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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE JONES,

Petitioner,

vs. Case No. 78,904

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

In the Circuit Court for Hillsborough County, the state filed an information charging Petitioner, ROBERT LEE JONES, with attempted burglary of a dwelling, count one, and possession of burglary tools, count two. [R5] These offenses allegedly occurred on April 26, 1990. [R5] After waiving his right to a jury trial, Petitioner appeared for a trial before the Honorable Harry Lee Coe, circuit court judge. [R10,29] The trial judge found Petitioner guilty of the charged offenses. [R56]

The trial court adjudicated Petitioner guilty of both counts. [R13-14] For count one, the court sentenced Petitioner to thirty months imprisonment followed by five years probation. [R14-16] The court sentenced Petitioner on count two to five years probation, to run concurrently with the probation in count one. [R14-16] The trial court denied Petitioner's motion to dismiss, which argued that convictions for both of the charged offenses violated his right against double jeopardy. [R9,31] Petitioner filed a timely notice of appeal. [R20]

On October 25, 1991, the Second District Court of Appeal affirmed Petitioner's convictions and ruled the proscription against double jeopardy did not prohibit convictions for both attempted burglary and possession of burglary tools. Jones v. State, 16 FLW D2739 (Fla. 2d DCA Oct. 25, 1991). This court, on November 13, 1991, postponed its decision on jurisdiction and ordered the initial brief to be filed.

STATEMENT OF THE FACTS

On April 26, 1990, Mini Davis saw Petitioner walking down the street. [R33-34] Davis testified that Petitioner attempted to pick the lock on her neighbor's door. [R35,37] William Harvester also identified Petitioner as the person tampering with the door lock. [R38-39] Davis approached Petitioner and told him to stop his efforts. [R35] Petitioner responded that his friend lived in the residence. [R35] After Davis called to a neighbor to phone the police, Petitioner walked away. [R35,40-41] Petitioner did not have permission to be on the property. [R32-33]

Davis admitted she could not see an instrument in Petitioner's hands. [R36] Ira Tyndall followed Petitioner as he left. [R40-41] Tyndall said he saw a shiny object in Petitioner's pocket. [R41] When Tyndall approached Petitioner, Petitioner denied any attempt to break into the residence. [R41-42] Subsequently, Tyndall identified to the police Petitioner as the perpetrator, [R43]

Officer James Nolan arrested Petitioner and searched his person. [R44-45] Nolan recovered a tool. [R46] Nolan testified the tool could be used to pick locks. [R50] But Nolan also said the tool was used to clean out smoking pipes. [R52] After he read Petitioner his Miranda rights, Nolan interviewed him. [R46-48] Petitioner stated he had met a person who invited him over to the house. [R49] Petitioner did not tell Nolan the name of the person, the directions to the house, or why he did not knock on the door. [R49] According to Nolan, Petitioner said that he crouched down by

the door because he was hiding from a white female who had a gun. [R50]

Petitioner testified that he was at the residence to meet Bill. [R54] Petitioner said he went to the front of the house and called out Bill's name. [R54] Although Petitioner intended to knock on the door, he did not knock when he saw a white woman with a gun. [R54] Petitioner denied attempting to break into the residence. [R55] He identified the tool as one used to set the gap on spark plugs. [R55]

SUMMARY OF THE ARGUMENT

The trial court erred in denying Petitioner's motion to dismiss. The convictions for both attempted burglary and possession of burglary tools violate Appellant's right against double jeopardy because the former offense is a lesser included offense of the latter. Under the test enunciated in Blockburger v. United States, 284 U.S. 299 (1932), and subsection 775.021(4)(b), Florida Statutes (1989), Petitioner's conviction for one of these offenses must be reversed.

ARGUMENT

ISSUE ONE

DID THE TRIAL COURT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THAT ARGUED HIS CONVICTIONS FOR BOTH POSSESSION OF BURGLARY TOOLS AND ATTEMPTED BURGLARY VIOLATED THE RIGHT AGAINST DOUBLE JEOPARDY?

The trial court denied Petitioner's motion to dismiss, which argued that convictions for both possession of burglary tools and attempted burglary violated the proscription against double jeopardy under Article I, section 9, of the Florida Constitution and the fifth amendment of the United States Constitution. [R9,31] The district court concurred in this ruling and affirmed Petitioner's convictions. The lower court holdings that no double jeopardy violation is present are erroneous because the offense of attempted burglary is a lesser included offense of the greater offense of possession of burglary tools. Thus these offenses are an exception under subsection 775.021(4)(b)3, Florida Statutes (1989), to the rule that separate convictions can be had for two offenses occurring during a single act. This court must reverse either of Petitioner's convictions.

Subsection 775.021(4)(a), Florida Statutes (1989), reads, "[O]ffenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial." This rule of statutory construction was first announced in Blockburger v. United States, 284 U.S. 299 (1932). The rule is a method of determining whether

the legislature intended to punish two or more offenses that arise in a single criminal episode. In State v. Smith, 547 So.2d 613, 616 (Fla. 1989), this court held that this subsection is the "polestar" in determining legislative intent.

Under this test set out in Blockburser, attempted burglary is not a separate offense from possession of burglary tools when the two offenses occur during one act. Both offenses do not require proof of an element that the other does not because attempted burglary does not require proof of any elements that are not found in the burglary tool offense. The elements of possession of burglary tools are: one, the intent to commit a burglary; two, an overt act to facilitate this intent; and three, possession of burglary tools. Section 810.06, Fla.Stat. (1989); Ghent v. State, 536 So.2d 285 (Fla. 3d DCA 1988); See also, State v. Smith, 16 FLW D2536 (Fla. 1st DCA, Sept. 26, 1991) (adding a fourth element, an intent to use the tool in a burglary). On the other hand, attempted burglary, requires proof of an intent to commit a burglary, one, and an overt act committed to effect that intent, two. Ghent, 536 So.2d 285. Because both of the elements of attempted burglary are also elements of possession of burglary tools, the two offenses are not separate under the Blockburger test codified in subsection 775.021(4)(a).

The above conclusion was reached in Ghent, where the court held that convictions for both attempted burglary and possession of burglary tools could not stand because of the proscription against double jeopardy. Contra, Morgan v. State, 576 So.2d 792 (Fla. 4th

DCA 1991) (reaching contrary result without explanation). The court in Ghent cited Thomas v. State, 531 So.2d 708 (Fla. 1988), in support of its holding. The decision in Thomas confirms that attempted burglary is necessarily intertwined with the burglary tool offense. In Thomas, this court addressed the circumstances under which possession of a common household item could constitute possession of a burglary tool. The burglary tool statute, this court said, is in essence a prohibition against an attempted burglary: "[the statute] criminalizes an attempt to commit a burglary or trespass, which is discerned through the possession of tools or devices coupled with the defendant's intent to use those tools in the commission of the crime." Id. at 709. That no crime exists of attempted possession of burglary tools also supports the finding that an attempted burglary is a necessary part of the possession of burglary tools offense. E.g., State v. Thomas, 362 So.2d 1348 (Fla. 1978).

The holding that an attempted burglary is inherent in every offense of possession of burglary tools, is grounded on the logic that burglary tools are in nearly all instances not in themselves contraband. Id. A conviction for possession of burglary tools is unconscionable in every instance where a person holds a screwdriver outside a home. As held by this court in Thomas v. State, 531 So.2d at 710, the state must show the specific intent that the tool be used in a burglary. Furthermore, this specific intent can only be shown by the presence of an overt act. Id. at 710. In the

instant case, the overt act is Petitioner's tampering with the lock on a door.

In its decision, the Second District Court of Appeal overlooked this element of an overt act. The court listed the following as the elements of possession of burglary tools: "(1) the defendant had in his possession a tool and (2) the defendant had a fully-formed, conscious intent that the tool would be used by him or someone else to commit a burglary." Jones v. State, 16 FLW D2739 (Fla. 2d DCA Oct. 25, 1991). The absence of an overt act from this listing of elements mandated the court's holding that attempted burglary is not a lesser included offense of possession of burglary tools. Attempted burglary requires an overt act[1], so this element must also be present in the possession of burglary tools offense if the former offense is to be a lesser included offense of the latter. The district court's misapprehension of the elements of the burglary tool offense led to its erroneous ruling.

Given that all the elements of attempted burglary are found in possession of burglary tools, the former offense is a lesser included offense of the latter. Subsection 775.021(4)(b)(3), Florida Statutes (1989), provides that an offense is not a separate offense from another offense if the elements of the lesser offense are subsumed by the greater offense. This subsection is one of three exceptions to the stated intention in subsection (b) that convictions be accessed for each offense committed in a criminal

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[1] Two elements establish an attempt: "a specific intent to commit a particular crime, and an overt act toward its commission." Thomas v. State, 531 So.2d at 710.

episode. In State v. McCloud, 577 So.2d 939 (Fla. 1991), this court construed the subsumed offense to be a lesser included offense. Thus double convictions for both attempted burglary and possession of burglary tools based on a single act cannot stand based on the Blockburser test or the clear legislative intent expressed in subsection 775.021(4)(b)(3).

The district court reasoned that attempted burglary could not be a "lesser" offense of possession of burglary tools, the "greater offense," because both offenses are third-degree felonies. This reasoning is a faulty application of double jeopardy principals. The lower court confuses "lesser included offenses" as that term is used in regard to jury instructions with its use in double jeopardy analysis. This court clarified this distinction in State v. Baker, 456 So.2d 419 (Fla. 1984). The degree of punishment for an offense is irrelevant to whether the offenses are multiple punishments for the same offense. Id.; see also, Baker v. State, 425 So.2d 36, 53 (Fla. 5th DCA 1982) (Cowart, dissenting). Furthermore, Petitioner should not be subject to multiple punishments for the same offense merely because attempted burglary is classified as a third-degree felony in section 774.04(4)(c), Florida Statutes (1989), a section unrelated to double jeopardy considerations.

When occurring in a single criminal act, possession of burglary tools and attempted burglary are not separate offenses under the Blockburger test or subsection 775.021(4)(b). The legislature's intent is to not punish the one act with multiple

prosecutions. The offenses not being separate, this court must reverse Petitioner's conviction for either offense.

ISSUE TWO

DID THE TRIAL COURT IMPOSE AN ILLEGAL SENTENCE?

The written judgment indicates that Petitioner was convicted of attempted burglary of a dwelling, a second degree felony. [R13] For this conviction, the trial court sentenced Petitioner to 30 months imprisonment followed by five years probation. [R14-16] The judgment is in error because attempted burglary is a third degree felony. §810.02(3), Fla. Stat. (1990); §777.04 (c), Fla. Stat. (1990). In its decision, the district court acknowledged this error; however, the court did not note that the total sanction of imprisonment plus probation exceeds the statutory maximum. The combined terms of incarceration and probation cannot exceed the statutory maximum. Weidner V. State, 559 So.2d 705 (Fla. 4th DCA 1990); State V. Lindsey, 560 So.2d 406 (Fla. 5th DCA 1990). This court must reverse the lower court order and remand for resentencing within the five year statutory maximum.

CONCLUSION

Based on the above arguments and authorities, Petitioner respectfully requests that this court grant the above stated relief.

APPENDIX

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APPENDIX

NOT FINAL UNTIL TIME: EXPIRES *TO* FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ROBERT LEE JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 90-02447

Opinion filed October 25, 1991.

Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, 111, Judge.

James Marion Moonnan, Public Defender, Bartow, and Kevin Briggs, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Brenda S. Taylor, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Robert Lee Jones appeals his convictions for attempted burglary and possession of burglary tools and the sentence imposed on the attempted burglary. We affirm the convictions, concluding that there is no infringement upon the protections against double jeopardy *for* convictions *of* both attempted burglary and possession *of* burglary tools. In reaching this

conclusion, we agree with the result reached in Morgan v. State, 576 So. 2d 792 (Fla. 4th DCA 1991) and certify conflict with Ghent v. State, 536 so. 2d 285 (Fla. 3d DCA), review denied, 545 So. 2d 1369 (Fla. 1989). We also affirm the sentence for attempted burglary, finding that the sentence imposed is a lawful probationary split sentence.

A person may be convicted of and sentenced for separate offenses committed during one criminal transaction or episode subject to certain enumerated exceptions. § 775.021(4), Fla. Stat. (1989). Section 775.021(4), Florida Statutes (1989) provides that "offenses are separate if each offense requires proof of an element that the other does not . . ." A court must analyze the elements of the offense without regard to the proof at trial or the accusatory pleading when faced with a double jeopardy question. State v. McCloud, 577 So. 2d 939, 941 (Fla. 1991) (quoting § 775.021(4), Fla. Stat. (Supp. 1988)).

Elements of attempted burglary are as follows: (1) that the defendant did some act toward committing the crime of burglary that went beyond just thinking or talking about it and (2) that the defendant would have committed the crime except that someone prevented him from committing the crime of burglary or that he failed.[1] Jones v. State, 492 So. 2d 1124 (Fla. 3d DCA), review denied, 501 So. 2d 1282 (Fla. 1986); see also Fla. Std.

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[1] The Third District, in Ghent, lists the elements for attempted burglary as:

> 1) the intent to commit burglary; and 2) some overt act committed to effect that intent.

Jury Instr. (Crim.) at 55, (Attempt to Commit Crime). The elements of possession of burglary tools are: (1) the defendant had in his possession a tool and (2) the defendant had a fully-formed, conscious intent that the tool would be used by him or someone else to commit a burglary.[2] Estevez v. State, 189 So. 2d 830 (Fla. 2d DCA 1966), ~~cert. dismissed~~, *200* So. 2d 807 (Fla. 1967); ~~see also~~ Fla. Std. Jury Instr. (Crim.), at 138, (Possession of Burglary Tools). Each offense, therefore, has an element which the other does not. Thus, attempted burglary and possession of burglary tools are separate offenses for which Jones may receive dual convictions and sentences unless one of the exceptions enumerated in section 775.021(4)(b) applies.

Section 775.021(4) contains three exceptions. The first exception applies when offenses require identical elements of proof. As shown above, these offenses have different elements of proof. The second exception is relevant when offenses are degrees of the same offense. This also is inapplicable. The third exception applies to "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." This exception also is inapplicable because one offense is not subsumed by the other in that they are both third-degree felonies: therefore, there is no "lesser" or "greater" offense. We conclude from this analysis that the offenses of

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[2] The Third District, in Ghent, lists the elements for possession of burglary tools as:

> 1) the intent to commit burglary: 2) some overt act committed to effect that intent: and 3) possession of burglary tools.

attempted burglary and possession of burglary tools are separate offenses, and Jones could be convicted of both. In so holding, we certify conflict with the Third District.

Jones also challenges his sentence imposed on the attempted burglary. The trial court sentenced Jones to three and one-half years' imprisonment followed by five years' probation for the attempted burglary (count one) and to five years' probation for possession of burglary tools (count two) to run concurrently with the probation in count one. Jones argues that the sentence on the attempted burglary is an unlawful probationary split sentence. The supreme court has ruled that a probationary split sentence such as the one imposed in the present case is proper. See Glass v. State, 574 So. 2d 1099 (Fla. 1991).

Finally, we must remand this case for a correction of the judgment. Both parties concede that the written judgment which listed the attempted burglary of a dwelling as a felony of the second degree is in error. We remand to the trial court for correction of the judgment to reflect that attempted burglary of a dwelling is a third-degree felony.

CAMPBELL, A.C.J., and FRANK and PARKER, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Brenda S. Taylor, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 6th day of December, 1991.

Respectfully submitted,

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