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FILED

SID J. WHITE

MAY 23 1991

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

QUINTEN L. CLEVELAND,
Petitioner,

v.

CASE NO. 77,491

STATE OF FLORIDA,
Respondent.

_____ /

MERITS BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

The district court decision should be approved. The crimes of attempted armed robbery with a firearm and use of a firearm while committing a felony are separate and distinct crimes. Hence, conviction and punishment for both is proper.

ARGUMENT

THE DISTRICT COURT CORRECTLY AFFIRMED THE JUDGMENT AND SEPARATE SENTENCES IMPOSED FOR ATTEMPTED ROBBERY WITH A FIREARM AND USE OF A FIREARM WHILE ATTEMPTING TO COMMIT A FELONY.

This court has held "that *Carawan*¹ has been overridden for offenses that occur after the effective date of chapter 88-131, section 7 . . ." *State v. Smith*, 547 So.2d 613, 617 (Fla. 1989). Hence the defendant's crimes, which were committed on April 12, 1989 (R 184)², are not affected by the holding in *Carawan*. This court ruled in *Smith*:

Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, all criminal offenses containing unique statutory elements shall be separately punished.

Id., 616 (emphases in opinion, footnote omitted).

The court below certified conflict with *Graham v. State*, 559 So.2d 411 (Fla. 2d DCA 1990). In *Graham* the court reversed the convictions on the authority of *Perez v. State*, 528 So.2d 129 (Fla. 3d DCA 1988). *Perez*, however, was founded upon the holding in *Hall v. State*, 517 So.2d 678 (Fla. 1988), which was based upon the holding in *Carawan*. Because the *Carawan* holding no longer controls in light of the subsequent holding of this court in

¹ *Carawan v. State*, 515 So.2d 161 (Fla. 1987).

² The parties are referred to as the defendant and the state. References to the record are indicated by "(R and page)".

Smith, those cases which rely upon the authority of *Carawan* are no longer controlling either.

This court considered the instant issue in *State v. Gibson*, 452 So.2d 553 (Fla. 1984). Although *Gibson* was overruled in *Hall*, "[t]he viability of the *Gibson* rationale was restored by the Florida Legislature's repudiation of the 'lenity' doctrine in its 1988 amendment to section 775.021(4). See *State v. Smith*, 547 So.2d 613 (Fla. 1989)." *Cleveland v. State*, 16 F.L.W. D503, D504 (Fla. 5th DCA February 14, 1991) (Cobb, J., concurring specially). This court discussed the elements of the crimes at issue in this proceeding in *Gibson*:

The offense of robbery while armed contains, in addition to its other constituent statutory elements, the element that the accused carried a firearm or other deadly weapon. The elements of the crime do not include displaying the weapon or using it in perpetrating the robbery. The offense of display or use of a firearm while committing a felony contains as one of its constituent elements that the offender displayed, used, or attempted or threatened to use a firearm during the commission of a felony. It is clear that each of these offenses contains at least one constituent element that the other does not.

Id., 556-557.

The defense argues that the use of a firearm while committing a felony is subsumed by the attempted robbery count. As the majority below observed:

Although under the facts of this case the use of the firearm in the robbery was necessary for the application of the weapons statute, this court recently held that the

appropriate test is not whether it is an "element" under the facts of the case, but, rather, "whether it is a necessary element *under the statute.*" *Davis v. State*, 560 So.2d 1231, 1234 (Fla. 5th DCA) (emphasis in opinion), *juris accepted*, 568 So.2d 435 (Fla. 1990).

Cleveland, D503-504); see also §775.021(4)(a) & (b).

This ruling is consistent with that espoused by this court in *Smith*. "[T]he statutory element test *shall* be used for determining whether offenses are the same or separate." *Id.*, 616.

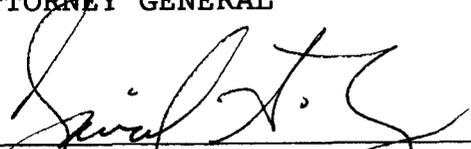
In short, the decision of the court below should be approved. Each crime has unique statutory elements and, therefore, separate convictions and punishments are proper.

CONCLUSION

The decision rendered by the Fifth District Court of Appeal in the instant cause should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to James T. Cook, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, FL 32114, by interoffice delivery on this 22^d day of May, 1991.



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