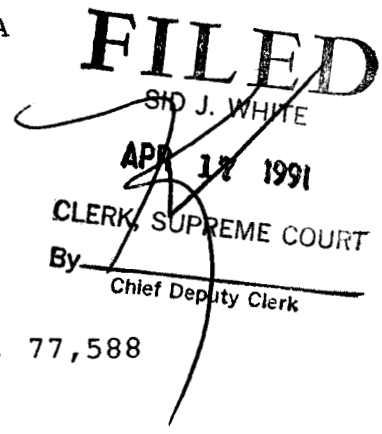
047

IN THE SUPREME COURT OF FLORIDA



RAYMOND JOHNSON,

Petitioner,

vs. Case No. 77,588

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

This case is before the court on a certified question. That question, however, relates only to the fourth issue raised before the First District. Johnson concedes this. (See his brief at p. 7: "Petitioner, in the fourth issue, addresses the question certified by the District Court of Appeal.").

Issues one through three were affirmed without discussion, as the First District found that they "lack[ed] merit." (slip opinion, p.2) By raising these issue before this Court, Johnson seeks review, in effect, of a "per curiam affirmed" decision. The State requests that the Court decline to review the three issues, and state that raising such issues -- if technically proper -- is disfavored.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case. It accepts his statement of the facts with the following additions and clarifications.

1. Petitioner was convicted for offenses that occurred on October 25, 1988. (T 16, 30).

2(a) The State objects to Petitioner's characterization of testimony by witness Chisholm as unclear or confusing. (initial brief, p. 3-4). Questions by a juror (T 61-62) do not corroborate Petitioner's characterization, but indicate only that the juror's memory faltered on two points of fact.

(b) Notably, the trial court allowed the jurors to take a blank legal pad into the deliberation room, in order to present written questions to the court if necessary. (T 62). None were forthcoming.

3. The filling station attendant (Chisholm) identified Petitioner, without hesitation, as the person he saw seconds before the purse was taken. (T 17). His view of the victim's car was very good (T 22), as was his view of Petitioner's face. (T 23). He saw Petitioner walk up to the station window and look in. "Two seconds later" the purse-snatching occurred. (T 22). No one, other than the victim and her companion, was in the vicinity. (T 29).

4. The purse-snatcher fled, and was the only one who ran away. (T 29). This testimony came in without objection.

5. The victim and the two eyewitnesses (Chisholm and Mixon) gave good descriptions of the purse-snatcher to the sheriff's deputy (Chaffin) who responded to the report. (T 31).

6. Only "several" days after the incident Deputy Chaffin twice saw Petitioner and asked him to "come here." Both times Petitioner ran away. (T 37). [NOTE: this testimony was allowed over Petitioner's objection, after proffer. (T 33-36).]

7. The victim (Betty Lu Green) testified that she left her purse in her car when she went to pay for her gas; the purse was gone when she returned. (T 41). She had left the driver's window down. (T 40).

8. While the court allowed Green's testimony that the items in her purse were not recovered, and that she had not received nay payment for loss of those items (T 45); the court sustained objection to her testimony that she had no hope of recovering them. (T 45).

9. Chisholm was shown a photo-lineup, including Petitioner, less than two days after the incident. He immediately identified Petitioner. (T 40-41).

10. Over objection, Detective Hewitt testified that Petitioner ran away from him (and another detective) after they identified themselves to Petitioner. This incident occurred on November 3, or nine days after the purse-snatching. (T 56).

SUMMARY OF ARGUMENT

I. The State's evidence, and reasonable inferences therefrom, established a *prima facie* case and excluded every reasonable hypothesis of innocence. Petitioner's motions for judgment of acquittal were properly denied.

II. Evidence of Petitioner's flight immediately after the purse-snatching was admitted without objection. That, plus other evidence of Petitioner's guilt, justified instructing the jury on flight. Admission of evidence of Petitioner's repeated flights, not more than nine days later, was proper; or, if erroneous, was harmless in light of the earlier flight evidence.

III. The trial court properly allowed the victim to testify that she had not be compensated for the loss of items stolen by Petitioner. The challenged testimony is harmless, in light of the victim's unchallenged testimony, immediately before, that she had no insurance and had not recovered the items.

IV. Petitioner's first conviction for grand theft, based solely on property value, was proper; as the second conviction for theft of a firearm required proof of an element not common to grand theft generally. Additionally, conviction under both counts is expressly authorized by Florida law.

ARGUMENT

ISSUE I

WHETHER THE STATE'S EVIDENCE, AND REASONABLE INFERENCES THEREFROM, EXCLUDED ALL REASONABLE HYPOTHESES OF INNOCENCE

There are two problems with Petitioner's argument. First, the evidence against him is not typically circumstantial, as he was clearly identified by one witness seconds before and after the purse-snatching. Second, reasonable inferences based on Petitioner's presence before and during the "two second" crime, and his flight immediately thereafter, constitute sufficient evidence from which the jurors could find guilt. Again, no persons other than Petitioner, the victim and her companion, and the filling station attendant were present. Petitioner was the only one who ran away.

To sustain a circumstantial case against a motion for judgment of acquittal, there must be competent evidence from which the jurors can exclude every reasonable hypothesis of innocence. State v. Law, 559 So.2d 187, 188-9 (Fla. 1989)(rejecting all hypotheses offered by the defendant to explain multiple serious injuries that were fatal to the young child); and Scott v. State, 559 So.2d 269 (Fla. 4th DCA 1990)(circumstantial evidence of knowledge and control of contraband sufficient to exclude all reasonable hypotheses of innocence).

Here, the jurors were faced with uncontradicted evidence that Petitioner was looking through the filling station window only seconds before the theft occurred; that he immediately ran away; and that the victim's companion immediately exclaimed someone had stolen her purse. In addition to the attendant's strong identification of Petitioner, the attendant testified that no others were present and that his view was unobstructed. All reasonable hypotheses of Petitioner's innocence were excluded. Petitioner was unable to suggest one.[1] His motions for judgment of acquittal were properly denied. *See* Jackson v. State, 16 F.L.W. S151, 153 (Fla. Jan. 18, 1991)(circumstantial evidence of armed robbery consistent with guilt, when defendant did not present a reasonable hypothesis of innocence under totality of evidence against him).

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[1] Petitioner's counsel did not suggest an hypothesis of innocence during closing (T 63-66, 79-80), but concentrated on alleged deficiencies in the State's case.

ISSUE II

WHETHER EVIDENCE OF PETITIONER'S POST-OFFENSE FLIGHTS WAS PROPERLY ADMITTED

Throughout his argument on this issue, Petitioner ignores these facts: he was strongly identified immediately before and after the very brief time it took to snatch the purse. He was the only person who ran from the scene. Two "eyewitnesses" and the victim gave "fairly good" descriptions of Petitioner. (T 31). Apparently these descriptions were consistent. Petitioner was readily identified by one eyewitness (Chisholm) in a photo-lineup about two days later. (T 40-1).

There was strong, independent evidence of Petitioner's guilt. Petitioner's flight immediately after the purse-snatching, had it been challenged, would have been admissible over objection. *See* Bradley v. State, 468 So.2d 378 (Fla. 1st DCA 1985), *aff'd*, 485 So.2d 1285 (Fla. 1986)(defendant's immediate, high-speed departure from robbery scene in car indicative of guilt and a desire to avoid arrest).

Only nine days[2] after the theft, Petitioner ran from two detectives who identified themselves. (T 56). No other charges were pending; Petitioner was not attempting to escape after arrest. This later flight evidence, with the facts noted above, is far more consistent with guilt than with innocence. It was

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[2] Deputy Chaffin testified to another post-offense flight, occurring "several days" later. (T 36-7). Petitioner's flight nine days later appears to be his second flight, other than immediate departure from the scene.

properly admitted. *See* Merritt v. State, 523 So.2d 573, 574 (Fla. 1988)(flight evidence admissible when there is sufficient evidence that defendant fled to avoid prosecution for charged offense); Jackson v. State, *supra* at 154 (flight instruction refers to a flight other than immediate departure from the scene); and Whitfield v. State, 452 So.2d 548, 549 (Fla. 1984)(flight instruction proper when there is significantly more evidence than "flight standing alone").

The issue narrows to whether the passage of "several" to nine days precludes the admission of evidence of repeated post-offense flight. Petitioner cites no authority for such proposition. Moreover, even if erroneously admitted, the evidence of delayed flight was harmless in light of the evidence of original flight. The delayed flight testimony could not have affected the outcome of the verdict. Reversal is not warranted. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The facts presented at trial proved flight. There were other circumstances indicating Petitioner's guilt. Therefore, flight could be considered a circumstance of guilt under the appropriate instruction. Batey v. State, 355 So.2d 1271, 1272 (Fla. 1st DCA 1978), citing Proffitt v. State, 315 So.2d 461 (Fla. 1975)(other citations omitted). The trial court was correct to give the instruction on flight. Jackson, Whitfield, *supra*.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY ALLOWED TESTIMONY THAT THE VICTIM WAS NOT COMPENSENATED FOR THE STOLEN ITEMS

The victim, Betty Lu Green, testified over objection that she had not received any money for the loss of items stolen by Petitioner. (T 45). The State agrees that this testimony is not relevant to Petitioner's guilt. It is, of course, quite relevant to whether Petitioner, upon conviction, would have to pay restitution.

Petitioner neglects to note that the victim testified immediately before (T 45, lines 3-6) that she did not have insurance and had not recovered the stolen items, thus implying no compensation for their loss. Petitioner did not object to that testimony. At most, the challenged statement was cumulative. It certainly had no effect on the verdict, and was thus harmless. State v. DiGuilio, *supra*.

ISSUE IV

WHETHER TWO CONVICTIONS, FOR GRAND THEFT AND GRAND THEFT OF A FIREARM, VIOLATE DOUBLE JEOPARDY

The State agrees that Petitioner, in a single act of purse-snatching, simultaneously stole property of sufficient value to constitute grand theft; and stole a firearm, which constitutes grand theft regardless of the firearm's value. Two separate offenses, each with a statutory element not common to the other were committed:

Grand Theft	Grand Theft/Firearm
[§812.014(1) and (2)(c)1, Fla. Stat. (1987)]	[§812.014(1) and (2)(c)3, Fla. Stat. (1987)]
1. knowingly obtains, etc.	1. same
2. property of another	2. same
3. with intent to temporarily or permanently	3. same
4. deprive or appropriate the property	4. same
5. valued at more than $300 and less than $20,000	5. not present
6. not present	6. a firearm

Cursory examination reveals that grand theft, a felony of the third degree, is committed when property worth over $300 and less than $20,000 is stolen. This element (range of value) is not present in grand theft of a firearm. Conversely, stealing a firearm is grand theft, regardless of the firearm's value.

The test is whether the two offenses are statutorily distinct. State v. Gibson, 452 So.2d 553 (Fla. 1984). Here, the statutes address separate evils. Conviction under both is proper. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Petitioner committed his crimes on October 25, 1988, four months after the effective date of section 7, Chapter 88-131, Laws of Florida. *See* §775.021(4), Fla. Stat. (Supp. 1988). That section limited application of the rule of lenity, and expressly authorized multiple convictions and sentences arising from "an act" that constitutes separate criminal offenses. Petitioner's convictions under counts II and III were expressly authorized by statute. His right against double jeopardy was not violated.

Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

Petitioner's position is badly undermined by this Court's recent decision in State v. McCloud, 16 F.L.W. S194 (Fla. Feb. 28, 1991). There, the Court held that separate convictions for the crimes of sale and possession of the same quantity of cocaine do not violate double jeopardy. McCloud reviewed recent decisions on the issue, and noted that the offenses occurred after the 1988 amendment to §775.021. *Id.* It tacitly accepted the State's argument that the offenses are statutorily distinct under a Blockburger, *supra*, analysis. *Id.* It expressly applied the directive in §774.021(4)(a) to hold that offenses are separate if each requires proof of an element that the other does not, regardless of the accusatory pleading or proof at trial.

The proof at trial notwithstanding, Petitioner was properly convicted under distinct statutes. His right against double jeopardy was not violated.

Recognizing their persuasiveness against his position, Petitioner candidly cites -- and attempts to distinguish -- two cases. The first, State v. Getz, 435 So.2d 789 (Fla. 1983), upheld convictions for grand theft of a firearm and petit theft arising from a single burglary. This Court expressly agreed with the State's argument that there was no double jeopardy problem, as each offense required proof of different statutory elements. *Id.* at 790-1. Notably, that two offenses were codified in the same statutory subsection: as §812.014(2)(b)3 and (2)(c), Florida Statutes (1979), respectively.

Here, the offenses of grand theft and grand theft of a firearm are found within the same statutory paragraph: §812.014(2)(c)1 and (c)3, Florida Statutes (1987), respectively. This, however, is a distinction without a difference.[3] Since each offense includes an element not common to the other, the second offense is not subsumed by the first. The act of purse-snatching took place in October, 1988; therefore, that act is punishable as two separate offenses under §775.021(4)(a), Florida Statutes (Supp. 1988). State v. Smith, 547 So.2d 613 (Fla. 1989); State v. Burton, 555 So.2d 1210 (Fla. 1989). *See* Cave v. State, 16 F.L.W. D915 (Fla. 1st DCA April 4, 1991)(convictions for robbery with deadly weapon and aggravated battery arising from single act do not violate double jeopardy).

Petitioner also attempts to distinguish Grappin v. State, 450 So.2d 480 (Fla. 1984). That case relied on the very fine distinction between "a" and "any" to find that each stolen firearm could constitute a separate count of grand theft. Assuming the 1988 amendments to §775.021 have not rendered the Grappin rationale obsolete, Petitioner's distinction is still not persuasive. Grappin involved theft of five firearms taken from the same place during the same episode. This case involves the same episode (purse-snatching), but also involves two separate items: "property" valued between $300 and $20,000; and a firearm.

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[3] By noting that each offense is codified within the "same subsection" (initial brief, p. 19), Petitioner would avail himself of the First District's rationale in Wheeler v. State, 549 So.2d 687 (Fla. 1st DCA 1985). That logic was rejected by this Court in Porterfield v. State, 567 So.2d 429, 430 at note 2 (Fla. 1990).

These items are distinct in fact and statute. Also, the fact that stealing a firearm constitutes "grand" theft regardless of the firearm's value represents legislative intent to punish such thievery more harshly. Petitioner's position defeats this intent.

Finally, Petitioner argues that both offenses should be treated as one, since both fall within the "more general category of property under the grand theft statute." (initial brief, p. 20). This is weak logic. If correct, a defendant at once stealing properly worth $300 to $20,000; a firearm; a will, etc.; a motor vehicle; "any" livestock; a fire extinguisher; at least 2,000 pieces of citrus fruit; and items from a designated construction site could be convicted for only one count of grant theft. Taken to extreme, this logic would defeat prosecution for grant and petit theft committed simultaneously -- despite the holding in Getz, *supra* -- as grand and petit are addressed in the same statutory section; that is, §812.014. Petitioner's final point is without merit.

CONCLUSION

The State's case excluded every reasonable hypothesis of innocence. Flight evidence was properly allowed; or, if improperly admitted, was harmless error. That the victim did not recover her loss was properly admitted or harmless in light of her prior unchallenged testimony. Convictions for the two counts of grant theft arising from a single act do not violate double jeopardy.

The certified question must be answered in the negative. Petitioner's convictions and sentences must be affirmed.

Respectfully submitted,

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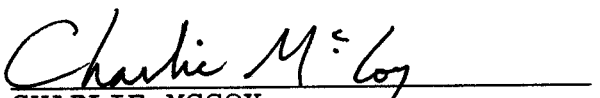
Attorney General



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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 **MS. LYNN WILLIAMS**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of April, 1991.

Charlie McCoy

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