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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,948

KAREN GARTRELL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS....................................ii-iii

PRELIMINARY STATEMENT....................................1

STATEMENT OF THE CASE AND FACTS........................2-3

SUMMARY OF ARGUMENT......................................4

ARGUMENT..5-13

POINT I

SINCE PETITIONER'S INITIAL SENTENCE WAS AN ILLEGAL DOWNWARD DEPARTURE SENTENCE AND THUS VOID, JEOPARDY DID NOT ATTACH AND PETITIONER WAS PROPERLY RESENTENCED.

POINT II

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE SHOWED ACTUAL POSSESSION.

CONCLUSION..14

CERTIFICATE OF SERVICE..................................14

TABLE OF CITATIONS

CASES **PAGE**

Alexander v. State,
402 So. 2d 485 (Fla. 2d DCA 1981)............................7

Ex parte Lange,
18 Wall 163, 85 U.S. 163, 21 L.Ed. 872 (1874).............6-7

Green v. State,
604 So. 2d 471, 473 (Fla. 1992)............................8

Herring v. State,
411 So. 2d 966 (Fla. 3d DCA 1982)..........................7

Jordan v. State,
548 So. 2d 737, 738 (Fla. 4th DCA 1989)................11-12

Lynch v. State,
293 So. 2d 44 (Fla. 1974).............................10, 12

Michell v. State,
154 So. 2d 701, 703 (Fla. 2d DCA 1963).....................6

Pizarro v. State,
403 So. 2d 1364 (Fla. 4th DCA 1981)........................6

State v. Beasley,
471 N.E.2d 774 (Ohio 1984).................................7

State v. Law,
559 So. 2d 187, 189 (Fla. 1989).......................10, 12

State v. Powers,
742 P.2d 792, 796 (Ariz. 1987).............................7

State v. Whitfield,
487 So. 2d 1045 (Fla. 1986)................................8

Tibbs v. State,
397 So. 2d 1120, 1123 (Fla. 1981).........................10

Tilghman v. Mayo,
82 So. 2d 136 (Fla. 1955)................................5-6

United States v. Benz,
282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354 (1931)............7

United States v. DiFrancesco,
449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980).........6

Wale v. State,
397 So. 2d 738 (Fla. 4th DCA 1981)..........................12

Wallace v. State,
333 S.E.2d 874, 876 (Ga. App. 1985)..........................7

Wilcox v. State,
522 So. 2d 1062 (Fla. 3d DCA 1988)..........................12

STATUTES

§921.001(6), Fla. Stat. (1991)..............................5,9

OTHER AUTHORITIES

Fla. R. Crim. P. 3.701(d)(11)..................................5

Fla. R. Crim. P. 3.800(a).................................4,7-9

PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in a criminal prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. Respondent, the State of Florida, was the appellee and the prosecution, respectively, in the lower courts.

In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal, except that Respondent may also be referred to as the State or the prosecution.

The following symbols will be used:

"R" Record on Appeal

Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts appearing on pages 2 through 5 of her Brief on the Merits to the extent that it is accurate and nonargumentative, but sets forth the following additional facts for purposes of clarification:

After effecting a traffic stop of the Cadillac automobile, Deputy Moore testified that, upon approaching the vehicle, he observed Petitioner lying down in the backseat using her purse as a pillow. Petitioner was lying in a fetal position and Deputy Moore believed she was napping. (R 52-53). Further, as Petitioner looked through her purse for her driver's license, Deputy Moore stated that Petitioner tilted her purse away from him apparently so that he could not see what she was doing. (R 55). And, when Petitioner placed her purse on the trunk lid of the car, she "started pushing some objects down from the top of the purse down towards the bottom." (R 56). After arresting Petitioner for possession of marijuana, and upon doing an inventory search of her purse, Deputy Moore found a dollar bill "folded over" and which contained suspect cocaine. (R 59). On the bottom of the purse in a zippered compartment, Deputy Moore found a plastic baggie containing additional suspect cocaine. (R 62).

Petitioner's permitted sentencing guidelines range was four and one-half (4½) years to nine (9) years imprisonment. (R

173). When Petitioner was initially sentenced by Judge Frye, who was filling in for presiding trial Judge Cianca during Judge Cianca's absence, Judge Frye did not enter written reasons to support his sentence. (R 124-139).

SUMMARY OF ARGUMENT

POINT I

Since Petitioner's initial sentence was an illegal downward departure sentence and thus void, jeopardy did not attach and Appellant was properly resentenced. In other words, since there was no initial jeopardy, there can be no double jeopardy. Furthermore, since Petitioner's original sentence was clearly illegal, the State properly filed a motion to correct this sentence pursuant to Fla. R. Crim. P. 3.800(a).

POINT II

There was substantial, competent and undisputed evidence from which the jury could have reasonably concluded, and hence this Court is required to conclude, that Petitioner was in actual possession of cocaine. As a result, it cannot be said that the trial court erred in denying Petitioner's motion for judgment of acquittal.

ARGUMENT

POINT I

SINCE PETITIONER'S INITIAL SENTENCE WAS AN ILLEGAL DOWNWARD DEPARTURE SENTENCE AND THUS VOID, JEOPARDY DID NOT ATTACH AND PETITIONER WAS PROPERLY RESENTENCED. (Restated).

Petitioner's permitted sentencing guidelines range was four and one-half (4½) years to nine (9) years imprisonment. (R 173). Since Judge Frye, who initially sentenced Petitioner in trial Judge Cianca's absence, did not provide any written reasons for his sentence of a three (3) year mandatory minimum term of imprisonment on the trafficking count and a concurrent term of twelve months in the county jail on the marijuana possession count, Petitioner's initial sentence was clearly contrary to law. See §921.001(6), Fla. Stat. (1991); Fla. R. Crim. P. 3.701(d)(11).[1] As such, it clearly constituted an illegal downward departure sentence.

Since Petitioner's original sentence was illegal, there was no double jeopardy since there was no initial jeopardy. As this Court opined in Tilghman v. Mayo, 82 So. 2d 136 (Fla. 1955):

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[1] Section 921.001(6), Fla. Stat. (1991) provides that, "The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge." Similarly, Fla. R. Crim. P. 3.701(d)(11) provides in pertinent part that, "Any sentence outside of the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure."

> The very fact that the former judgment was void is the reason that it cannot effectively be pleaded as a basis of former jeopardy. In general, to constitute a proper basis for the claim of former jeopardy a proceeding must be valid, and if the proceedings are 'lacking in any fundamental prerequisite which renders the judgment void' they will not constitute a proper predicate for such a claim * * * [numerous citations omitted].

Id., 82 So. 2d at 137. See also Michell v. State, 154 So. 2d 701, 703 (Fla. 2d DCA 1963) ("There was no double jeopardy here, for there had been no initial jeopardy, the prior proceedings being null and void.").

In the analogous case of Pizarro v. State, 403 So. 2d 1364 (Fla. 4th DCA 1981), the Fourth District held that the trial judge, who had initially imposed the maximum sentence of 6 years provided by the Youthful Offender Act, based on his erroneous belief that application of the Act to the defendant was mandatory, could properly resentence the defendant to concurrent 30-year terms upon remand from the Fourth District which determined that the Act was inapplicable. In finding the resentencing proper, the District Court noted that the decision of the United States Supreme Court in United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), had abandoned the principle that increasing a defendant's sentence after service of the sentence had begun was constitutionally prohibited. The court found that the prior case from which this principle evolved, Ex parte Lange, 18 Wall 163,

85 U.S. 163, 21 L.Ed. 872 (1874), had been misinterpreted and that dictum as to the constitutional basis of such a prohibition in United States v. Benz, 282 U.S. 304, 51 S.Ct. 113, 75 L.Ed. 354 (1931), a case Petitioner relies on for support herein, was confined to the specific context of Lange where the defendant had completely satisfied his sentence by payment of a fine under a statute which allowed imposition of a fine or imprisonment, but not both. See also Herring v. State, 411 So. 2d 966 (Fla. 3d DCA 1982); Alexander v. State, 402 So. 2d 485 (Fla. 2d DCA 1981); State v. Beasley, 471 N.E.2d 774 (Ohio 1984) (Trial court's correction of a statutorily incorrect sentence, which was void and to which jeopardy did not attach, did not violate defendant's right to be free from double jeopardy); State v. Powers, 742 P.2d 792, 796 (Ariz. 1987) (Trial court may constitutionally increase a sentence imposed in contravention of its statutory authority); Wallace v. State, 333 S.E.2d 874, 876 (Ga. App. 1985).

Since Petitioner's original sentence was illegal no matter how the term "illegal" is defined, the State below properly utilized Fla. R. Crim. P. 3.800(a)[2] to correct this illegal sentence. However, even if Petitioner's original sentence is not viewed as an "illegal sentence," but rather only

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[2] Rule 3.800(a) presently provides:

> (a) 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.

a "guidelines departure sentence," the State's motion to correct sentence was still appropriate. By this Court's 1986 amendment to Rule 3.800(a), this Court evidenced a desire to have unauthorized guidelines departure sentences corrected at the trial level via a motion to correct, thereby eliminating the need for recourse to the appellate courts. State v. Whitfield, 487 So. 2d 1045 (Fla. 1986). Indeed, as this Court explained in Whitfield, supra, the precise reason for the amendment was to **"facilitate the correction of such (guideline departure) errors at the trial court level."** Id. at 1047. Thus, whether Petitioner's sentence is deemed an illegal sentence or an unauthorized guidelines departure, the State permissibly filed a motion to correct the sentence pursuant to rule 3.800(a).

Contrary to Petitioner's apparent view, the issue is not whether the legislature or the rule drafters intended "illegal sentences" and "guideline departures" to mean the same thing. Rather, the issue is whether they intended the term "illegal sentence" to have some restricted or exclusive meaning for purposes of rule 3.800(a). The fact that "illegal sentence" was not defined by rule or statute strongly suggests that a special meaning of that phrase was simply not intended. As the Fourth District held, quoting from this Court's decision in Green v. State, 604 So. 2d 471, 473 (Fla. 1992), in such circumstances the courts are required to give statutory language its plain and ordinary meaning. Utilizing this rule of construction in the instant case, it is clear that a departure sentence without

written reasons, being violative of §921.001(6), Fla. Stat. (1991), is necessarily included within the plain and ordinary meaning of the term "illegal sentence" used in rule 3.800(a). As such, the State's motion to correct illegal sentence was most appropriate.

POINT II

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE SHOWED ACTUAL POSSESSION. (Restated).

The State initially reminds this Court that motions for judgments of acquittal should only be granted when it is apparent that no legally sufficient evidence has been submitted from which a jury could find a verdict of guilty. Lynch v. State, 293 So. 2d 44 (Fla. 1974). In moving for a judgment of acquittal, the defendant admits all facts in the evidence adduced and every conclusion favorable to the prosecution that a jury might fairly and reasonably infer from the evidence. Lynch v. State, supra at 45. As this Court has emphasized:

> As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981). Moreover, as this Court reiterated in State v. Law, 559 So. 2d 187, 189 (Fla. 1989), the State is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but must only introduce evidence which is inconsistent with the defendant's version in order to overcome a motion for judgment of acquittal.

Turning to the merits of the instant case, there was substantial, competent and undisputed evidence from which the jury could have reasonably concluded, and hence this Court is required to conclude, that Petitioner was in actual possession of the cocaine contained in her purse. First, it is undisputed that Petitioner was in physical possession of her purse. This fact requires this Court to view this case as one involving "actual" possession, not "constructive" possession as Petitioner argues. See Jordan v. State, 548 So. 2d 737, 738 (Fla. 4th DCA 1989) for definition of "constructive possession". Further, there was substantial competent evidence adduced to show that Petitioner was in exclusive possession of her purse. Indeed, Deputy Moore testified that, upon approaching the vehicle, he observed Petitioner napping in the backseat using her purse as a pillow. (R 52-53). Further, as Petitioner looked through her purse for her driver's license, Deputy Moore stated that Petitioner tilted her purse away from him apparently so that he could not see what she was doing. (R 55). And, when Petitioner placed her purse on the trunk lid of the car, she "started pushing some objects down from the top of the purse down towards the bottom." (R 56). This evidence was inconsistent with Petitioner's version, i.e., that she did not know that the cocaine was in her purse. Thus, there was ample evidence from which the jury could have reasonably inferred that Petitioner was in exclusive possession of her purse during the pertinent time in question.

With Petitioner's exclusive possession of her purse established, it necessarily follows that the jury could have reasonably and permissibly inferred Petitioner's guilty knowledge of the presence of the cocaine in her purse. As the Fourth District Court of Appeal opined in Wale v. State, 397 So. 2d 738 (Fla. 4th DCA 1981) relative to the general rule concerning exclusive possession:

> **If the premises, area, structure, vehicle, etc. in which a contraband substance is found is within the exclusive possession of the accused, the accused's guilty knowledge of the presence of the contraband, together with his ability to maintain control over it, may be inferred.**

Id. at 739-740. Indeed, upon Petitioner's motion for judgment of acquittal, the State was entitled to the benefit of such an inference. Lynch v. State, supra at 45. At the very least, the question of whether Petitioner had exclusive possession of her purse, and hence guilty knowledge of the cocaine contained therein, was for the jury to resolve. Jordan, supra, 548 So. 2d at 739. Further, Petitioner's claim that she did not know that cocaine was in her purse was for the jury, not the trial court, to accept or reject. Certainly, the jury had the right to, and did, reject Petitioner's version of events inside the car. Law, supra, 559 So. 2d at 189; See also Wilcox v. State, 522 So. 2d 1062 (Fla. 3d DCA 1988) (evidence created jury questions whether defendant as convicted felon had exclusive possession of bag and knew about gun in bag and whether defendant had possession of

gun, even though defendant and his girlfriend testified that they had equal access to bag). As a result, it cannot be said that the trial court erred in denying Petitioner's motion for judgment of acquittal.

Since this case involves actual exclusive possession as argued above, the State submits that the cases relied on by Petitioner involving joint possession are inapposite.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that the decision of the Fourth District Court of Appeal be **APPROVED** in all respects, and that the certified question be answered in the affirmative.

Respectfully submitted,

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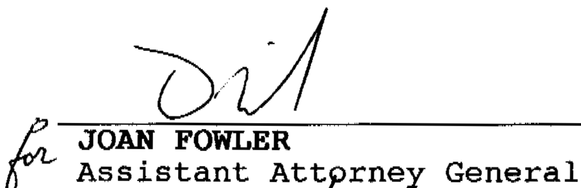

for **JOAN FOWLER**
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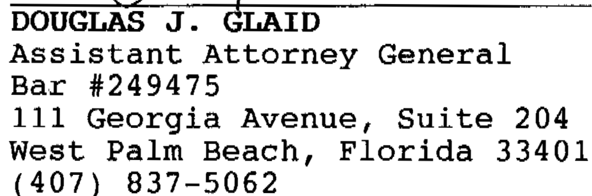

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by U.S. Mail to: ELLEN MORRIS, Assistant Public Defender, Counsel for Petitioner, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, on this 11th day of February, 1993.

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