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IN THE SUPREME COURT OF FLORIDA

QUINTEN L. CLEVELAND,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO.: 77,491

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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 Petitioner,)
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 vs.) CASE NO.: 77,491
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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The state charged Petitioner, Quinten Lee Cleveland, with attempted robbery with a firearm, grand theft and use of a firearm while committing a felony. (R 184) The state dropped the theft charge during Appellant's trial before Circuit Judge R. Michael Hutcheson on the remaining allegations. (R 1, 49, 195)

At trial, Judith Carney testified that Petitioner pointed a gun at her and demanded money outside a motel. (R 21-25) Carney pushed Petitioner and ran screaming to her husband. (R 25) Within minutes, police apprehended Petitioner and three companions a short distance away along side a highway. (R 69-70) Police also found a gun along the road between the hotel and the spot where Petitioner was stopped. (R 77-81) No bullets were found, either in the gun or on Petitioner and his friends. (R 80-81)

The court denied Petitioner's motion for judgments of acquittal. (R 112, 118) The jury found him guilty of robbery with a firearm and use of a firearm in the commission of a felony

as charged. (R 171, 188) Defense counsel argued against an enhancement of the degree of the robbery, asserting that it was improper to enhance an offense already enhanced for use of a firearm. (R 174, 179-180) The court rejected these arguments and adjudicated Petitioner guilty of the offenses as first and second degree felonies. (R 181-182, 190-191) The court imposed concurrent guideline sentences of 5½ years imprisonment on each offense, with credit for time served. (R 191, 192-194)

Petitioner appealed to the Fifth District Court of Appeal and argued that the conviction of attempted armed robbery and use of a firearm in the commission of a felony, the attempted armed robbery, is a double jeopardy violation. The Fifth District Court of Appeal affirmed on the authority of Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990), juris accepted, 568 So.2d 435 (Fla. 1990). The Fifth District Court of Appeal also noted that the Second District Court of Appeal had reached a different conclusion in Graham v. State, 559 So.2d 410 (Fla. 2d DCA 1990) and certified conflict.

Petitioner filed a timely petition to invoke discretionary review.

SUMMARY OF ARGUMENT

Robbery with a firearm contains no elements not also necessary to prove use of a firearm in the commission of a felony. One subsumes the other, making dual convictions unlawful double jeopardy under a strict Blockburger analysis. The parasitic offense of use of a firearm in the commission of a felony must fall.

ARGUMENT

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT AGAINST DOUBLE JEOPARDY BY ADJUDICATING HIM GUILTY AND SENTENCING HIM BOTH FOR USE OF A WEAPON IN THE COMMISSION OF A FELONY AND FOR THE UNDERLYING FELONY OF ARMED ROBBERY.

Petitioner's indiscretion with the firearm in the Days Inn parking lot occurred after the effective date of the amendment to Section 775.021(4), Florida Statutes (Supp. 1988). The amendment returns analysis of the fruits of prosecutorial overcharging to what has become known as a straight Blockburger analysis, a reference to the test applied by the U.S. Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932). Under Blockburger and Florida statute, offenses are separate if each requires proof of an element which the other does not. Exceptions to the legislature's pronounced intent of multiple convictions whenever possible include offenses which require identical elements of proof, or those which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Attempted armed robbery includes the elements of a failed effort to accomplish a taking by force or putting in fear through the use of a firearm or deadly weapon. Sections 812.13(1) and (2)(a), Florida Statutes (1989). Use of a weapon in the commission of a felony includes the felony plus use, display or threatened use or display of a firearm. Section 790.07(2), Florida Statutes. Both offenses consist of the felony

-- here, robbery -- and the use of a firearm in committing that felony. They require identical elements of proof. Although a higher degree crime, the robbery is a "lesser" offense of the firearm crime, for double jeopardy purposes, as all its constituent elements, the felony plus the firearm, are subsumed by the elements of use of a firearm in the commission of a felony.

In Ellison v. State, 538 So.2d 90 (Fla. 1st DCA 1989), the court recognized that aggravated assault with a firearm requires the same elements of proof as use of a firearm in the commission of a felony. Consequently, double jeopardy required reversal of one conviction. In his dissent in Smith v. State, 548 So.2d 755 (Fla. 5th DCA 1989), Judge Cowart maintained his tradition of incisive double jeopardy analysis to reach the same conclusion:

Because the weapon and firearm offenses necessarily incorporate within themselves, as one composite element, all of the elements of the underlying felony offense plus an additional multi-faceted element: that while committing or attempting to commit the underlying felony, the perpetrator displays, uses, or threatens the use of a weapon or firearm (or carries a concealed firearm). This makes the weapon or firearm offense always ancillary to, and dependent upon, the underlying felony offense.

* * *

Where, as here, the underlying offense requires the use of a weapon or firearm, then the underlying offense and the ancillary offense are obviously "the same offense" and also fall within the exception provided in section 775.021(4)(b)1., Florida Statutes (1988), relating to "offenses which require identical elements of proof." Even when the

underlying offense does not require the use of a weapon or firearm, because the underlying felony offense, whatever its elements, is always completely included within the weapon or firearm offense, the underlying felony offense is always a necessarily lesser included offense of the ancillary weapon or firearm offense and, as such, [it] is "the same offense" within the constitutional contemplation and also falls within the exception provided in section 775.021(4)(b)3., Florida Statutes (1988), relating to "offenses which are subsumed by the greater offense."

Id. at 761 (Coward, J., dissenting).

As noted earlier, the Fifth District Court of Appeal has certified conflict with its sister court's conclusion in Graham v. State, 559 So.2d 410 (Fla. 2d DCA 1990). Graham appealed his convictions and sentences for attempted armed robbery with a firearm and possession of a firearm during the commission of a felony. The Second District Court of Appeal held that those dual convictions constitute a violation of double jeopardy under the authority of Perez v. State, 528 So.2d 129 (Fla. 3rd DCA 1988). Consequently, Graham's conviction and sentence for use of a firearm during the commission of a felony was vacated.

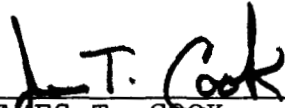
In summary, Petitioner argues that the conflict between the Fifth District Court of Appeal and the Second District Court of Appeal be resolved by affirming the Second District Court of Appeal's analysis and conclusion of the issue certified. Petitioner's conviction of attempted armed robbery and use of a firearm in the commission of a felony is a double jeopardy violation.

CONCLUSION

Based on the forgoing reasons and authority, Petitioner urges this Honorable Court to resolve this certified conflict in favor of the Petitioner and rule that double jeopardy requires reversal of his conviction for use of a weapon in the commission of a felony. The decision of the District Court must be quashed and the cause remanded with instructions to vacate Petitioner's sentence and remand for resentencing for the attempted armed robbery only under a properly calculated scoresheet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto, Suite 447, Daytona Beach, Florida 32114, in his basket, at the Fifth District Court of Appeal; and to: Quinten Cleveland, P.O. Box 875, Chatahoochee, FL 32324, this 1st day of May, 1991.



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