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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 78,728

DENNIS WAYNE THOMPSON,

Respondent.

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

On March 26, 1980, the state filed an information charging respondent with one count of sale of a counterfeit controlled substance, in violation of Section 817.563(1), Florida Statute (1989) and one count of felony petit theft, in violation of Sections 812.014(1)(a) and 812.014(2)(d), Florida Statute (1989) (R 282).

Respondent proceeded to jury trial on the charges on June 12-13, 1990, with the Honorable Robert B. McGregor, Circuit Judge presiding (R 1-222). Following deliberations, the jury returned a verdict finding respondent guilty as charged on both counts (R 214, 309-310). Respondent was immediately adjudged guilty of the offenses (R 311-312).

On September 27, 1990, respandent again appeared before Judge McGregor for sentencing (R 223-274). Defense counsel objected to the court imposing any sentence on count II on the grounds that it constitutes the same offense as count I (R 225-226). The trial court determined that respondent met the criteria for enhanced sentencing and adjudicated him to be an habitual offender (R 269). Judge McGregor sentenced respondent to ten years in prison on count I followed by two years community control and three years probation on count II (R 269, 335-342). Respondent filed a timely notice of appeal on October 10, 1990 (R 345-346).

On September 12, 1991, the Fifth District Court of Appeal vacated respondent's conviction and sentence for the offense of felony petit theft. Thompson v. State, 16 F.L.W. 2380 (Fla. 5th

DCA September 12, 1991). The court certified the following question to be of great public importance:

> Can a defendant be properly convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft where both charges arose from the same fraudulent sale?

Id., at 2381.

SUMMARY OF ARGUMENT

A defendant can be, and respondent was, properly convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft where both charges arise from the same fraudulent sale. In determining whether separate convictions and sentences are proper, an analysis based on the facts is not to be done. Rather, the analysis is to be made by examining the statutory elements of each offense. If each offense requires proof of an element the other does not, then separate convictions and sentences are proper. Sale of a counterfeit controlled substance and felony petit theft each require proof of an element the other does not. Neither offense is a lesser included offense of the other, as each offense is the same degree and carries the same penalty. Finally, §817.563 is a drug abuse law, not a fraud or theft law.

ARGUMENT

A DEFENDANT CAN PROPERLY BE CONVICTED OF BOTH FRAUDULENT SALE OF A COUNTERFEIT CONTROLLED SUBSTANCE AND FELONY PETIT THEFT WHERE BOTH CHARGES AROSE FROM THE SAME FRAUDULENT SALE.

Respondent was charged by a single information with one count of sale of a counterfeit controlled substance and felony petit theft (R 282). Respondent pled not guilty and a trial by jury was had (R 1-223). Respondent was found guilty as charged (R 214). At sentencing, respondent was found to be a habitual offender and sentenced to 10 years incarceration on the sale count and 2 years community control followed by 3 years probation on the petit theft count (R 335-343).

On appeal, the Fifth District held that respondent could not be convicted and sentenced for both sale of a counterfeit controlled substance and felony petit theft, In so holding, the court determined that both offenses were theft or fraud crimes, with felony petit theft being a general theft crime and sale of a counterfeit controlled substance being a specific theft crime. The court did acknowledge that the two offenses were "not the 'same' for Blockburger purposes.'' Thompson, supra.

The court was correct in determining that sale of a counterfeit controlled substance and felony petit theft are not the same offenses, as the test is whether each offense requires proof of an element the other does not, rather than whether each count is based on the same underlying conduct.

Section 775.021(4), Florida Statute (1989), provides:

> (a) Whoever, in the course of one criminal transaction or episode, commits **an act or acts which constitute one or more separate criminal offenses,** upon conviction and adjudication **of** guilt, **shall** be **sentenced separately for each criminal offense;** and the sentencing judge may order the sentence to be served concurrently or consecutively. For **the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, <u>without regard to the accusatory pleading or the proof adduced at trial</u>.**
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity **as** set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> (1) Offenses which require identical elements of proof.
>
> (2) Offenses which are degrees of the same offense as provided by statute.
>
> (3) Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

(Emphasis added). In <u>State v. Carpenter</u>, 417 So.2d 986, 988 (Fla. 1982), this court held that in determining whether offenses are separate and can be punished separately, <u>Blockburger v. U.S.</u>, **450 U.S.** 333, 101 S. Ct. 1137, 67 L.Ed.2d **275** (1981), "requires that courts examine the offenses to ascertain whether each offense requires proof of a fact which the other does not."

> If each requires proof of a fact that the other does not, the Blockburger test is satisfied, **notwithstanding a substantial overlap in the proof offered to establish the crimes.**

Carpenter, at 988. (Emphasis added). Furthermore,

> [i]n applying the Blockburger test the courts look **only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts as alleged in a particular information.**

(Emphasis added). Id.; State v. McCloud, 577 So.2d 939 (Fla. 1991); State v. Crisel, 16 F.L.W. 607 (Fla. September 12, 1991); Smith v. State, 16 F.L.W. 2776 (Fla. 2d DCA November 1, 1991); Kase v. State, 16 F.L.W. 1471 (Fla. 1st DCA May 28, 1991); Collins v. State, 577 So.2d 986 (Fla. 4th DCA 1991); Cave v. State, 578 So.2d (Fla. 1st DCA 1991); Brown v. State, 569 So.2d 1320, 1321 (Fla. 1st DCA 1990). It is apparent from §775.021(4) that the Blockburger test has been incorporated into the statute.

Petitioner asserts that under §775.021(4)(a), Carpenter, supra, and the above cited cases, that respondent was properly convicted and sentenced for both offenses. Respondent was charged with one count of sale of a counterfeit controlled substance and one count of felony petit theft. Each of the offenses requires proof of an element the other does not. Neither proof adduced at trial nor facts alleged in the information are to be considered in determining whether offenses are separate. McCloud, supra; Carpenter, at 988; Crisel, supra; Davis v. State, 560 So.2d 1231, 1234 (Fla. 5th DCA 1990), approved, 581 So.2d 893 (Fla. 1991); §775.021(4)(a). Sale of a

counterfeit controlled substance required **a** showing of just that, the sale of **a** counterfeit controlled substance. §817.563(1), Fla. Stat. (1989). Felony petit theft does not require a sale. Felony petit theft does require a showing of knowingly and unlawfully obtaining the property of another. §812.014(1)(a) and (b), Fla. Stat. (1989). Sale of a counterfeit controlled substance **does** not. Also, while sale of a counterfeit controlled substance and felony petit theft may occur in conjunction with one another, neither is needed in order for the other offense to be committed.

Furthermore, sale of a counterfeit controlled substance and felony petit theft are not lesser included offenses of each other. Both are third degree felonies and carry the same penalty. §817.563(1), Fla. Stat. (1989); **§812.014(2)(d),** Fla. Stat. (1989). **As** both carry the same penalty, one cannot be deemed a lesser included offense of the other. Carpenter, at *987;* Ray v. State, 403 **So.2d 956 (Fla. 1981).** Thus, petitioner asserts that a defendant can properly be convicted of both sale of a counterfeit controlled substance and felony petit theft.

Finally, contrary to the appellate **court's** holding, petitioner asserts that **8817.563** is not **a** fraud or theft statute. Petitioner relies on this court's decision in State v. Bussey, 463 **So.2d** 1141 (Fla. 1985). In Bussey, this court held:

> **. . . We do not agree that the statute is aimed** at preventing fraud. The legislature, in enacting section 817.563, was not concerned with protecting persons illegally purchasing controlled substances from the danger of being sold bogus

> controlled substances. ... It **seems clear to us that section 817.563 is not a fraud statute;** it **is not** designed to protect illegal drug users and dealers from fraudulent representations by other dealers. **We** find **that the statute is merely a part of the law of this state pertaining to drug abuse prevention and control and is rationally related to the purposes for which those laws were enacted-**
>
> * * *
>
> **We find the statute is not a fraud statute . . .**

(Emphasis added). Bussey, at **1143.**

> **We conclude that section 817.563 is a drug abuse law rather than a fraud law; . . .**

(Emphasis added). Id., at 1145. Petitioner asserts that it is clear pursuant to Bussey, that this court has previously determined that 3817.563 is part of the law of the state of Florida pertaining to drug abuse prevention and control, not pert of the law pertaining to theft or fraud. **As** 8817.563 is part of Florida's drug abuse prevention and control laws, petitioner asserts that a defendant may properly be convicted of both sale of a counterfeit controlled substance and felony petit theft. The certified question should be answered in the affirmative.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully requests this honorable court answer the certified question in the affirmative, reverse the decision of the Fifth District Court of Appeal, and affirm respondent's judgment and sentence on both counts.

Respectfully submitted,

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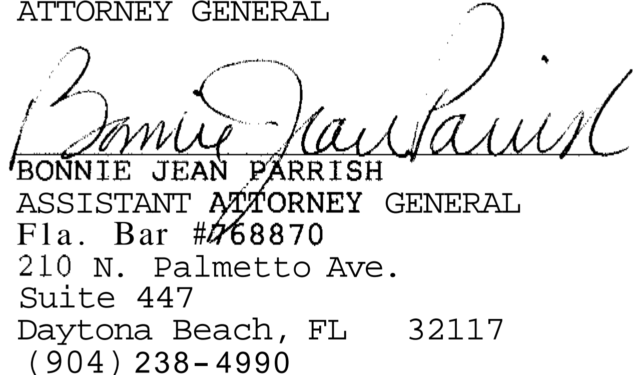

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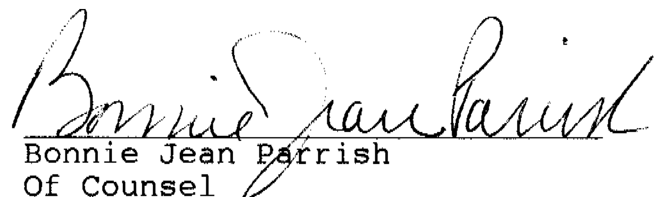
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Petitioner has been furnished by delivery to Michael S. Becker, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, this 25th day of November, 1991.



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