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FILED
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FEB 22 1993
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

KAREN GARTRELL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 80,948

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon her Statement of the Case and Facts filed in her Brief on the Merits.

SUMMARY OF ARGUMENT

I.

Petitioner's increased sentence pursuant to the state's motion under Rule 3.800(a), Florida Rules of Criminal Procedure, 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), Florida Statutes (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), FLORIDA RULES OF CRIMINAL PROCEDURE, AFTER PETITIONER COMMENCED TO SERVE THE ORIGINAL SENTENCE AND WHERE THE STATE FAILED TO APPEAL THE SENTENCE UNDER 924.07(1)(I), FLORIDA STATUTES, AND RULE 9.240((C)(1)(J).

Petitioner will rely upon her argument in Point I filed in her Brief on the Merits, with the following additions and/or clarifications:

1. Petitioner continues to maintain that the second sentence imposed after she had begun serving her legal sentence violated the double jeopardy prohibition (R 132-133). Amend. V, United States Constitution; Art. I, § 9, Florida Constitution; United States v. Benz, 282 U.S. 304, 51 S. Ct. 113, 75 L. Ed. 3354 (1931); Troupe v. Rowe, 282 So. 2d 85 (Fla. 1973).

Respondent argues that there was no double jeopardy because when the second judge called the original sentencing "void" there was no initial jeopardy. However, the cases Respondent relies upon to support this idea are inapposite. In Tilghman v. Mayo, 82 So. 2d 136 (Fla. 1955), this Court found that jeopardy had not attached because the judgment and sentence were rendered void because the accused had been deprived of his right to obtain counsel. There, the former judgment and sentence "lack[ed]...any fundamental prerequisite which render[ed] the judgment void." Id., 82 So. 2d at 137. The error in Tilghman was of such magnitude as to make void the judgment and sentence. It cannot be logically argued that

some sort of fundamental prerequisite was lacking sufficient to render void the sentencing proceeding here. Respondent suggests none.

2. Likewise, Respondent's reliance on Michell v. State, 154 So. 2d 701 (Fla. 2d DCA 1963) pet. rev. denied State v. Michell, 170 So. 2d 290 (Fla. 1964) is misplaced. There, the juvenile defendant's initial judgment and sentence were set aside because the trial court failed to comply with the statute requiring parental notification. Clearly, the defect in Michell, which implicated the fundamental right to notice, was sufficiently egregious to render the entire proceedings void "...from arraignment through judgment and sentence." Michell, supra, 154 So. 2d at 704. Respondent has not and cannot demonstrate the original sentence imposed here, which was, after all, within the statutory limits, was defective in any fundamental way. Petitioner would point out as a further distinction the fact that in Michell, the judgment and sentence were set aside. So too in Tilghman, supra. In Gartrell, Respondent makes no challenge to the judgment; calling the original sentencing "void" does not make it so. Nor can Respondent even claim that the sentence here was "statutorily incorrect" as the court held in State v. Beasley, 472 N.E. 2d 774 (Ohio 1984) (finding jeopardy did not attach to a statutorily incorrect sentence), a case Respondent cites.

3. In Gartrell, Respondent simply utilized a procedural device, rule 3.800(a), Florida Rules of Criminal Procedure, to circumvent the requisite statutory remedy of appeal. § 924.07, Fla. Stat. (1991); Fla. R. App. P. 9.140(c)(J). Respondent's citation to Pizarro v. State, 4403 So. 2d 1364 (Fla. 4th DCA 1981)

does nothing to further its claims. In Pizarro, the defendant was resentenced after the District Court vacated the original sentence pursuant to the state's appeal of the sentence pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(I). The state appeal in Pizarro was authorized by the appellate rules. The problem here is that unlike the state in Pizarro, Respondent failed to use the authorized legal remedy, Rule 9.140(c)(1)(J) [authorizing state appeals for guidelines departure errors such as the one complained of here], to pursue its challenge.

4. Petitioner further contends that Respondent's use of Rule 3.800(a) violates common law and statutory authority. Rule 3.800(a) restricts guidelines error corrections to one error: "...an incorrect calculation made by it in a sentencing guidelines scoresheet." (emphasis added). No incorrect calculation was ever mentioned by the state below or at bar. Cf. State v. Whitfield, 487 So. 2d 1045 (Fla. 1986) (utilizing Rule 3.800 to correct a guidelines scoresheet error improperly assessing victim injury points) which Respondent cites in its brief.

5. Tellingly, Respondent wholly fails to acknowledge the public policy consequences of its position. Here, the state did not comply with the proper procedure - direct appeal - to raise its sentencing claims. Instead, the state sought an unauthorized remedy - collateral attack. The inevitable result of permitting this procedure will be an overwhelming increase of post-conviction challenges which could have been but were not raised via direct appeal. And this increase could come from defendants as well as from the state.

Based upon the foregoing and the argument presented in Petitioner's brief on the merits as to Point I, 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.

In its brief on the merits, Respondent submits that Petitioner's possession was exclusive and therefore the state below could infer guilty knowledge from the fact of possession [Respondent's brief on the merits at 12]. Respondent limits its claims to this faulty premise, and fails to address Petitioner's argument that because the trafficking statute does not expressly include the presumption of guilt arising from the mere fact of possession. Compare Section 893.135(1)(b)(1)(a), Fla. Stat. (1991) [trafficking statute] and Section 893.131(1)(f), Fla. Stat. (1991) [simple possession].

In the process, Respondent ignores this Court's clear statement in State v. Medlin, 273 So. 2d 394 (Fla. 1973) that the trafficking statute expressly includes guilty knowledge as a separate element which must be proven by the state. Cf. Green v. State, 17 Fla. L. Weekly D1456, 1458 (Fla. 4th DCA June 10, 1992). See also Frank v. State, 199 So. 2d 117 (Fla. 1st DCA 1967).

Petitioner continues to maintain that the possession here was non-exclusive. Consequently, the state was not entitled to the inference of knowledge from the fact of mere possession. Moreover, Respondent's idea that there was undisputed evidence that Petitioner possessed the cocaine in her purse is not borne out by the record. Rather, there was undisputed evidence that two others had access to Gartrell's purse.

Therefore, Respondent's reliance upon Jordan v. State, 548 So. 2d 737 (Fla. 4th DCA 1989) and Wilcox v. State, 522 So. 2d 1062 (Fla. 3d DCA 1988) is misplaced. In Jordan, supra, there was undisputed evidence that the aunt and girlfriend, whom Jordan said keys to the automobile trunk containing cocaine, testified that they never opened the trunk. Jordan, supra, 548 So. 2d at 739. Likewise, in Wilcox v. State, the state adduced undisputed testimony that Wilcox grabbed a bag containing a firearm and ram from arresting officers. Wilcox, supra, 522 So. 2d at 1064.

In contrast, the state below failed to adduce any undisputed evidence which could support the extra element of guilty knowledge here. Rather, there is a reasonable hypothesis of innocence that Jones and/or Briggs, who had access to Gartrell's purse when she was asleep, placed the cocaine, dollar bill and beeper in the purse before Briggs awakened Gartrell and told her to move her purse.

Respondent claims that Gartrell (a) tilted her purse away from the deputy and (b) pushed objects in her purse around and that these circumstances show Gartrell knew (c) there was cocaine in her purse. These claims do not convince. Gartrell candidly admitted she had marijuana in her purse. In light of this fact, these circumstances fail to exclude the reasonable hypothesis that Gartrell did not know cocaine was in her purse and that she was attempting to prevent the deputy from viewing the marijuana.

Hence, the circumstantial evidence upon which the state relied failed to exclude every reasonable hypothesis of innocence. E.g. State v. Law, 559 So. 2d 187 (Fla. 1989). 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 18th day of February, 1993.

Ellen Morris

ELLEN MORRIS
Assistant Public Defender