

OA 5-6-93 047

FILED

SID J. WHITE

FEB 18 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JESSIE SIRMONS,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 80,545

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114

(904) 252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	
A DEFENDANT CANNOT CONSTITUTIONALLY BE CON- VICTED OF BOTH GRAND THEFT AUTO AND ROBBERY WITH A WEAPON, WHERE THE CONVICTIONS WERE PREDICATED ON THE SINGLE TAKING OF THE SAME AUTOMOBILE.	2
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

Blockburger v. United States
284 U.S. 299 (1932)

2

Grady v. Corbin
495 U.S. 508 (1990)

3

Johnson v. State
597 So.2d 798 (Fla. 1992)

2-4

State v. Rodriguez
500 So.2d 120 (Fla. 1986)

4

United States v. Bayer
331 U.S. 532 (1947)

3

United States v. Felix
___ U.S. ___, 118 L.Ed.2d 25 (1992)

3, 4

IN THE SUPREME COURT OF FLORIDA

JESSIE SIRMONS,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 80,545

PETITIONER'S REPLY BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

The opinion of the District Court of Appeal, Fifth District, follows a conflicting line of cases which misinterprets and fails to follow the correct state and federal constitutional analysis which would preclude dual convictions for a single criminal act wherein the same core elements are present (and the only differing elements are those defining the degree of the crime). The defendant's dual convictions for the single act of robbery (wherein the subject of the taking was an automobile) and grand theft (also where the subject of the taking was the automobile) cannot stand.

ARGUMENT

A DEFENDANT CANNOT CONSTITUTIONALLY BE CONVICTED OF BOTH GRAND THEFT AUTO AND ROBBERY WITH A WEAPON, WHERE THE CONVICTIONS WERE PREDICATED ON THE SINGLE TAKING OF THE SAME AUTOMOBILE.

The state in its answer brief makes the same mistake as the district court did in analyzing the double jeopardy problem in the instant case: it looks no further than a strict "elements" test of Blockburger v. United States, 284 U.S. 299 (1932), which produces an absurd and unconstitutional result in the instant case. As argued in the initial brief of petitioner, court decisions have held that a strict Blockburger test is not the end of the double jeopardy analysis, but merely a starting point. (See Petitioner's initial brief on the merits, pp. 5-8)

The state also attempts to distinguish and/or apply this Court's decision of Johnson v. State, 597 So.2d 798 (Fla. 1992), by contending that since, in Johnson, it was permissible to have separate convictions for burglary of an automobile and theft of the purse contained in the car, it is okay here to convict the defendant of both armed robbery and grand theft. The state fails to recognize that the point of Johnson is not the permissibility of multiple convictions for burglary and theft (with their differing core elements -- unlawful intrusion versus a taking), but rather the impermissibility of multiple grand theft convictions for a single taking (with the same core element of a taking, despite different elements defining the degree of the taking crime). As discussed in the petitioner's initial

brief on the merits, the holding and rationale of Johnson, supra, apply here to the single taking of the victim's automobile. While there may be differing "degree" elements in the crimes of robbery and theft, the same essential "core" elements -- the taking of property -- which define the crimes themselves, are present in both, dictating that the crimes are the same for double jeopardy purposes.

The state further indicates that the United States Supreme Court severely limited Grady v. Corbin, 495 U.S. 508 (1990), in United States v. Felix, ___ U.S. ___, 118 L.Ed.2d 25 (1992). While Grady and Felix do deal with successive prosecutions, the underlying rationales of these cases are applicable to the instant situation. Grady looked to the single action to determine that only one crime in fact had occurred. Felix looked at the separate and distinct acts of the defendant to determine that multiple crimes occurred allowing for multiple prosecutions. United States v. Felix, 118 L.Ed.2d at 36. United States v. Felix also discussed the importance of looking beyond a strict Blockburger analysis, to study the "essence" of the crimes to determine if they are the same offense for double jeopardy purposes. Felix, 118 L.Ed.2d at 36, citing United States v. Bayer, 331 U.S. 532, 542 (1947). In so doing the Court ruled that the "essence" of conspiracy -- an agreement to commit a crime -- differs from the substantive offenses themselves.

Using this analysis here (as was also argued in the initial brief), the "essence" of both the robbery and theft

counts is the taking of the automobile; thus the two crimes share the same core elements (or "essence") and are the same for double jeopardy analysis. They differ only when looking at the degree elements, which should not be used for a double jeopardy issue. Additionally, there was only a single, simple criminal conduct (a single taking) calling only for a single punishment; as opposed to "multilayered conduct, both as to time and to place," (as in conspiracy at one time and place and the substantive acts themselves at another time and place) which would allow for multiple punishments. United States v. Felix, 118 L.Ed.2d at 36.

Finally, the state argues that the petitioner's contention 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." (Respondent's answer brief, p. 8) However, the state fails to note that the petitioner did argue in the district court that the multiple convictions for armed robbery and grand theft violated constitutional provisions. Further, the petitioner contended in the motion for rehearing that the district court's analysis, based on section 775.021(4) (a) and State v. Rodriguez, 500 So.2d 120 (Fla. 1986), resulted in a conclusion contrary to that which Johnson v. State, supra, and thus the constitution would dictate. The issue is properly before this Court.

The defendant can only be convicted of either the robbery or the grand theft charge. They are the same crime for double jeopardy purposes, differing only in degree. There was

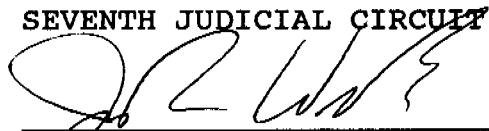
only one taking. This Court should vacate the decision of the district court herein, disapprove of multiple convictions for the single taking, and return significance to the federal and Florida constitutions' double jeopardy provisions.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court reverse the decision of the District Court of Appeal, Fifth District, and remand with instructions to vacate the duplicative conviction for grand theft and to resentence the petitioner on the remaining conviction.

Respectfully submitted,

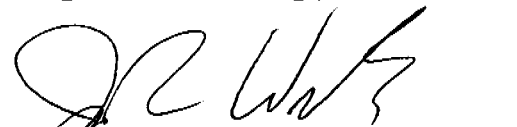
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue - Suite A
Daytona Beach, Florida 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal, and mailed to Jessie S. Sirmons, Inmate # 300194, Tomoka Correctional Institution, 3950 Tiger Bay Rd. Daytona Beach, FL 32114, this 16th day of February, 1993.



JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER