IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,002

KEVIN BERNARD BROWN,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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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

The State relies upon its statement of the case and facts. The State contends that the additional facts presented in Respondent's statement of the case and facts, which do not relate to the certified question, are not relevant to this appeal.

SUMMARY OF ARGUMENT

ISSUE I:

A person who has been convicted of armed robbery may also be convicted of the offense of use of a firearm in the commission of a felony without violating double jeopardy principles.

ISSUE II:

The trial court did not abuse its discretion in granting the State's motion in limine and excluding irrelevant evidence of the victim's previously dropped bookmaking charge. However, this Court is without jurisdiction to decide this issue because it was not a part of the certified question and does not present express and direct conflict with a decision of this Court or other district courts of appeal.

ARGUMENT

ISSUE I

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. (Certified Question).

The decision of the United States Supreme Court in Missouri v. Hunter, 459 U.S. 359 (1983), stands for the proposition that the intent of a legislature controls double jeopardy analysis. Section 775.021, Florida Statutes, expresses the intent of the Florida Legislature to utilize the Blockburger test in double jeopardy analysis as to state crimes in Florida, unless a particular criminal statute contains language which "otherwise provides." Respondent contends that the statutory element "carried a deadly weapon or firearm" contained in the offense of armed robbery is the same element as "used a firearm" contained in the offense of use of a firearm in the commission of a felony. The State contends that the statutory elements are not the same. The disjunctive element of armed robbery provides two alternatives, while the firearm element of use of a firearm in the commission of a felony can be proved only by a firearm. It is only by reference to the charging document that we learn the "firearm" portion of the disjunctive in armed robbery was utilized in the instant case. However,

reference to the charging document to conduct a double jeopardy analysis is expressly forbidden by Section 775.021(4)(a), Florida Statutes. Thus, the two offenses are not the same statutorily, and conviction for both does not violate double jeopardy principles.

Respondent states that this Court's decision in State v. Enmund, 476 So. 2d 165 (Fla. 1985), wherein this Court held that double jeopardy principles permit conviction and sentencing for the offenses of felony murder and the underlying felony, is not applicable to the instant context because the felony murder statute is "unique." Respondent, however, does not show how the felony murder statute so differs from other criminal statutes that it stands in a class by itself and that any double jeopardy analysis involving the statute is inapplicable to other contexts. Enmund is, in fact, an unexceptionable application of section 775.021(4).

Respondent contends that the modified statutory element analysis utilized by this Court in Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), is the proper double jeopardy analysis. As pointed out in the State's initial brief, under the Cleveland analysis a court may look to the charging document to learn the felony underlying the "felony element" of the offense of use of a firearm in the commission of a felony. In this case, the underlying felony was attempted first-degree murder, an offense which was not

otherwise enhanced by a firearm. Respondent does not show how his right against double jeopardy was violated under Cleveland when he was not twice placed in jeopardy for carrying a firearm as to the offense of attempted murder.

Respondent contends that this Court need not address the instant issue because whether the State wins or loses this appeal Respondent's habitual offender sentences will stay the same. The First District Court of Appeal certified the instant question to this Court because it felt the issue was one of great public importance and needed to be addressed by this Court. The State agrees with the First District that the question raised in the instant case affects more than Respondent's sentences. It will affect the manner in which the State brings charges in future crimes involving firearms. Thus, Respondent is wrong in stating that "this sentencing issue is not likely to make any real difference . . . ." Respondent's answer brief at 17. Thus, the State asks this Court to address the certified question.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION IN LIMINE NUMBER TWO, THEREBY EXCLUDING IRRELEVANT EVIDENCE OF A BOOKMAKING CHARGE. (Issue without jurisdiction).

Respondent challenges a ruling of the trial court granting the State's motion in limine to exclude facts relating to the victim's arrest for bookmaking on October 24, 1989 and the nolle prosequi of that charge on January 18, 1990 (R 64-65, 90, 133). While Appellant raised this issue in the First District, that court did not discuss this issue in its opinion. Brown v. State, 18 Fla. L. Weekly D981 (Fla. 1st DCA Apr. 12, 1993). The basis for jurisdiction in this case lies with the certified question discussed in issue one. Respondent did not seek to invoke the jurisdiction of this Court as to the instant issue.

This Court should decline to address the merits of this issue for several reasons. First, this Court has limited resources which should be spent on addressing issues properly before the court, rather than entertaining issues that have been "piggybacked" onto jurisdictional issues. Second, consideration of this issue gives Respondent a second appellate review of an issue, when such review is denied him by the Florida Constitution. Art. V, § 3(b)(3), Fla. Const.; Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), cited with approval in Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980). Third, there is no reason to assume

that a second review by this Court will be more accurate than the review by the district court. This Court, like the United States Supreme Court, is not final because it is infallible, rather it is infallible because it is final. Brown v. Allen, 344 U.S. 443, 540 (1953).

This Court has recently declined to review issues beyond the scope of the conflict or the certified question. See e.g., Flanagan v. State, 18 Fla. L. Weekly S475, n.4 (Fla. Sept. 9, 1993); State v. Hodges, 616 So. 2d 994 (Fla. 1993); Burke v. State, 613 So. 2d 441 (Fla. 1993); and, Stephens v. State, 572 So. 2d 387 (Fla. 1991). The State asks this Court to do likewise here.

Even if the merits are improvidently reached, no error was committed below with respect to the granting of the State's motion in limine. It is well settled that a trial court has wide discretion concerning the admissibility of evidence and, absent an abuse of discretion, a ruling regarding admissibility will not be disturbed on appeal. Jent v. State, 408 So. 2d 1024 (Fla.), cert. denied, 102 S.Ct. 2916 (1981). In the present case, the trial court did not abuse its discretion in excluding evidence of the victim's bookmaking charge. The charge was unrelated to the crimes in the instant case, and the charge was not pending at the time of trial but had been dropped eleven months earlier. In Torres-Arboledo v. State, 524 So. 2d 403, 408 (Fla.), cert. denied, 488 U.S. 901 (1988), this Court held

that, "[w]hen charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive or self-interest." (Emphasis added). As the bookmaking charge was not pending at the time of trial, the trial court did not abuse its discretion in excluding the evidence.

CONCLUSION

Based on the foregoing legal authorities and arguments, Petitioner respectfully requests that this Honorable Court reverse the decision of the First District Court of Appeal and affirm the conviction and sentence rendered in this case.

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, Florida 32301, this 21st day of September, 1993.

Wendy S. Morris
Assistant Attorney General