OA 5-6-93

047

IN THE SUPREME COURT OF FLORIDA

JESSIE SIRMONS,

Appellant,

v. CASE NO. 80,545

STATE OF FLORIDA,

Appellee.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

A defendant can be convicted of both grand theft of a motor vehicle and robbery with a weapon. Each offense contains an element the other does not contain. The legislative intent as expressed in Section 775.021(4)(b) is to punish for both convictions, and Sirmons' case does not fall within any of the three exceptions to this rule.

ARGUMENT

A DEFENDANT CAN BE CONVICTED OF BOTH GRAND THEFT AUTO AND ROBBERY WITH A WEAPON.

The offenses for which the petitioner, Jessie Sirmons ("Sirmons") was convicted occurred on June 18, 1990, after the enactment of subsection 775.021(4), Florida Statutes (Supp. 1988). Subsection 775.012(4) overrode Carawan v. State, 515 So. 2d 161 (Fla. 1987). State v. Smith, 547 So. 2d 613 (Fla. 1989). The Fifth District Court of Appeals held in the opinion now being reviewed that since Carawan had been overriden, the rule in Florida criminal jurisprudence was once again State v. Rodriquez, 500 So. 2d 120 (Fla. 1986)[1]. Sirmons v. State, 603 So. 2d 82, 83 (Fla. 5th DCA 1992)[2]. Rodriquez II held that:

> It is now well settled in Florida that the determination of whether one offense is a lesser included offense of another, at least for purposes of deciding whether there may be cumulative convictions based on a single factual event, is made by analysis of the statutory elements, without regard to the allegations in a particular charging document or the evidence

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[1] "Rodriquez II"

[2] The Fourth District Court of Appeals has also specifically held that the effect of the statutory amendment in subsection 775.021(4) was to return the law of double jeopardy to its pre-*Carawan* state when the *Blockburger* analysis controlled. Collins v. State, 577 So. 2d 986 (Fla. 4th DCA 1991).

The First District Court of Appeals has also held that the controlling factor for crimes occurring after the effective date of the statutory amendment is whether the punishment imposed is greater than the Legislature intended. Brown v. State, 569 So. 2d 1320, 1321 (Fla. 1st DCA 1990), citing State v. Smith, 547 So. 2d 613, 614 (Fla. 1989). In Brown, the First District held that State v. Baker, 452 So. 2d 927 (Fla. 1984) was controlling. Baker was a pre-Carawan case which was also cited as authority in Rodriquez and Sirmons.

presented at a particular trial. *State v. Baker*, 456 So. 2d 419 (Fla. 1984); *State v. Baker*, 452 So. 2d 927 (Fla. 1984); *Borges v. State*, 415 So. 2d 1265 (Fla. 1982).

> A less serious offense is included in a more serious one if all of the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter. If each offense requires proof of an element that the other does not, the offenses are separate and discrete and one is not included in the other. *Blockburger v. United States*, 284 U.S. 299 ...52 S.Ct. 180, 76 L.Ed. 306 (1932).

Borges v. State, 415 So. 2d at 1267.

Rodriquez II, supra, at 122.

Although this court did not specifically state in Smith that the Blockburger analysis was once again the rule of Florida criminal jurisprudence, the court did indicate that subsection 775.021(4) was the prevailing law, and it is quite apparent that subsection 775.021(4) is the Blockburger test. Subsection 775.021(4)(a) provides:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal defenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences 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, without regard to the accusatory pleading or the proof adduced at trial.

The Blockburger test is:

> [w]here the same act or transaction constitutes a violation of two distinct statutory provision, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 234 U.S. 299, 52 S.Ct. 180, 182 (1932). The Fifth District Court of Appeal correctly found that robbery and grand theft each contains at least one element that the other does not, to-wit: robbery - force; grand theft - the value of the property taken. Sirmons at 82. This is a correct analysis under Blockburger and subsection 775.021(4).

The Fifth District Court of Appeals also recognized the principle of constitutional law found in Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) in finding the legislative intent was to punish both robbery and grand theft. Sirmons, supra, at 83. In Hunter, the Court held that even if two statutes proscribed the "same" conduct under *Blockburger*, if the legislature specifically authorized cumulative punishment under two statutes, the court's task of statutory construction was at an end and cumulative punishment could be imposed. Missouri v. Hunter, 459 U.S. at 368. In other words, as this court stated in Rodriquez II, "[w]here a single act violates two criminal statutes, separate punishments for the two offenses are permissible if the legislature intends such a result." Rodriquez II at 121. Subsection 775.021(4)(b) provides:

> (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.

None of the exceptions apply in the present case. The first exception is whether the offenses require identical elements of proof. As illustrated by Rodriquez II, robbery and grant theft each have an element the other does not. The second exception is whether the offenses are degrees of the same offense as provided by statute. Grand theft is governed by Section 812.014, Florida Statutes. Robbery is governed by Section 812.13, Florida Statutes. The offenses are not degrees of the same offense. The third exception is whether the offenses are lesser offenses the statutory elements of which are subsumed by the greater offense. Robbery is not a lesser included offense of grand theft. Schedule of Lesser Included Offenses, Florida Standard Jury Instructions in Criminal Cases, (1981 Edition, p. 294). Grand theft is not a lesser included offense of robbery. Rodriquez II, supra at 121. See also State v. McCloud, 577 So. 2d 939, 941 (Fla. 1991); Perrin v. State, 599 So. 2d 1365 (Fla. 1st DCA 1992).

The only doubt the Fifth District Court of Appeal expressed was whether Johnson v. State, 597 So. 2d 798 (Fla. 1992) cast a

shadow on the reasoning that Rodriquez II was controlling. Sirmons at 83-84. In Johnson, the defendant snatched a purse left in an unattended car at a gas station. The purse contained both money and a firearm, and this court held that a defendant who steals a purse cannot be convicted of grand theft for each item contained in the purse. There was no issue whether the convictions for both burglary of a conveyance and theft of an item therein were proper. Similarly, there is no issue whether convictions for both armed robbery of the victim and grand theft of her car are appropriate. Sirmons' convictions for armed robbery and grand theft compare to the Johnson convictions for both burglary of a conveyance and theft of an item in the conveyance. The language which concerned the Fifth District Court in Johnson was that concerning the degree of the felony and the "separate distinct acts of seizing". Sirmons at 84. The degree-of-crime issue is not an issue in the present case since robbery and theft are two distinct crimes and not different degrees of the same crime. The "separate act" of seizing is unfortunate dicta and defies the reasoning of Blockburger, Hunter, and subsection 775.021(4). If a separate act were required for each crime, then the volumes of double jeopardy case law could simply be discarded. Blockburger, Hunter and subsection 775.021(4) establish that dual convictions are appropriate when there is one act or transaction unless there is an applicable exception. To revert to the "single act" theory would be to resurrect the rule of lenity of Carawan. Furthermore, to say that even though robbery and grand theft have

different elements but because they occurred in the same transaction multiple punishments are precluded, runs afoul of the rule that the court must analyze the elements of the offense without regard to the proof at trial or the accusatory pleadings. See Jones v. State, 588 So. 2d 644 (Fla. 2d DCA 1991), citing State v. McCloud, 577 So. 2d 939, 941 (Fla. 1991). Johnson is fact-specific, and has been distinguished on the facts. See McInnis v. State, 17 F.L.W. D2112 (Fla. 4th DCA, September 9, 1992) (grand theft of a motor vehicle and grand theft of merchandise in the motor vehicle). Johnson does not, as Sirmons argues, indicate that the Blockburger test is inapplicable. Johnson held that, after analyzing the two offenses, there were no separate crimes. Johnson's crime occurred after the effective date of the statutory amendment[3], and under subsection 775.021(4)(a) the offenses must be analyzed to determine whether they are separate criminal offense. This court appeared to conduct the analysis under the statute, which as previously discussed is the Blockburger test, and found there were not two separate offenses for taking two items in one purse.

Sirmons' cite to the dissent in Foster v. State, 596 So. 2d 1099 (Fla. 5th DCA 1992) to support his position is unavailing. Foster occurred during the Carawan window and was analyzed under that set of rules. Foster, supra, at 1101. Sirmons also cites several pre-Carawan cases to support his argument; however, he does not acknowledge that the basis of Fifth District Court of Appeals' affirmance in Sirmons is that the law has returned to

[3] See Johnson v. State, 574 So. 2d 242 (Fla. 1st DCA 1991).

pre-Carawan law, and thus Rodriquez II is the prevailing rule. Sirmons' cite to Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) is likewise fruitless. Grady was severely limited in United States v. Felix, 112 S.Ct. 1377 (1992).

Sirmons' argument that Section 775.021(4)(a) is an unconstitutional encroachment on constitutional provisions was never raised in the Fifth District Court of Appeals and is not properly before this court.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished by delivery to James R. Wulchak in the Public Defender's basket at the Fifth District Court of Appeals, this 4th day of February, 1993.

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