IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,002

KEVIN BERNARD BROWN,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial court and Appellee in the district court of appeal, shall be referred to herein as "the State." Respondent, KEVIN BERNARD BROWN, defendant in the trial court and Appellant in the district court of appeal, will be referred to herein as "Respondent." References to the record on appeal, including the transcripts of the proceedings below, will be by the use of the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On December 30, 1989, Respondent and Mr. Ronald Burch arrived at an Avenue B General Store, which was managed by Mr. Osborne Hall, the victim in the present case (R 171, 179). Mr. Hall testified that Respondent and Mr. Burch pulled guns on him; that they took $1100.00 cash from him; that Mr. Burch told the victim that they had to kill him because he knew their identity; that Respondent and Mr. Burch fired four to five shots at him; and, that they wounded him twice in the hand, once in the face, once in the shoulder, and once in the neck (R 183-186, 209-210).

On August 22, 1990, Respondent was charged with the following offenses stemming from this criminal episode: (1) Armed robbery, (2) attempted first-degree murder, (3) use of a firearm in the commission of a felony, to wit: attempted first-degree murder, (4) shooting into a building, and (5) possession of a firearm by a convicted felon (R 35-36). On October 18, 1990, Respondent moved to sever count five relating to the offense of possession of a firearm by a convicted felon, and the trial court granted the motion to sever on October 19, 1990 (R 38-39, 47). On December 10, 1990, Respondent was found guilty by a jury of above-mentioned counts one through four (R 81-84). The trial court adjudicated Respondent guilty of the four offenses and imposed the following habitual felony offender sentences: (1) As to the offense of armed robbery, Respondent received a life sentence; (2) as to the offense of attempted first-degree murder, Respondent received a life sentence; (3) as to the offense of use of a firearm during

the commission of a felony, Respondent received a sentence of thirty years' incarceration; and, (4) as to the offense of shooting into a building, Respondent received a sentence of thirty years' incarceration (R 106-126). The sentences were to run concurrently to one another (R 106-126).

In a decision reported at Brown v. State, 18 Fla. L. Weekly D981, D982 (Fla. 1st DCA Apr. 12, 1993), the First District Court of Appeal held that Brown's convictions and sentences for armed robbery and use of a firearm in the commission of a felony, to wit: attempted murder, violated Respondent's right against double jeopardy. The court stated that Section 775.021(4), Florida Statutes, prohibited looking at the charging document to determine that the "felony" element of the offense of use of a firearm in the commission of a felony was attempted premeditated murder, rather than armed robbery or any other felony. Id. The court then determined that the statutory elements of the offense of armed robbery and use of a firearm in the commission of a felony were identical, causing this case to fall within the first exception to the legislature's intent to convict and sentence for each criminal offense committed in the course of one criminal episode, as expressed in Section 775.021(4)(b), Florida Statutes. Id.

SUMMARY OF ARGUMENT

A person who has been convicted of armed robbery and attempted first-degree murder may also be convicted of possession of a firearm in the commission of a felony, to wit: attempted first-degree murder. Under Section 775.021(4), Florida Statutes, offenses are separate if without reference to the charging document each offense requires proof of a statutory element not found in the other. Contrary to the decision of the First District Court of Appeal, the statutory elements of the offenses of armed robbery and use of a firearm in the commission of a felony are not identical. In addition, the offense of armed robbery is not a necessarily lesser included offense of use of a firearm in the commission of a felony.

Under Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), this Court utilized a modified statutory analysis test to determine whether a double jeopardy violation had occurred and looked to the charging document to determine the underlying felony of the offense of use of a firearm in the commission of a felony. Even under the Cleveland test, however, Respondent's convictions do not violate double jeopardy because reference to the charging document shows that the underlying felony was attempted first-degree murder, not armed robbery. Therefore, this Court should answer the certified question in the affirmative.

ARGUMENT

ISSUE

WHETHER A PERSON WHO HAS BEEN CONVICTED OF ARMED ROBBERY WITH A FIREARM AND ATTEMPTED FIRST-DEGREE MURDER WHICH ARISES OUT OF THE SAME CRIMINAL EPISODE OR TRANSACTION MAY ALSO BE CONVICTED OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, TO WIT: ATTEMPTED FIRST-DEGREE MURDER, WHERE THERE HAS BEEN NO ENHANCEMENT OF THE ATTEMPTED MURDER CHARGE AS A RESULT OF THE FIREARM.

The trial court convicted Respondent inter alia of the offenses of attempted first-degree murder, armed robbery and use of a firearm in the commission of a felony, to wit: attempted first-degree murder (R 36-38). The offenses arose out of a single criminal episode involving the robbery and shooting of Mr. Osborne Hall in a convenience store. In a decision reported at Brown v. State, 18 Fla. L. Weekly D981, D982 (Fla. 1st DCA Apr. 12, 1993), the First District reversed the conviction for use of a firearm in the commission of a felony, finding that such conviction was dual as to the armed robbery conviction. However, the Double Jeopardy Clause did not bar the trial court from convicting Respondent of armed robbery and use of a firearm in the commission of a felony, to wit: attempted first-degree murder because the legislature intended that Respondent be convicted of both offenses.

The role of courts in applying the Double Jeopardy Clause to multiple convictions and punishments arising from a single trial has been prescribed by the United States Supreme Court in Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), wherein the Court held that Hunter's convictions for armed

criminal action and the underlying felony of robbery in the first degree did not violate double jeopardy principles. The Court stated:

> With respect to cumulative sentences imposed in a single criminal trial, the Double Jeopardy Clause does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended.
>
> * * *
>
> "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution." [quoting from Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981) (emphasis in original)].
>
> * * *
>
> Our analysis and reasoning in Whalen[v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715] and Albernaz leads inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes.
>
> * * *
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. (Emphasis added).

Hunter, supra, at 366-69 (footnote omitted). With respect to cumulative sentences arising from a single trial, the dispositive question is whether the legislature intended separate convictions and sentences for the two crimes. State v. Smith, 547 So. 2d 613, 614 (Fla. 1989).

The Double Jeopardy Clause, then, imposes no restriction on the power of the legislature to define crimes. If the legislature intends that defendants be convicted both of armed robbery and use of a firearm in the commission of a felony the convictions are not dual. Such intent must be determined from the language of the statutes involved because the legislature is assumed to know the meaning of words and to have expressed its intent by the use of the words in the statute. St. Petersburg Bank and Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982); S.R.G. Corp. v. Dept. of Revenue, 365 So. 2d 687, 689 (Fla. 1978); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976).

The 1988 Florida Legislature simplified the task of Florida courts vis-a-vis double jeopardy by amending Section 775.021(4), Florida Statutes (1989),[1] to include the following statement of legislative intent:

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[1] This section as amended is a codification of the following statutory element test used to determine whether two offenses are the "same", which was established in Blockburger v. United States, 284 U.S. 299, 304 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

775.021 Rules of Construction.

* * *

(4)(a) Whoever, in the course of one criminal transaction or episode commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. (Emphasis added).

See Fla. Stat. §775.021 (1989); ch. 88-131, § 7, Laws of Fla. In so amending the statute, the legislature limited previous abuse of the rule of lenity and reiterated a firm legislative intent to convict and sentence separately for each criminal offense occurring in the course of a criminal transaction or episode.

State v. McCloud, 577 So.2d 939, 940 (Fla. 1991). The United States Supreme Court has refined the Blockburger test, interpreting it as a mere "rule of statutory construction" rather than a constitutional "litmus test" that imposes a conclusive presumption of law. Hunter, supra, at 366-368; see also United States v. Kragness, 830 F.2d 842, 863 (8th Cir. 1987).

Smith, supra, at 616. The primary effect of the statutory amendment was to return the law of double jeopardy to its state before the Florida Supreme Court's decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987). Id; Collins v. State, 577 So. 2d 986, 986 (Fla. 4th DCA 1991).

Regarding the legislative intent expressed in Section 775.021(4) as amended, this Court observed:

> By its terms and by listing the only three instances where multiple punishment shall not be imposed, subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense, it clearly does not. However, the statutory element test shall be used for determining whether offenses are the same or separate. Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity. (Emphasis in original) (footnote omitted).

Smith, supra, at 616. See State v. McCloud, 577 So. 2d 939 (Fla. 1991) ("[S]ection 775.021(4)(a) precludes the court from examining the evidence to determine whether the defendant possessed and sold the same quantum of cocaine such that possession is a lesser-included offense of sale in any one case." (Emphasis added)).

The statutory elements of the offense of armed robbery are as follows: (1) Respondent took the money or property from the person or custody of the victim; (2) the taking was by force, violence or assault, or by putting the victim in fear; (3) the property taken was of some value; (4) at the time of the taking,

Respondent intended to permanently deprive the victim of the money and property; and, (5) Respondent carried a deadly weapon in the course of committing the robbery. See Fla. Stat. §812.13(1) & (2)(a) (1989); Fla. Std. Jury Instr. (Crim.) at 155-56 (1985). The offense of use of a firearm in the commission of a felony consists of the following elements: (1) Respondent displayed or used a firearm; and, (2) he did so while committing or attempting to commit a felony. See Fla. Stat. §790.07(2) (1989); Fla. Std. Jury Inst. (Crim.) at 99 (1985).

In looking at the above-mentioned statutory elements, we see that armed robbery and use of a firearm in the commission of a felony contain unique elements. First, the offense of armed robbery may be proved by use of any deadly weapon and does not require proof of a firearm. In contrast, the offense of use of a firearm specifically requires proof of a firearm. Thus, a defendant could commit the offense of armed robbery without committing the offense of use of a firearm because a defendant could rob a person with a deadly weapon such as a dirk, thereby committing the offense of armed robbery and not the offense of use of a firearm in the commission of a felony. Second, the offense of use of a firearm in the commission of a felony requires proof of any crime falling within the felony class and does not require proof of an armed robbery or of any elements thereof. This "felony" element is not found in the offense of armed robbery. Therefore, a defendant could commit the offense of use of a firearm without committing the offense of armed robbery because a defendant could commit a kidnapping or grand theft with a firearm,

thereby committing the offense of use of a firearm in the commission of a felony without committing the offense of armed robbery. Because the statutory elements of the offenses of armed robbery and use of a firearm in the commission of a felony are not identical, the two offenses are not the "same" under Blockburger. Therefore, they do not fall under the first exception to the legislature's intent to convict and sentence for each offense committed during a criminal episode, as set forth in §775.021(4)(b)(1), Fla. Stat.

Armed robbery also is not a necessarily lesser included offense of use of a firearm in the commission of a felony. In State v. Enmund, 476 So. 2d 165, 168 (Fla. 1985), this Court held that a defendant can be convicted and sentenced for the offenses of felony murder and the underlying felony of robbery without violating double jeopardy principles. A jury convicted Enmund of two counts of felony murder and one count of robbery. Id. at 166. Citing Hunter, supra, this Court concluded that the underlying felony of robbery was not a necessarily lesser included offense of felony murder. Id. at 167. This Court stated that the Hunter Court made it clear that the Blockburger rule of statutory construction will not prevail over legislative intent to impose multiple punishments when both a murder and a felony occur during a single criminal episode. Id. Similarly, the offense of robbery or armed robbery is not a necessarily lesser included offense of use of a firearm in the commission of a felony. As the Enmund Court held that the "felony" element of felony murder may be proved by many offenses other than robbery, the "felony" element

of use of a firearm in the commission of a felony also may be proved by many offenses. Thus, robbery is not a necessarily lesser included offense of use of a firearm and the two offenses do not fall under the third exception to the legislature's intent to convict and sentence for every offense committed during a criminal episode, as set forth in §775.021(4)(b)(3), Fla. Stat.

In Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), this Court utilized a modified statutory element analysis and consulted the charging document to determine the "felony" element of the offense of use of a firearm in the commission of a felony. In concluding that Cleveland's convictions for attempted robbery with a firearm and use of a firearm while committing a felony constituted the same offense, this Court stated:

> We hold that when a robbery conviction is enhanced because of the use of a firearm in committing the robbery, the single act involving the use of the same firearm in the commission of the same robbery cannot form the basis of a separate conviction and sentence for the use of a firearm while committing a felony under section 790.07(2). (Emphasis added).

Thus, the Court looked to the document charging the offense of use of a firearm in the commission of a felony to learn that the underlying felony was "the same robbery," rather than any other felony. The Court also looked to the information to determine that the offense of armed robbery involved the "same firearm," rather than any other deadly weapon.

The Cleveland decision does not cause Respondent's armed robbery and use of a firearm offenses to violate double jeopardy. The Cleveland decision turned on whether a person could be subjected to two penalties for committing the same act. In the instant case, however, the robbery and attempted murder, while a part of the same criminal episode, were distinct acts. Thus, the Cleveland analysis is not applicable to the instant case. Nonetheless, under the Cleveland double jeopardy analysis, Respondent's convictions for armed robbery and use of a firearm in the commission of a felony, to wit: attempted first-degree murder pass double jeopardy muster. The charging document shows us that the underlying felony in the instant case was not robbery, rather the underlying felony was attempted first-degree murder, an offense which had not been enhanced by virtue of a firearm.

In sum, a person who has been convicted of armed robbery may also be convicted of use of a firearm in the commission of a felony, to wit: attempted first-degree murder. Under Section 775.021(4), Florida Statutes, offenses are separate if the statutory elements are not identical. The elements of armed robbery and use of a firearm are not identical. Also, the offense of robbery is not a necessarily lesser included offense of use of a firearm in the commission of a felony. Therefore, this Court should answer the certified question in the affirmative.

CONCLUSION

Based on the foregoing legal authorities and arguments, Petitioner respectfully requests that this Honorable Court answer the certified question in the affirmative, reverse the decision of the First District Court of Appeal, and reinstate Respondent's conviction for the offense of use of a firearm in the commission of a felony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301, this 2d day of August, 1993.

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