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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,252

TWONDY GAIL HENDERSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

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

****

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This is a review of a decision of the District Court of Appeal, Third District, certifying conflict with a decision of the Fourth District. The parties will be referred to as they stood in the trial court. The petitioner, Twondy Gail Henderson, was the defendant at trial and the appellant in the district court of appeal. The respondent, the State of Florida, was the prosecutor at trial and the appellee on appeal.

QUESTION PRESENTED

WHETHER DUAL CONVICTIONS FOR THEFT AND UTTERING A FORGED INSTRUMENT VIOLATE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AS SET FORTH IN CARAWAN v. STATE, 515 So.2d 161 (FLA. 1987).

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's statement of the case and facts as substantially correct and complete.

SUMMARY OF THE ARGUMENT

The defendant's theory that the act of presenting a forged check merely represents the attempt or intent to thieve, thus precluding separate convictions of uttering a forged instrument and theft, is wrong. Theft and uttering have no elements in common; under the Blockburger test, such a result raises a presumption of separateness. That presumption is further strengthened, not defeated, by the fact that each offense addresses a separate evil: the disruptive effect on society of instruments that are not genuine and the nonconsensual taking of another's property. Analogous case law finding that extortion and theft may be punishable separately, though decided pre-Carawan, provides a rational and well-reasoned basis for a similar finding regarding uttering and theft. Where, as here, the uttering statute does not proscribe the taking of money and simply requires an intent to defraud, uttering a forged check is not merely an attempt to take money or a manifestation of the intent to deprive, but rather a complete and separate offense on its own. The defendant's further action of taking money in return for the check constitutes a second offense of theft. So found the Third District and so must this Court.

ARGUMENT

THE DEFENDANT'S CONVICTIONS FOR THEFT AND UTTERING A FORGED INSTRUMENT DO NOT VIOLATE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AS SET FORTH IN CARAWAN v. STATE, 515 So.2d 161 (FLA. 1987).

The defendant contends that dual convictions for theft and uttering a forged instrument violate the principles of Carawan. [1] The convictions resulted from her presenting forged checks to her employer's bank and either receiving cash in return or having the proceeds deposited to the defendant's own account. The Third District, certifying conflict with the Fourth District, [2] found no error in punishment for both theft and uttering. The Third District reasoned that, under Carawan, "where there are separate acts, then separate penalties can be imposed, even though the separate acts are part of the same criminal transaction." Henderson v. State, 16 F.L.W. D14 (Fla. 3d DCA Dec. 18, 1990). Moreover, the court noted, the two crimes do not address the same evil, another indication under Carawan that the legislature intended dual punishments. The defendant contends that the Third District is in error -- that

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[1] Carawan v. State, 515 So.2d 161 (Fla. 1987), applies here since the events occurred in 1986 and 1987, prior to the legislative amendment superceding it. See State v. Smith, 547 So.2d 613 (Fla. 1989).

[2] The Fourth District found error in convicting and sentencing for both uttering a forged instrument and grand theft. Sikora v. State, 551 So.2d 613 (Fla. 4th DCA 1989).

because the language of the theft statute precludes a separate crime of attempted theft, the single act of presenting a forged check merely represents an attempt or intent to thieve, and thus theft cannot be punished separately.

An examination of the principles enunciated in Carawan reveals that the defendant is wrong. Carawan teaches that courts should first employ the test established in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether the legislature intended dual punishments for the offenses in issue. "If [, in comparing the statutory elements of the crimes,] both have one element that the other does not, then a presumption arises that the offenses are separate, a presumption that nevertheless can be defeated by evidence of a contrary legislative intent." Carawan, 515 So.2d at 165. Section 831.02, Florida Statutes, defining the crime of uttering a forged instrument, reads as follows:

> **831.02 Uttering forged instruments.** - Whoever utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in s. 831.01 knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The elements of uttering a forgery are further set out in the Florida Standard Jury Instructions in Criminal Cases as three:

(1) passing or offering to pass as true the instrument in question, (2) knowing the instrument to be forged, and (3) intending to injure or defraud some person or firm. On the other hand, Section 812.014, defining theft, provides in relevant part as follows:

> **812.014 Theft. -**
>
> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit therefrom.
>
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto.

The standard jury instructions identify the elements of theft as two: (1) knowingly and unlawfully obtaining, using, or endeavoring to obtain or use the property of another, and (2) doing so with intent to either temporarily or permanently deprive the other of his right to or appropriate the property to his own use.

A mere cursory glance shows us that theft and uttering a forgery have no elements in common, as expressed statutorily or as delineated in the jury instructions. Yet the defendant urges the court either to bypass the first step in a Carawan analysis -- the Blockburger test -- or to ignore the presumption

of separateness raised by finding disparate elements during that first step. Carawan makes clear that only evidence of a contrary legislative intent will defeat the presumption of separateness. The second step, then, after applying the Blockburger test is to "consider the presumption so created [that is, that the legislature intended separate punishments] in light of any relevant factors that may indicate a contrary legislative intent." Carawan, 515 So.2d at 167.

One indication that dual punishments were not intended is that both statutes "manifestly address the same evil." Id. at 168. Such may occur, for example, where certain statutes punish for attempts or for differing degrees of crimes. Id. In the instant case, however, the fact that the theft statute includes attempt within its language, thereby eliminating the possibility of attempt as a separate offense, does not lead logicially to the conclusion, as the defendant urges, that uttering a forged instrument merely represents the attempt, or intent, to obtain money. [3] Where a defendant presents a forged check, or will, or deed, or public record, or other instrument set out in section 831.01, Florida Statutes, to the appropriate party but obtains no benefit therefrom, he is not guilty merely of an attempt to benefit; he is guilty of a separate act -- that of passing as true the forged instrument. This is so because the forgery

[3] Attempted uttering a forged instrument is also not an offense. Ward v. State, 446 So.2d 267 (Fla. 2d DCA 1984).

statute protects society against the disruptive effect of instruments that are not genuine. See Perkins & Boyce, Criminal Law §8 (3d ed. 1982). The theft statute, on the other hand, addresses a different evil entirely, that of taking another's property without consent. Henderson v. State, 16 F.L.W. at D14 n. 4.

Thus far, we have seen that the tests prescribed by Carawan result in a proper finding that the legislature intended to punish separately for theft and for uttering a forged instrument: the two statutes share none of the same elements and each addresses a different evil. Further support for the decision of the Third District lies in analogous case law. In State v. O'Hara, 478 So.2d 24 (Fla. 1985), this Court, prior to Carawan, examined the offenses of theft and extortion and determined that although the defendant by his threat received one sum of money he could indeed be convicted of two crimes. This Court approved the reasoning of Judge Cowart in his dissent to the Fifth District majority opinion after determining that the statutory elements of the two crimes differed:

> [I]t is legally immaterial that a taking constituting a grand theft (or grand larceny) was accomplished by also committing the separate and substantively different crime of robbery or extortion just as it is legally immaterial that a grand larceny is accomplished by also committing the separate and substantively discrete offense of burglary. A defendant can be convicted for being both a burglar and a

thief (a robber and a grand thief or an extortionist and a thief) notwithstanding that the two charges are factually "intrinsically connected" and but for the burglary (the fear, force or threat) the theft could not or would not, have occurred.

O'Hara was not "convicted of two crimes for the taking of only one sum of money." He was convicted of two crimes, but only one (grand theft) was for the taking (obtaining) of money. The other crime (extortion) only involved the wrongful intent to obtain money in that the unlawful obtaining of money was the objective of the wrongful specific intent that was an element of the extortion charge in the very same way that an unlawful obtaining of money may be the objective of the wrongful specific intent that is an element of a burglary charge when the specific intent in the burglary is to commit the felony of grand theft within the burglarized structure. O'Hara was convicted of extortion for maliciously communicating a threat with the specific intent to accomplish the wrongful obtaining of money.

The majority opinion states that by the extortion statute (§ 836.05, Fla. Stat.) "the legislature has proscribed the taking of money by extortion." The extortion statute does not proscribe "the taking of money." It proscribes a malicious threat to accuse, to injure, to expose or to impute, made "with intent thereby to extort money or any pecuniary advantage whatsoever." The actual taking of money is not thereby made an element of statutory extortion. When a threat is made with the requisite malice and specific intent the crime of extortion occurs and is complete whether or not any money is taken. Therefore, contrary to the assertion in the majority opinion, the extortion statute was obviously not meant to punish for the taking.

O'Hara v. State, 448 So.2d 524, 528 (Fla. 5th DCA 1984)(Cowart J., dissenting)(emphasis in original). Similarly applied to the instant case, the same reasoning demands the conclusion that because the forgery statute does not proscribe the taking of money, and such taking is not an element of the crime, uttering and theft are separately punishable. Stated another way, the essence of the offense of uttering a forged instrument is the intent to defraud, regardless of whether any benefit is gained. Hazen v. Mayo, 90 So.2d 123 (Fla. 1956). "The offense consists in trying to defraud another by use of a writing which the culprit knows to be a forgery. . . ." Harrell v. State, 79 Fla. 220, 83 So. 922, 923 (1920). Such an offense and intent clearly differ from that of theft, which is defined essentially as the non-consensual taking of property with intent to deprive another of its use or benefit.

The defendant in the case at bar fourteen times presented to a bank checks on which she had forged the name of her employer as drawer or endorser. At that point, because evidence showed her intent to defraud the bank and her employer, the offense of uttering was complete. Thereafter, she received as cash or a credit to her own account money that rightfully belonged to her employer. Evidence showed that she intended to deprive the owner of that property. Thus, the additional offense of theft was also complete.

Contrary to the defendant's contention but like the finding in O'Hara, the defendant did indeed commit two distinct acts when she presented a check at the bank in return for the proceeds. No precept expressed in Carawan compels a different conclusion from that arrived at by the Third District.

CONCLUSION

Based on the foregoing analysis and citation of authority, the State respectfully submits that the convictions and sentences below must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to ROSA FIGAROLA, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 27th day of March, 1991.

JOAN L. GREENBERG
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