047
w/app

1-23

IN THE SUPREME COURT OF FLORIDA

KAREN GARTRELL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 80,948

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Karen Gartrell was charged by information filed August 17, 1990 with possession of cannabis under 20 grams (count I) and with trafficking in cocaine in the amount of 28 grams or more (count II) (R 141).

The charges arose from the following circumstances. Ms. Gartrell and her boyfriend Mr. Briggs were passengers in a car driven by Mr. Jones when the latter was stopped for speeding on I-95 (R 53, 75). Deputy Sheriff Moore saw Gartrell lying down in the backseat using her purse as a pillow (R 75). When the deputy learned that Jones' license was under suspension, he issued several traffic citations (R 53-54).

Moore asked Briggs and Gartrell whether either had a license to drive the car (R 54-55). Gartrell, who exited the vehicle, stood near the trunk of the car and looked through her purse for her license (R 55). The deputy stated that Gartrell tilted her purse away from him (R 55). Moore testified that Gartrell was not under any suspicion or arrest and that he told Gartrell he did not want to search her purse but he wanted to see what she was doing so that he could see for his own safety whether there were any weapons inside (R 56-57, 67-68). Gartrell then moved her purse on the trunk and looked for her license.

Moore saw personal items in the purse and a kleenex which covered several blue plastic bags. Moore apparently deduced the bags contained marijuana, arrested Gartrell for possession of marijuana and continued searching the purse (R 57-59). Moore continued to search the purse and found a folded one dollar bill

which contained white powder (R 59). He opened a zippered compartment at the bottom of the purse and found a brown paper bag; Moore opened the paper bag and seized a ziplock bag which contained 86.25 grams of cocaine (R 62-63).

At trial, Gartrell testified that she was napping in the backseat of the car. Her purse was on the armrest until Briggs awakened her[1] and told her to get the purse off the armrest and that a policeman was behind them (R 74-75). Gartrell then put the purse under her head since there was no other room in the backseat and continued to sleep (R 75). Gartrell admitted that she had marijuana in her purse, that she knew she had marijuana in the purse, and that she did not want the officer to see it. She testified that she had no knowledge that cocaine was in her purse (R 77).[2]

At the close of the evidence, Gartrell moved for judgment of acquittal on the basis that the state failed to rebut her reasonable hypothesis of innocence that she had no knowledge that cocaine was in her purse and that the purse had not been in her exclusive possession (R 70-71, 82-84).[3] The motion was denied and Gartrell was convicted by a jury as to each charge and so adjudicated (R 122-123, 170, 174, 183-184).

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[1] Gartrell testified that the purse stayed on the armrest from Miami up until St. Lucie County (R 75-77).

[2] Gartrell also testified that a folded dollar bill did not belong to her (R 77).

[3] The defense at trial admitted the cannabis possession for purposes of the motion for judgment of acquittal (R 82).

At the January 28, 1991, sentencing hearing, the judge sentenced Gartrell to concurrent sentences of one year in the county jail (as to possession of cannabis under twenty grams) and to a three year mandatory minimum (as to trafficking in cocaine in the amount of 28 grams or more) (R 129, 177-178). Gartrell scored within the permitted guidelines range of four and one half years to nine years imprisonment (R 173). On February 12, 1991, upon the state's 3.800(a) motion, a second judge imposed a sentence of time served (for cannabis possession) and to nine years imprisonment with a three year mandatory minimum (for trafficking in 28 grams or more of cocaine) (R 133-138, 185-186).

Gartrell timely appealed to the Fourth District Court of Appeal. There she argued that the trial court erred in denying her motion for judgment of acquittal because the evidence was insufficient to prove that her possession of the purse was non-exclusive and that she did not know the cocaine was in the purse. Gartrell also challenged the resentencing on the basis that the increase to a greater term after imposition of a legal sentence she had commenced to serve violated double jeopardy.

The District Court issued its opinion on November 25, 1992. That court voted to affirm the conviction and sentence, with one judge dissenting on both grounds. Gartrell v.State, 17 Fla. L. Weekly D2633 (Fla. 4th DCA Nov. 25, 1992). The District Court certified the following question to this Court as one of great public importance:

> IS A SENTENCE TO LESS THAN THE GUIDELINES RANGE WITHOUT WRITTEN REASONS AN "ILLEGAL SENTENCE" WITHIN THE MEANING OF RULE 3.800(A); AND IF SO, CAN THE STATE PROPERLY SEEK TO HAVE SUCH A SENTENCE INCREASED TO THE GUIDELINES

RANGE BY FILING A MOTION UNDER RULE 3.800(a) AFTER THE STATE HAS FOREGONE APPEALING THE SENTENCE UNDER SECTION 924.07(1)(I), FLORIDA STATUTES, AND RULE 9.140(C)(1)(J)?

[Appendix at 2]; 17 Fla. L. Weekly at D2624. On December 28, 1992, Petitioner filed notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

I.

Petitioner's increased sentence pursuant to the state's motion under Rule 3.800(a), Fla.R.Crim.P., violated her double jeopardy rights. Petitioner had commenced to serve her original sentence and respondent failed to raise its claims on direct appeal as required under Section 924.07(1)(I), Fla. Stat. (1991). See also Rule 9.140(C)(1)(J). Rather, respondent improperly sought relief via collateral attack in clear violation of common law and statutory principles which strictly limit the state's available remedies.

II.

The District Court erred in affirming Petitioner's conviction for trafficking possession of cocaine. Petitioner's motion for judgment of acquittal should have been granted. The evidence was insufficient to establish the requisite element of guilty knowledge. Petitioner presented undisputed testimony that the purse containing the cocaine was not within her exclusive possession. Respondent failed to introduce competent, substantial evidence inconsistent with Petitioner's reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1989).

ARGUMENT

POINT I

PETITIONER'S DOUBLE JEOPARDY RIGHTS WERE VIOLATED WHEN HER SENTENCE WAS INCREASED TO THE GUIDELINES RANGE PURSUANT TO THE STATE'S MOTION UNDER RULE 3.800(a), FLA.R.CRIM.P., AFTER PETITIONER COMMENCED TO SERVE THE ORIGINAL SENTENCE AND WHERE THE STATE FAILED TO APPEAL THE SENTENCE UNDER SECTION 924.07(1)(I), FLA. STAT. AND RULE 9.140(C)(1)(J).

Petitioner was sentenced for trafficking in cocaine and cannabis possession on January 28, 1992. The trafficking charge included a three year mandatory minimum sentence. Gartrell's permitted guidelines range was four and one-half to nine years imprisonment (R 173). The sentencer imposed a three year mandatory minimum sentence for cocaine trafficking and a concurrent one year sentence for cannabis possession (R 127-129, 176-179). The sentencer entered a written judgment of conviction and sentence that day.

On February 6, 1991, the state filed a "motion to correct illegal sentence" which was heard February 12, 1991 (fifteen days after entry of judgment and sentence (R 129-134). Petitioner objected to the resentencing on the basis that the sentence was not illegal since it was within the statutory limits. Sections 775.082(3)(b), and 893.135(1)(b), Fla. Stat. (1991). As such, it was a legal sentence which Petitioner commenced serving on January 28, 1991. Consequently, the resentencing violated the double jeopardy prohibition because she would be twice sentenced for the same offense (R 132-133). The hearing judge who presided at trial but who was not the sentencer declared the original sentence "void

ab initio", set it aside, and imposed a new sentence of nine years imprisonment with a three year mandatory minimum for the trafficking conviction (R 133-138).

The Fifth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution both provide that no person shall be put in jeopardy more than once for the same criminal offense. It is axiomatic that resentencing on a permissible sentence which Petitioner commenced to serve violated the prohibition against double jeopardy and must be reversed. United States v. Benz, 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354 (1931); Troupe v. Rowe, 283 So.2d 85 (Fla. 1973).

Moreover, the state's use of a procedural device, rule 3.800(a), Fla.R.Crim.P., to circumvent the requisite statutory remedy was plainly improper. Section 924.07, Fla. Stat. (1991); Rule 9.140(c)(J), Fla.R.App.P. An analysis of the statutes addressing sentencing errors in criminal appeals demonstrates that the legislature did not intend to include guidelines departure sentences absent written reasons within Rule 3.800(a).

Rule 3.800(a), Fla.R.Crim.P., provides that a court "may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guidelines scoresheet." The rule does not define "illegal sentence". A number of sentencing errors may be called "illegal". Judge Farmer, in Gartrell v. State, 17 Fla. L. Weekly D2623, 2627 (Fla. 4th DCA Nov. 25, 1992), discussed four possible categories:

> First, there is the sentence that exceeds the maximum punishment fixed by statutes for the crime: e.g., the maximum period of imprisonment for the crime is five years but the court sentences to six years. Second,

> there is the sentence that fails to impose the minimum punishment required by statute for the crime: e.g., the minimum mandatory period for the crime is three years but the court sentences to two years. Third, there is the sentence that exceeds the guidelines range but does not exceed, or is less than, the maximum allowed by statute for the crime: e.g., the guidelines range is four to nine years, while the statutory maximum is ten years, and the court sentences without an explanation to ten years. Fourth, there is the sentence that is less than the guidelines range but is equal to or greater than any statutory minimum mandatory period, e.g., the guidelines range is four to nine years while the minimum mandatory period is three years yet the court sentences without explanation to three years [the type of error here]....

As the dissent aptly notes, while a first-category error is indisputably illegal, it does not necessarily follow that errors of the other categories are similarly illegal. Gartrell v. State, 17 Fla. L. Weekly at D2627 (Farmer, J., dissenting). The [fourth-category] sentence imposed in Gartrell is not, for purposes of rule 3.800(a), an "illegal" sentence.

Statutory analysis bears this out. Section 924.07, Fla. Stat., permits state appeals of the following sentencing errors:

(e) The sentence on the ground that it is illegal.

(i) A sentence imposed outside the range recommended by the guidelines authorized by s. 921.001

Thus there is one category for appeals of "illegal" sentences and a separate category for appeals of sentences outside the guidelines. A similar distinction exists in section 924.06, Fla. Stat. (1991), which permits a defendant to appeal from a sentence on the ground it is "...(d)...illegal; or (e)...outside the recommended guidelines authorized by section 921.001...." These distinctions reflect the legislature's intent that the statutory

term "illegal sentence" does not include guidelines departures such as Petitioner's. This clear legislative intent is amplified by the concomitant amendment of rule 3.800(a) when sections 924.06(e) and 924.07(i) were adopted. The amended rule 3.800(a) added a provision that a court may at any time correct "...an incorrect calculation made by it in a sentencing guidelines scoresheet." (emphasis added).

Furthermore, in view of the parallel procedural history of rule 3.800(a) with the legislative history of sections 924.06(e) and 924.07(i), it cannot be legitimately argued that the architects of rule 3.800(a) meant anything other than the statutory meaning of the term "illegal sentence". This is succinctly stated in Gartrell v. State, 17 Fla. L. Weekly at D2627 (Farmer, J., dissenting) as follows:

> There is absolutely no reason to suppose that in using the statutory term, "illegal sentence", the drafters of rule 3.800(a) meant something different than the legislature did in the right-to-appeal statutes. In the first place, rule 3.800(a) comes directly from section 921.24, Florida Statutes(1969) which reads: "A court may at any time correct an illegal sentence imposed by it in a criminal case." That statute was repealed by chapter 70-339, Laws of Florida, when the Florida Rules of Criminal Procedure were adopted. Similarly, section 921.25, Florida Statutes (1969), allowed the court to reduce - but not increase - a legal sentence within certain prescribed time limits. That statute, also, was repealed with the adoption of the procedural rules. Rule 3.800 was taken directly from sections 921.24 and 921.25...[which] predated the sentencing guidelines....

In the same vein, the drafters of Rule 9.140(c)(1)(I), (J), Fla.R.App.P., intended the legislature's meaning of "illegal sentence". This is so because the rule of appellate procedure,

9.140(c)(1)(I), (J), distinguishes state appeals from "...(I) [a]n illegal sentence..." and state appeals from "...(J) [a] sentence imposed outside the range recommended by the guidelines....

The foregoing statutes and rules of procedure separately categorize "illegal sentences" and "guidelines departures". It makes no logical sense that the legislature and rule drafters intended "illegal sentences" to mean the same thing as "guidelines departure". The categories are not interchangeable. Consequently, the legislature did not intend that the guidelines departure error claimed by respondent here to be encompassed by Section 924.07(e) (an "illegal" sentence); Rule 9.140(I), Fla.R.App.P. (an "illegal" sentence); or Rule 3.800(a) (an "illegal" sentence). Otherwise stated:

> If the legislature had understood that the term "illegal" sentence encompassed a guidelines departure sentence improperly done (i.e. without written reasons) there would have been no reason to have added the statutory provision for guidelines departure sentences. Similarly, if the rule drafters had intended guidelines calculations to be embraced by the term "illegal sentence", then there would have been no need to amend the rule to add the provision for guidelines calculations...[4]

Gartrell v. State, supra, 17 Fla. L. Weekly at 2627 (Farmer, J., dissenting) (footnotes omitted).

Yet respondent failed to use the available remedy - direct appeal - in the present case. Instead, it sought to challenge the

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[4] As Judge Farmer, dissenting, noted, "...there is `illegal' and then there is `illegal'. A thing may be (1) contrary to law, or it may be (2) forbidden by law, or it may be (3) merely unauthorized by law. These three conditions do not constitute identical conditions or circumstances." 17 Fla. L. Weekly at 2628-2629 (at fn. 11).

sentence via rule 3.800(a). This maneuver flies in the face of the strict limitation statutory and decisional authority places upon the state's right to appeal. State v. Creighton, 460 So.2d 735 (Fla. 1985); State v. Burns, 18 Fla. 185, 187 (1891); Section 924.07, Fla. Stat. (1991).

This Court, in State v. Creighton, stated that at common law, there was a "virtual prohibition" of the state's right to appeal. State v. Creighton, supra, 469 So.2d at 740. This principle remains in the "...strictly limited and carefully crafted exceptions designed to provide appellate review to the state in criminal cases where such is needed as a matter of policy and where it does not offend against constitutional principles...." Id. at 740 (footnote omitted). Creighton reaffirms "...that the state's right of appeal in criminal cases depends on statutory authorization and is governed strictly by statute." Id. at 740. In the same vein, the committee note to rule 9.140(c), Fla.R.App.P, states the rule lists the only matters which may be appealed by the state as well as the following caveat:

> No provision of this rule is intended to conflict with a defendant's constitutional right not to be placed twice in jeopardy, and it should be interpreted accordingly....

Applying the foregoing principles to the present facts, respondent's use of rule 3.800(a) violates common law and statutory authority. Simply put, this collateral remedy is not interchangeable with the very circumscribed remedies available to the state on direct appeal.

The decision of the Third District Court of Appeal in Gonzalez v. State, 596 So.2d 711 (Fla. 3d DCA 1992) further supports

Petitioner's position. In Gonzalez, the defendant entered a guilty plea in exchange for a two year sentence on a charge which included a three year mandatory minimum sentence. The defendant had begun to serve his sentence but the next day the state moved to vacate the sentence because it used a lower guidelines range than was applicable. The judge vacated the conviction and sentence and the defendant was subsequently sentenced to five and one-half years, which was within the guidelines, including a three-year mandatory minimum sentence. The Third District reversed, stating:

> It is entirely clear that the resentencing to a greater term after the entry of a jurisdictionally permissible sentence which the defendant had commenced to serve was unequivocally a violation of his double jeopardy rights - one which cannot constitutionally be justified by the prosecution's simple unilateral mistake in recommending and concurring in the sentence. Troupe v. Rowe, 283 So.2d 857, 860 (Fla. 1973) ("Jeopardy had attached in petitioner's case and sentence which had been imposed could not thereafter be increased (as the second assistant state attorney's position would do) in violation of defendant's constitutional guaranty not be twice placed in jeopardy."); State v. Wagner, 495 So.2d 283, 284 (Fla. 2d DCA 1986) ("[S]ince Wagner has commenced service of his sentence, he may not be resentenced to a greater term of imprisonment. Such a sentence would constitute double jeopardy. Troupe v. Rowe, 283 So.2d 857 (Fla. 1973); Hinton v. State, 448 So.2d 712 (Fla. 2d DCA 1984)"); Macias v. State, 572 So.2d 22, 23 (Fla. 4th DCA 1990) ("[A]n increase of a lawful sentence is expressly prohibited by case law and constitutes double jeopardy"); Berry v. State, 547 So.2d 273, 274 (Fla. 1st DCA 1989) (["T]he court may not impose a greater sentence once [the] defendant starts to serve original sentence."); See Madrigal v. State, 545 So.2d 392, 393 (Fla. 3d DCA 1989) ("[T]he prosecutor had the right, and the binding duty if Madrigal complied, to recommend a sentence less than that provided by section 893.135(1)(b)(2), Florida Statutes (1985)."); State v. Collins, 482 So.2d 388

> (Fla. 5th DCA 1985) (state agreement justifies downward departure); State v. Devine, 512 So.2d 1163 (Fla. 4th DCA 1987) (same) review denied, 519 So.2d 988 (Fla. 1987).

Gonzalez v. State, supra, 596 So.2d at 711-712.

Petitioner maintains that Gonzalez applies to the present case. Gartrell, like Gonzalez was sentenced to a greater term after she began serving her original sentence. Just as Gonzalez's double jeopardy rights were violated due to the increased term, so too were Gartrell's. The state in Gonzalez, like respondent here, unsuccessfully raised the matter via collateral attack.

Given the above-discussed common law and statutory principles which narrowly limit the state's right to appeal, respondent's use of a rule 3.800(a) motion to present its challenge was improper. These principles are an expression of strong public policy that the requisite procedure be followed. As the dissent in Gartrell reasons:

> The fact that the state might have successfully appealed Gartrell's original sentence, see Cheshire v. State, 568 So.2d 908, 913 (Fla. 1990) (reversal of downward departure sentence imposed without written explanation), does not mean that the common law and constitutional policy can be evaded by the simple expedient of post-conviction motion practice by the state. If defendants are precluded from raising in a collateral attack non-constitutional errors in their conviction and sentence that could have been raised on direct appeal but were not, there is little reason to suppose that the state can do so.

Gartrell v. State, supra, 17 Fla. L. Weekly at 2628 (emphasis added).

In the present case, respondent was required to follow the proper procedure - direct appeal - to raise its sentencing claims. Failing to do so, it exacerbated the error by seeking relief in an

unauthorized (i.e. collateral attack) manner. To permit this procedure to stand, it is not difficult to imagine the inevitable onslaught of post-conviction challenges, which could have been but were not raised on direct appeal, from defendants as well as from the state.

Based upon the foregoing, Petitioner's nine year sentence must be reversed and the decision of the Fourth District Court of Appeal, affirming the sentence, must be reversed.

ARGUMENT

POINT II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT PETITIONER'S CONVICTION FOR POSSESSION OF COCAINE.

Petitioner maintains that the evidence was insufficient to prove trafficking possession of cocaine. Section 893.135(1)(b)(1)(a), Fla. Stat. (1991). A review of the evidence adduced at trial demonstrates that the state failed to sustain its burden of proof. Specifically, the evidence is insufficient to prove constructive possession of cocaine because the state failed to prove Petitioner had knowledge the contraband was in the purse. Brown v. State, 428 So.2d 250 (Fla. 1983), cert. denied, 463 U.S. 1209, 103 S.Ct. 3541, 77 L.Ed.2d 1391 (1983).

Section 893.135(1)(b)(1)(a), Fla. Stat. (1991), provides in pertinent part:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of 28 grams or more of cocaine as described in s. 893.03(2)(a)(4) or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as trafficking in cocaine.

(emphasis added). The express language of the trafficking statute establishes that specific guilty knowledge is an element the state

must prove.[5] See also State v. Dominguez, 509 So.2d 917 (Fla. 1987).

In Brown v. State, 428 So.2d 250 (Fla. 1983), this Court set forth a series of rules enunciating the law on the constructive possession:

> Constructive possession exists where the accused without physical possession of the controlled substance knows of its presence on or about his premises and has the ability to maintain control over said controlled substance. Hively v. State, 336 So.2d 127, 129 (Fla. 4th DCA 1976). To establish constructive possession, the state must show that the accused had dominion and control over the contraband, knew the contraband was within his presence, and knew of the illicit nature of the contraband. Wale v. State, 397 So.2d 738 (Fla. 4th DCA 1981). If the premises where contraband is found is in joint, rather than exclusive, possession of a defendant, however, knowledge of the contraband's presence and the ability to control it will not be inferred from the ownership but must be established by independent proof. Wale; Frank v. State, 199 So.2d 117 (Fla. 1st DCA 1967).

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[5] In contrast, the simple possession statute contains no such element of guilty knowledge, stating instead

> "It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance accept as otherwise authorized by this chapter. Any person who violates this provision is guilty of a felony of the third degree.

In Green v. State, 17 Fla. L. Weekly D1456, 1458 (Fla. 4th DCA June 10, 1992) the Fourth District recognizes the distinction between the element of general knowledge in simple possession cases and the element of specific "guilty" knowledge in trafficking cases.

428 So.2d at 252. With that statement this Court established the three elements which must be proved to demonstrate constructive possession: 1. knowledge of the contraband's presence, 2. the ability to exercise dominion and control over it, and 3. knowledge of its illicit nature. This Court further acknowledged that the type of proof necessary to show those three elements of constructive possession will necessarily be different in a case involving exclusive possession of premises and one involving premises which are jointly occupied; in the former, the elements may be inferred, but in the latter they must be proved by evidence.

As the First District Court correctly ruled in Frank v. State, 199 So.2d 117 (Fla. 1st DCA 1967), in a constructive possession case involving hidden items and joint access, the state must prove a defendant's actual knowledge of and ability to control the secreted item. "This is not a mere technicality in the law, but a legal principle which must be observed in order to safeguard innocent persons from being made victims of unlawful acts perpetrated by others, and of which they have no knowledge." 199 So.2d at 121. Consequently, possession was non-exclusive, the inference of knowledge from the fact of possession was not permitted. 199 So.2d at 119-120. The Frank court correctly concluded:

> From the foregoing it appears to be established in this state that before one charged with unlawfully possessing narcotic drugs may be convicted, the state must establish beyond a reasonable doubt that the accused knew of the presence of narcotic drugs on the premises occupied and controlled by him, either exclusively or jointly with others. If the premises on which drugs are found are in the exclusive possession and control of the accused, knowledge of their

> presence on such premises coupled with his ability to maintain control over them may be inferred...If the premises on which the drugs are found is not in the exclusive but only in the joint possession of the accused, knowledge of the drugs' presence on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof.

Id., 199 So.2d at 121 (emphasis added). In the present case, no such proof was established.

The absence of evidence here can be contrasted with the evidence of guilty knowledge in Spataro v. State, 179 So.2d 873 (Fla. 2d DCA 1965). Gartrell v. State, 17 Fla. L. Weekly D2624, 2626 (Farmer, J. dissenting). In Spataro, the defendant maintained that the drugs seized from a dresser drawer were accessible to a housemate. The housemate, who the state presented as a witness, denied knowledge that drugs were present. Following Spataro's testimony, the state recalled the housemate on rebuttal. The housemate testified Spataro called her during the search and asked if the police found "...the stuff in the gold purse?" which Spataro had borrowed from the housemate. Id., 179 So.2d at 876. The Spataro court held that evidence of guilty knowledge was properly inferred from Spataro's telephone statement. In contrast, respondent presented no proof from which such knowledge could be inferred here.

In Murphy v. State, 511 So.2d 397, 399 (Fla. 4th DCA 1987), the Fourth District stated:

> (W)hen contraband is found in a vehicle which is in the possession of two or more persons, circumstantial evidence of defendant's knowledge of the presence of contraband must be consistent with the accused's guilt, inconsistent with innocence and must exclude every reasonable hypothesis except that of

> guilty. Harvey v. State, 390 So.2d 484 (Fla. 4th DCA 1980); Manning v. State, 355 So.2d 166 (Fla. 4th DCA 1978); D.J. v. State, 330 So.2d 35, 36 (Fla. 4th DCA 1976); Townsend v. State, 330 So.2d 513 (Fla. 4th DCA 1976).

See Soler v. State, 547 So.2d 251, 252 (Fla. 4th DCA 1989); Cockett v. State, 507 So.2d 1217 (Fla. 4th DCA 1987).

As the dissent in Gartrell states, this Court's decision in State v. Medlin, 273 So.2d 394 (Fla. 1973) makes clear:

> ...that if the legislature has omitted the requirement of guilty knowledge in the text of a statute, then guilty knowledge is not an element of that crime. The simple possession statute is an example of such knowledge being omitted. [State v.] Dominguez, [509 So.2d 917 (Fla. 1987)]; and Way [v. State, 475 So.2d 239 (Fla. 1985)] make clear that where the legislature has expressly included guilty knowledge as an element of the crime, as it has done in the trafficking statute, then that specific knowledge is a separate element that must be proven by the state. Hence, for the state to be entitled to an inference of guilty knowledge, there must be additional evidence -- beyond the mere fact of possession -- showing that the defendant actually knew that she had the substance charged.

Gartrell, supra, 17 Fla. L. Weekly at 2626. (Farmer, J., dissenting) (emphasis added). The trafficking statute at issue here does not expressly include a presumption of guilty knowledge arising from the mere presence of cocaine. Id. Cf. Green v. State, 17 Fla. L. Weekly D1456, 1458 (Fla. 4th DCA June 10, 1992).

Therefore, in the present case, respondent was entitled to no presumption of guilty knowledge in the face of undisputed evidence that two others had access to Gartrell's purse.

Wilcox v. State, 522 So.2d 1062 (Fla. 3d DCA 1988) relied upon by the Gartrell majority is distinguishable from the present facts. There, a canvas tote bag was on a bench between Wilcox and his

girlfriend. After the police approached and informed him he was under arrest, he grabbed the bag which contained a firearm and fled. As the Gartrell dissent aptly notes, Wilcox's grabbing the bag and running away supplied the extra element of guilty knowledge. In contrast, the extra element of guilty knowledge remains lacking in Gartrell.

In sum, there is no evidence that Gartrell actually knew there was cocaine in her pocketbook. Gartrell denied the cocaine and related dollar bill and beeper were hers. Moreover, there is a reasonable hypothesis of innocence that Jones and/or Briggs, who had access to her purse while she was asleep, placed the cocaine, dollar bill and beeper in the purse before Briggs awakened Gartrell and told her to move her purse. The state failed to dispute this evidence and failed to prove the requisite element of guilty knowledge.

The circumstantial evidence upon which the state relied failed to exclude every reasonable hypothesis of innocence. Respondent failed to introduce competent substantial evidence inconsistent with Gartrell's hypothesis of innocence. E.g., State v. Law,, 559 So.2d 187 (Fla. 1989). Consequently, the trial judge erred in denying Gartrell's motion for judgment of acquittal. Id.; Murphy v. State, supra. Accordingly, Gartrell's conviction and sentence must be reversed with instructions for discharge.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Douglas J. Glaid, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 29th day of December, 1992.

Ellen Morris
Counsel for Petitioner