instances, the defendant directed that the funds be deposited in her bank account, by which means the defendant obtained the money of the victims. In each instance the act of uttering the forged instrument was followed by a separate act of theft: obtaining the victims' funds.

Henderson v. State, 16 FLW at D14.

By distinguishing the act of presenting the check from the actual taking of the property, the court has incorrectly limited the definition of theft. Section 812.014(1) specifies that "[a] person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another." By including the words "or endeavors to obtain or to use" the statute makes no distinction between the actual taking and the attempt to take. State v. Sykes, 434 So.2d 325 (Fla. 1983); Bell v. State, 383 So.2d 107 (Fla. 1st DCA 1980); Miles v. State, 374 So.2d 1167 (Fla. 2d DCA 1979). Thus the crime of attempted theft does not exist and Twondy Henderson did not commit two distinct acts every time she presented a forged check to be cashed. Accordingly, the dual convictions for theft and uttering a forged instrument violated the principles enunciated by this Court in Carawan v. State, supra.

Ms. Henderson's convictions for theft and uttering a forged instrument must therefore be reversed and remanded with instructions to the trial court that: (1) the convictions for petit theft be vacated, See, Bogan v. State, 552 So.2d 1171 (Fla. 3d DCA 1989); and (2) the convictions for either grand theft of the accompanying uttering a forged instrument be vacated. See, Ghent v. State, supra.

CONCLUSION

Based on the foregoing facts, authorities and arguments, appellant respectfully requests this Court to quash the decision of the district court of appeal and remand the petitioner's case to the trial court for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 5th day of March, 1991.

Rosa C. Figarola
ROSA C. FIGAROLA
Assistant Public Defender