IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA

Petitioner,

v. CASE NO. 77,416

ALVIN GEORGE STENSON,

Respondent.

_____/

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

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

On August 3, 1988, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Appellant, ALVIN STENSON, with purchase of cocaine and possession of cocaine arising out of the same transaction on July 15, 1988, in violation of section 893.13(1), Florida Statutes (1987) (R2, 3, 31, 32). On August 9, 1988, Mr. Stenson made an oral motion to dismiss the possession charge based on double jeopardy. The trial court applied the newly amended section 775.021(4), Florida Statutes (Supp. 1988), and denied the motion (R 22-31). Mr. Stenson then entered a plea of no contest reserving the right to appeal the denial of his motion to dismiss (R 32-35). At that time Mr. Stenson received 30 months imprisonment concurrent on each sentence which was within the recommended guidelines range (R7-13, 35-36).

On appeal, the Second District held that double jeopardy bars convictions for both sale and possession of the same quantum of cocaine where the crimes were committed after the effective date of Section 775.021, Floirda Statutes (Supp. 1988). The trial court vacated the conviction and sentence for possession of cocaine. The state filed a notice to invoke discretionary jurisdiction to review a question certified as being of great public importance.

SUMMARY OF THE ARGUMENT

The trial court properly denied the motion to dismiss. The district court erred in holding that possession of cocaine is a lesser-included offense of sale of cocaine. This court should quash the decision of the district court.

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.

ARGUMENT

The issue presented in this appeal is the identical issue addressed in this court's opinions in State v. McCloud, Opinion filed Feb. 28, 1991, Case No. 75,975, and State v. V.A.A., Opinion filed Feb. 28, 1991, Case No. 75,902. In McCloud and V.A.A., supra, this court held that it is not improper to convict and sentence for both sale and possession of the same quantum of cocaine after the effective date of section 775.021, Florida Statute (Supp. 1988).

As this Court stated in McCloud, supra, an offense is a lesser-included offense for purposes of section 775.021(4) only if the greater offense necessarily includes the lesser offense. Proof of possession is not required for a conviction for sale and proof of sale is not required for conviction of possession. Therefore the trial court properly denied the motion to dismiss and the district court erred in vacating the conviction and sentence.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this court should quash that part of the decision of the district court vacating the conviction and sentence for possession of cocaine and remand this case for proceedings consistent with this court's opinion in McCloud and V.A.A.

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 Deborah K. Bruckheimer, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 4th day of March, 1991.

OF COUNSEL FOR PETITIONER

OF COUNSEL FOR PETITIONER