OA 11-5-93

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,183

JUAN NOVATON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE

OTHER AUTHORITIES

INTRODUCTION

Respondent, the State of Florida, was the prosecution at trial. Petitioner, Juan Novaton, was the defendant. All parties will be referred to as they stood at trial. The symbols "R.", "T.", "A.", and "B." will be used to refer to the record on appeal, the transcript of court proceedings, Defendant's appendix and Defendant's brief on the merits, respectively.

STATEMENT OF THE CASE AND FACTS

Defendant was charged by indictment in case number 90-38637 on October 17, 1990 with burglary of a structure, burglary of a conveyance, two counts of armed robbery, aggravated battery, unlawful possession of a firearm while engaged in a criminal offense and third degree grand theft. (R. 1-7) He was charged by amended indictment in case number 90-38933 on January 31, 1991 with burglary of a structure, burglary of a conveyance, robbery, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense and unlawful possession of a firearm by a convicted felon. (R. 39-46)

The state filed notices of intent to seek enhanced penalties based upon the habitual offender statute in both cases on January 29, 1991. (R. 19 and 33)

On March 11, 1991 a hearing was held before Judge William Dimitrouleas, the presiding judge in case number 90-38933. At that hearing it was stipulated that the judge would accept Defendant's pleas in both cases. (T. 4) The State indicated that it had previously made an offer to Defendant of 50 years on the felonies punishable by life, with fifteen years minimum mandatory, thirty years on the second degree felonies, all sentences to run concurrently, with defendant stipulating to habitualization as a violent offender and to the waiver of presentence investigation. (T. 2-3)

After a lengthy plea colloquy (T. 13-45), the court announced it was satisfied and accepted Defendant's plea as

offered by the State. (T. 45) Defendant was then sentenced, in accordance with the terms of the plea bargain, as follows: fifty years each as a violent habitual offender with a fifteen year minimum mandatory for armed burglary of a structure, armed burglary of a conveyance, and two counts of armed robbery, and also a three year minimum mandatory for the armed burglary; ten years each with a five year minimum mandatory for the aggravated assault and grand theft; and thirty years each with a ten year minimum mandatory for the possession of a firearm by a by a convicted felon, aggravated battery, and possession of a firearm while engaged in a criminal offense. (T. 48-49).

An appeal to the Third District Court of Appeal followed. Defendant raised two issues in that appeal. The first was whether, by entering a negotiated plea and sentence agreement with the State, the Defendant waived an otherwise viable double jeopardy claim. (A. 1) The court held that he did. (A. 1-6) The second issue was whether the trial court erred in imposing a minimum mandatory sentence for a first degree felony punishable by life under the habitual offender statute. The court held that the issue was without merit, citing Burdick v. State, 594 So. 2d 267 (Fla. 1992). (Op. 6)

This appeal followed, with Defendant challenging the holding of the Third District Court of Appeal as to the first issue, on the basis of conflict.

POINT ON APPEAL

(RESTATED)

WHETHER DEFENDANT IS PREVENTED FROM SEEKING TO OVERTURN HIS CONVICTION AND SENTENCE FOR POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE ON DOUBLE JEOPARDY GROUNDS WHERE HE WAS ALSO CONVICTED OF FELONIES ENHANCED BY THE USE OF THE SAME FIREARM, BUT WHERE, IN A NEGOTIATED AGREEMENT HE HAS PLEAD TO BOTH THE JUDGMENT AND TO THE SPECIFIC SENTENCE IN QUESTION?

SUMMARY OF ARGUMENT

(a) Defendant argues he should not have been convicted and sentenced for both use of a firearm in the commission of a felony and for other felonies which were enhanced because of the use of a firearm. However, this argument is based upon double jeopardy principles. As a general rule, under federal law, double jeopardy claims are waived by the entry of a guilty plea to the charges. An exception lies where the constitutional infirmity is the states lack of power to bring the charges at all.

Defendant's case falls under the general rule. No double jeopardy claim was implicated until he was convicted of both charges. Up until that time under a variety of scenarios he could have been convicted of the felonies and of possession of a firearm. As such it can not be said that the state was without power at all to bring the charges.

This court has previously approved the federal rule. The decision below was based on both the federal principles and upon this court's dictum. On the contrary, the cases which purportedly conflict with the decision below are not so grounded. One case did not even involve the question of waiver. The second, relying on the first, essentially found there could be no waiver because of the adverse consequences which would flow from a waiver. The State submits that subsequent consequences are not a valid consideration in determining whether a waiver occurred. Rather the analysis should examine the acts of the defendant prior to the waiver.

One such factor which must be considered is that Defendant's plea was negotiated both as to conviction and sentence. By so pleading he avoided the possibility of two consecutive life sentences without possibility of parole. It would now be unjust to allow him to renege on his bargain.

The decision of the Third District Court of Appeal should be affirmed, and Defendant's convictions and sentences should be upheld.

(b) The State also respectfully submits that the Court's decision in Cleveland should be reexamined. The only test is identity of elements. As this court has held in the past, the possession statute and the other felonies do not contain identical statutory elements. As such the State may properly convict and sentence Defendant for each offense. Thus regardless of whether Defendant waived the claim or not, his double jeopardy argument is without merit and his convictions and sentences should be affirmed.

(c) Even if Defendant's claims are meritorious, he is not entitled to simply have the allegedly jeopardy-violative convictions and sentences vacated. The sentences and convictions were part of a comprehensive quid pro quo. The State is therefore entitled either to the benefit of its bargain or to have the entire agreement set aside, although the State at its discretion, may seek to enforce the agreement without the objectionable elements. If the Court finds for Defendant, upon remand the valid charges should be reinstated and the parties

placed in the positions they occupied immediately prior to the entry of the plea.

ARGUMENT

DEFENDANT WAIVED HIS DOUBLE JEOPARDY CLAIM AS TO BOTH CONVICTION AND SENTENCE BY KNOWINGLY AND VOLUNTARILY ENTERING INTO A COMPREHENSIVE NEGOTIATED PLEA AGREEMENT.

A. Defendant has waived his double jeopardy claim.

Defendant asserts that under Cleveland v. State, 587 So.2d 1145 (Fla. 1991), it was improper to convict and sentence him on the charge of unlawful possession of a firearm while engaged in a criminal offense where he was also convicted of other offenses which were enhanced because of the use of a firearm.[1] He further asserts that that claim was not waived when he pleaded guilty, without objection, to the charges he now complains of and agreed to the sentences which were imposed in order to avoid potential consecutive life sentences without possibility of parole. The Third District Court of Appeal rejected his contentions. That court was correct and its judgment should be affirmed.

The question of whether the double jeopardy protection afforded under the U.S. Constitution[2] is waivable where the Defendant pleads guilty is controlled by United States v. Broce, 488 U.S. 563, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989). Broce sets forth the general rule that a voluntary and counseled guilty

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[1] But see the State's argument "B.", below.

[2] Florida's double jeopardy clause in Article I, Section 9 of the state constitution was intended to mirror the protection provided by the U.S. Constitution. Carawan v. State, 515 So. 2d 161, 164 (Fla. 1987), overruled on other grounds, State v. Smith, 547 So. 2d 613 (Fla. 1989).

plea waives all constitutional claims, including double jeopardy. Broce, 488 U.S., at 569. Menna v. New York, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975), sets forth the narrow exception to the rule. The exception applies only where the constitutional infirmity lies in the state's power to bring any charge at all. Broce, 488 U.S., at 575.

In State v. Johnson, 483 So. 2d 420 (Fla. 1986), this court ruled that there are circumstances where a jeopardy claim may be waived, citing United States v. Pratt, 657 F.2d 218 (8th Cir. 1981), and United States v. Herzog, 644 F.2d 713 (8th Cir. 1981), cert. den., 451 U.S. 1018, 101 S. Ct. 3008, 69 L. Ed. 2d 390 (1981).[3] Both Pratt and Herzog involved guilty pleas to charges which were allegedly multiplicitous. Presaging Broce, the Eighth

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[3] Johnson pleaded guilty to a lesser offense and was convicted and sentenced accordingly. The trial court subsequently improperly vacated the judgment and reinstated the original charges, for which Johnson was tried and convicted.

The Court found that the double jeopardy claim had not been waived by the defendant's failure to raise the issue before his trial. Although Johnson did not involve the question of whether a guilty plea waives a double jeopardy claim, the Court did observe:

> We agree with the Court of Appeals of New York that the failure to raise the defense before the second trial is more equivocal than agreeing to plead guilty to the second charge, and conclude, as it did, that the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim. See, People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371

Johnson, at 422-423 (emphasis supplied).

Circuit distinguished Menna in both cases and held that the claim was waived.

Significantly, the Menna exception does not appear to have been applied by the Supreme Court in any case where, as here, the allegedly jeopardy-violative charges were brought in the same proceeding. Although this factor is not per se dispositive of the issue, it highlights the reasons for the exception. In both Menna and Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), the defendants had previously been convicted. Subsequent to their convictions, new charges, based upon the same offense were brought. In both cases the exception was applied because

> the defendant's right was "the right not to be haled into court at all upon the felony charge. The very initiation of proceedings against him . . . thus operated to deny him due process of law."

Broce, 488 U.S., at 574-575 (quoting Blackledge, 417 U.S., at 30-31).

Defendant cannot claim that he could not lawfully be charged as he was. Mahaun v. State, 377 So. 2d 1158 (Fla. 1979). Obviously, double jeopardy is not implicated until a defendant is convicted of at least one of the charges. Defendant's contention can only be that he ought not to have been convicted of both possession of a firearm in the course of committing a felony and of the same felony "enhanced" by the use of a firearm. Cleveland v. State, 587 So. 2d 1145 (Fla. 1991).

Had Defendant not pleaded guilty and stood trial, the jury could properly have found him guilty of the lesser offense of burglary without a firearm and of possession of a firearm while committing that burglary.[4] Or the jury could have found that he was guilty of First Degree Felony Burglary by reason of an assault or battery,[5] and properly convicted him also of possession of the firearm during that burglary. In neither case would the "double enhancement" which Cleveland proscribes have arisen. Thus, unlike the charges filed in Menna and Blackledge, the charges here were not facially violative of the double jeopardy clause. Thus under Broce, the exception to the rule does not apply. See, Taylor v. Whitney, 933 F.2d 325 (5th Cir. 1991)(Where charges pled in the alternative, double jeopardy violation not facially apparent and deemed waived).

The Third District's opinion in the case at bar was a logical extension of its previous holding in Guardado v. State, 562 So. 2d 696 (Fla. 3d DCA 1990), rev. den., 576 So. 2d 287 (Fla. 1990). Guardado, in turn was based soundly upon Johnson.

The cases which Defendant asserts conflict with Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), Kurtz v. State, 564 So. 2d 519 (Fla. 2d DCA 1990), and Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991), do not have similar pedigrees. In Kurtz, waiver was not even in issue. Kurtz pleaded nolo

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[4] The informations charged him with using the firearm while committing "BURGLARY . . . and/or any lessor included FELONY". (R. 6, 43)

[5] The informations were pled in the alternative.

contendere, reserving the right to appeal the trial court's denial of his double jeopardy claim. On appeal the court declined to even address whether Kurtz' convictions violated the double jeopardy clause as a matter of constitutional law. Kurtz, at 520. It held that under Carawan and § 775.021(4), Fla. Stat. (Supp. 1988), the convictions were improper as a matter of statutory law.

The court in Arnold, in a rather murky opinion first observed, apparently approving of the holding in Guardado, that double jeopardy protections are waivable in some "circumstances". Arnold, at 516. It then concluded that the distinction between Menna and Pratt and Herzog was that "multiplicitousness" as a defense is waived by a plea. Id., at 517. The court rejected the distinction, finding a "complicating factor" and citing Kurtz. Id. It quoted that portion of the Kurtz opinion which found that § 775.021(4), Fla. Stat. (Supp. 1988) does not authorize additional convictions in cases where additional punishments would be improper. The court pointed out that as "an even stronger argument" that it even a conviction without a sentence could be used on a future scoresheet as an additional or prior offense. From there the court concluded that Arnold did not waive the right to challenge his convictions or the sentences by entering a plea of nolo contendere without reserving the right to appeal. Id.

The rule set forth in the Fourth District's opinion seems to be that a waiver of double jeopardy rights is effective only

when there are no adverse consequences which flow from the waiver. This amounts to holding that the rights may never be waived.

The State submits that the Fourth District's reasoning is faulty. Even setting aside the fact that it appears to based upon a precedent in which the waiver was not an issue, it apparently ignores the essence of what a waiver is. Of course finding a waiver in this, or any other case, will have adverse consequences. Waiver has been defined as:

> The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect irregularity, or wrong.

Black's Law Dictionary 815 (abr. 5th ed. 1983). Certainly the defendants in Broce could have suffered the same consequences as those envisioned in Arnold. This consideration simply should not be a factor when determining whether a waiver has occurred.

It must be remembered that the waiver doctrine derives from the admissions necessarily made upon entry of a voluntary plea of guilty. Broce, 488 U.S., at 573-574. As such the relevant inquiry is not the consequences arising from the waiver but the acts from which the waiver arises.

Thus, the fact that this was a negotiated plea should be taken into account. Herzog took this factor into account:

> Appellant had ample time prior to entering his pleas in which to scrutinize closely the charges in the indictment and determine if they were subject to objection. He chose not to challenge the indictment, but rather to

> negotiate for the dismissal of numerous counts in return for his pleas. Appellants reasons for pleading guilty and nolo contendere to four counts of the indictment are as valid now as they were at the time the pleas were entered. The indictment to which appellant pleaded has not changed with the passage of time.
>
> To permit appellant to now raise his double jeopardy complaint would thwart the orderly and efficient administration of our criminal justice system . . .

Herzog, at 716. Also, see Pratt, at 221:

> Menna's case was not complicated by the presence of additional charges which the state agreed to dismiss. And Menna did not explicitly and voluntarily expose himself to the very event (here, consecutive terms of imprisonment) that he later claimed was a violation of the Double Jeopardy Clause. Pratt by contrast . . . had no right to be surprised at the sentence that was imposed. He received the benefit of his bargain, dismissal of the other four counts.
>
> Waiver of constitutional rights is not lightly to be presumed, . . . however, we believe that it would be unjust in the circumstances of this case for the defendant to be heard to say that his sentence was illegally imposed.

See, also, Quarterman v. State, 527 So.2d 1380 (Fla. 1988)(plea bargain constitutes a valid reason for departure from guideline sentence; thus no grounds existed for withdrawal of plea); Johnson v. State, 458 So.2d 850, 851 (Fla. 2d DCA 1984)("Because Johnson was bound by her contract, we affirm the sentence."); Jacobs v. State, 522 So.2d 540 (Fla. 3d DCA 1988)(denial of

motion to correct allegedly illegal sentences affirmed where they were part of negotiated plea).[6]

Defendant does not contend that his plea was anything but knowing and voluntary. A review of the rather lengthy plea colloquy (T. 13-45) indicates that Defendant and his counsel had several days in which to contemplate the State's offer. (T. 2) At no point was any objection to the counts in question or the sentences raised by Defendant, his counsel, his co-defendant or co-defendant's counsel.

By agreeing to the fifty year sentences with fifteen years minimum mandatory, Defendant avoided the possibility of consecutive life sentences without possibility of parole, which would have been within the judge's discretion to impose under the habitual offender statute. Defendant should be held to his bargain.

The decision below comports with the law as established by this court and the Supreme Court of the United States. The decision in Arnold does not. Novaton should be approved, Arnold

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[6] Although its finding of waiver obviated the necessity of considering the issue, the court in Broce pointedly observed:

> We therefore need not consider the degree to which the decision to enter into a plea bargain which incorporates concessions by the Government, such as the one agreed to here, heightens the already substantial interest the Government has in the finality of the plea.

Broce, 488 U.S., at 576 (emphasis in original)

should be disapproved,[7] and Defendant's convictions and sentences should be affirmed.

B. Defendant's convictions and sentences do not violate the double jeopardy clause.

Although the issue appears to have been raised in Cleveland, the state submits that under the present version of § 775.021(4), Fla. Stat., and State v. Smith, 547 So. 2d 613 (Fla. 1989), the convictions and sentences herein are proper. The State therefore respectfully requests that the Court reconsider its holding in Cleveland.

In Hall v. State, 517 So. 2d 678 (Fla. 1988), based upon the Court's interpretation of § 775.021(4) in Carawan, it was held that dual convictions of the type involved here are not permissible. In response to Carawan, the legislature amended § 775.021(4).

In Smith, the Court held that following the amendment it was the intent of the legislature that:

> all criminal offenses containing unique statutory elements shall be separately punished.
>
> * * *
>
> However the statutory element test shall be used for determining whether offenses are the same or separate.

Smith, at 616.

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[7] As discussed above, Kurtz did not involve a waiver issue. Its correctness therefore need not be addressed.

In State v. Gibson 452 So. 2d 553 (Fla. 1984), which Hall overruled based upon Carawan,[8] the Court applied the Blockburger[9] test to the armed robbery and firearm possession statutes. It found that the elements of armed robbery were:

> (1) a taking of money or other property that may be the subject of larceny; (2) from the person or custody of another; (3) by force, violence, assault, or putting in fear; and (4) that the offender carried a firearm or other deadly weapon in the course of committing the robbery. § 812.12(1), (2)(a), Fla. Stat. (1977). The elements of the other offense in question [were] (1) the display, use, or threat or attempt to use; (2) a firearm; (3) while committing or attempting to commit a felony. § 790.07(2), Fla. Stat. (1977)

Gibson, at 556. The Court held:

> Applying this test to the statutory elements of the two offenses in question in the present case, we conclude that, because each offense has at least one statutory element that the other does not, the offenses are separate crimes even when based on the same act or factual event. Therefore under the Blockburger test, the two offenses were intended by the legislature to be separately prosecuted and punished.

Id. (emphasis added).

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[8] Hall, at 678:

> We find, in accordance with our recent decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987), that the question must be answered in the negative, and our decision in State v. Gibson, 452 So. 2d 553 (Fla. 1984), is overruled.

[9] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The statutory element test referred to in Smith under § 775.021(4) is a codification of Blockburger. See, Gibson, at 557, n. 6.

The statutory definitions of the crimes have not changed since Gibson was decided in 1984. The test applied in Gibson was that prescribed by Smith and § 775.021(4). The State therefore respectfully submits that Cleveland's reaffirmation of Carawan-based Hall is anomaly which must be corrected. See, also, Hall, at 680-681 (Shaw, J., dissenting). The State respectfully asks this court to overrule Cleveland and Hall and return to Gibson.

C. Defendant's only remedy is to set aside the entire plea agreement and reinstate the charges against him.

Defendant requests that this court remand his case with directions to vacate the two counts of possession of a firearm during the commission of a felony. (B. 26) Even if Defendant is correct on the merits of his claim, he is not entitled to the relief he seeks. The proper remedy in a case involving an improper guilty plea is to vacate the entire plea and return the parties to the status quo ante.[10] To allow the plea to stand would allow Defendant to get more than he bargained for and deny the State what it bargained for. Forshee v. State, 579 So. 2d 388 (Fla. 2d DCA 1991); Jolly v. State, 392 So. 2d 54 (Fla. 5th DCA 1981); Prestridge v. State, 519 So. 2d 1147 (Fla. 3d DCA 1988). Thus if the Court finds for Defendant, it should remand

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[10] However, the State has the option of enforcing the plea with the objectionable convictions and sentences, if it so desires. This option is to prevent the injustice which would occur if, due to the passage of time, key witnesses or evidence were no longer available. Jolly v. State, 392 So. 2d 54 (Fla. 5th DCA 1981).

with instructions to vacate the pleas and reinstate the charges against Defendant, unless the State desires to stand by the plea.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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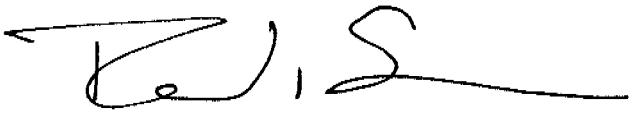

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to LOUIS CAMPBELL, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 10th day of September, 1993.

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