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FILED
SID J. WHITE
JAN 26 1994
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RICHARD T. STEARNS,

Respondent.

CASE NO. 82,826

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CITRUS COUNTY
STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0147370
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

ATTORNEY FOR RESPONDENT

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SUMMARY OF ARGUMENT

Convictions for both burglary of a structure while armed and possession of a firearm while engaged in a criminal offense arising out of the same incident do violate the constitutional prohibition against double jeopardy.

ARGUMENT

POINT ON APPEAL

RESPONDENT'S CONVICTIONS FOR BURGLARY OF A STRUCTURE WHILE ARMED AND POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE VIOLATE DOUBLE-JEOPARDY PRINCIPLES.

Just as the trial court's ruling on a motion to suppress comes to the Appellate court closed with a presumption of correctness[1] so should the Fifth District Court of Appeal ruling be considered correct.

Respondent was originally charged with burglary of a structure while armed, grand theft, and carrying a concealed weapon while committing a felony, to wit: grand theft. The Fifth DCA held:

> The state cannot, consistent with double jeopardy principles, charge, convict and sentence a defendant for two offenses for the single act of possession of one weapon. (citations omitted) The conviction and sentence for carrying a concealed weapon while committing a felony are reversed.

On motion for rehearing and certification, the Fifth DCA certified the following question:

> WHETHER A DEFENDANT WHO, IN THE COURSE OF ONE CRIMINAL TRANSACTION OR EPISODE, COMMITS AND IS CONVICTED OF BURGLARY OF A STRUCTURE WHILE ARMED AND GRAND THEFT OF PROPERTY FOUND THEREIN MAY, CONSISTENT WITH DOUBLE JEOPARDY PRINCIPLES, ALSO BE CONVICTED OF CARRYING A CONCEALED WEAPON WHILE COMMITTING THE GRAND

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[1] State v. Jones, 592 So. 2d 312 (Fla. 1st DCA 1991)

THEFT.

Respondent's position is that the Fifth District Court of Appeal was correct in reversing his conviction and sentence for carrying a concealed weapon while committing a felony.

In Cleveland v. State, 587 So. 2d 1145 (Fla. 1991) it was held:

> 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 use of 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....

In Cruz v. State, 593 So. 2d 312 (Fla. 3d DCA 1992) it was held:

> The defendant's conviction for possession of a firearm during the commission of a felony cannot stand. Based on the controlling authority of Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), we conclude that when, as here, a trespass conviction is enhanced to a third degree felony because of the use of a firearm in committing the trespass, the single act involving use of the same firearm in the commission of the same trespass 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), (Fla. Stat. 1989).

In Washington v. State, 597 So. 2d 840 (Fla. 3d DCA 1992):

> The trial court erred in convicting and sentencing the defendant to both possession of a firearm in the commission of a felony and

> aggravated assault with a firearm where the use of the firearm in the commission of the felony conviction encompassed solely the same assault with the gun. (other citations omitted) Therefore, convictions and sentences for unlawful possession of a firearm while engaged in a criminal offense, are hereby reversed and vacated.

In Pedrick v. State, 599 So. 2d 200 (Fla. 5th DCA 1992), citing Cleveland v. State, 587 So. 2d 1145 (Fla. 1991) as dispositive; where the Florida Supreme Court reversed and held:

> where the robbery conviction was enhanced because of the use of a weapon.... The single act involving the use of a weapon in the same robbery cannot form the basis of a separate conviction for use of that same weapon in the commission of a felony. The conviction for the use of a weapon while committing a felony is therefore reversed.

In Young v. State, 600 So. 2d 24 (Fla. 3d DCA 1992) (the conviction for one act of possessing a firearm could not be used as a basis for both a separate conviction and sentence, [as well as] enhancement of other sentences). In McGahee v. State, 600 So. 2d 9 (Fla. 3d DCA 1992)([the] defendant's conviction of unlawful possession of a firearm during the commission of a felony violated double jeopardy standards, where the defendant was also convicted of attempted manslaughter with a firearm.). Mulkey v. State, 602 So. 2d 991 (Fla. 3d DCA 1992) held: (we set aside the judgement of conviction and sentence for possession of a firearm during the commission of the attempted murder). In Stripling v. State, 602 So. 2d 663 (Fla. 3d DCA 1992) (the

Stripling v. State, 602 So. 2d 663 (Fla. 3d DCA 1992) (the conviction of unlawful display of a firearm during the commission of a felony could not stand when it was based on the same acts used to enhance the sentence for armed robbery). Pearson v. State, 603 So. 2d 676 (Fla. 3d DCA 1992) (double jeopardy barred a conviction for unlawful possession of a firearm during the commission of a felony arising out of the same act forming the basis for a conviction of second degree murder with a firearm).

In Montequin v. State, 605 So. 2d 944 (Fla. 3d DCA 1992) (the defendant was charged with murder in the second degree and unlawful possession of a firearm while engaged in a criminal offense. He was convicted of murder in the second degree with a firearm, and display of a firearm during the commission of a felony. The court found error as to sentencing for displaying a firearm and vacated said sentence.) In Wilson v. State, 608 So. 2d 842 (Fla. 3d DCA 1992) the trial court erred in convicting and sentencing the defendant for possession of a firearm during the commission of a felony where this conviction violated his double jeopardy rights. See, Cleveland v. State, 587 So. 2d 1145 (Fla. 1991); Hall v. State, 517 So. 2d 678 (Fla. 1988); Perez v. State, 528 So. 2d 129 (Fla. 3d DCA 1988). Therefore, the defendant's conviction for possession of a firearm in the commission of a felony must be vacated.

In Brown v. State, 611 So. 2d 1376 (Fla. 4th DCA 1993) the:

> defendant's numerous convictions here included one count of

> attempted robbery and two counts of burglary, all enhanced from second degree to a first degree felony by virtue of his use of a firearm. We find that the trial court erred in also convicting him for the separate offense of use of a firearm during commission of a felony because these convictions arose from the same act. Cleveland v. State, 587 So. 2d 1145 (Fla. 1991).

In Thomas v. State, 617 So. 2d 1128 (Fla. 3d DCA 1993) the court held:

> We do agree with the defendant, that because the use of a firearm is the basis for raising the charge of second degree murder to a life felony, double jeopardy barred the second conviction for misuse of the same firearm.

In Brown v. State, 617 So. 2d 744 (Fla. 1st DCA 1993)

> [the] defendant could not be convicted and sentenced for possession of a firearm during the commission of a felony when he was also found guilty and received an enhanced sentence for carrying a firearm during commission of a robbery, when both crimes took place during the same criminal episode.

In Gotthardt v. State, 475 So. 2d 281 (Fla. 5th DCA 1985), the opinion reads in part:

> The danger of recognizing a constitutional legislative authority to subdivide substantive offenses at will is that it gives the prosecutor opportunities to prosecute repeatedly one citizen for what is but one and "the same offense" contrary to the intent of the constitutional double jeopardy clauses. To recognize the three statutes in this case as being substantively different means that an accused can be constitutionally charged and placed in jeopardy as to one such statutory offense and after acquittal again charged the same

factual event as to the second statutory offense and after acquittal as to that charge again charged on the same factual event as to the third statutory offense. Such a possibility of multiple jeopardy as to essentially one factual event violates the intent of the constitutional prohibition against double jeopardy. It makes no difference whether the three criminal charges are made in three charging documents and tried in three trials or made in one document and tried together. As explained in the dissent in Barnhill, [471 So. 2d 160 (Fla. 5 DCA 1985)], the original Blockburger case related to multiple charges in one trial setting. The Blockburger test could be modified to compare only nuclear elements that serve to define different substantive offenses and not to compare elements that serve only to differentiate different degrees or variations of what is but one basic substantive offense. However, if each substantive offense must first be identified in order to compare only its nuclear elements the Blockburger test would be unnecessary because its very purpose is only to identify substantively different offenses.

Houser v. State, 474 So. 2d 1193 (Fla. 1985), states: And "[t]he assumption underlying the Blockburger rules is that [the legislative body] ordinarily does not intend to punish the same offense under two different statutes." Ball v. United States, [---U.S.-----] 105 S.Ct. 1668, 1672 [84 L.Ed.2d 740] (1985). This assumption should apply generally to statutory construction. While the legislature is free to punish the same crime under two or more statutes, it cannot be assumed that it ordinarily intends to do so.

The same concern was expressed in Rhames v. State, 10 FLW 1939 (Fla. 1st DCA August 13, 1985), when the court stated:

We are constrained to avoid a result which would countenance the "labeling under different statutory sections of essentially the same crime."

citing Bell v. State, 437 So. 2d 1057, 1059 (Fla. 1983), citing Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). I believe that if a legislature by two statutes prohibited that which is in substance one and "the same offense" and clearly and expressly stated its intent that an accused could, as to a single factual event or act, be tried and convicted for both offenses, the constitutional double jeopardy clause would bar the effectuation of that unconstitutional legislative intent. Nevertheless, in

> this case, two of the three convictions should be reversed under the current rationale of the Florida and United States Supreme Courts because according to Houser there is no basis for any assumption that the legislature intended to punish the one lewd act in this case under all three different statutes.
>
> The basic substantive offense in this case appears to be the prohibition of "a lewd act," and the elements distinguishing the three statutes in question distinguish only degrees or variations of the one basic prohibited act.
>
> CONCLUSION:
>
> The three criminal charges in this case are, in substance and constitutional contemplation "the same offense" and the violation of the defendant's constitutional double jeopardy rights resulting from his three convictions for "the same offense" is fundamental error (Johnson v. State, 460 So. 2d 954 (Fla. 5th DCA 1984). Accordingly, the two misdemeanor convictions (Secs. 798.02 and 800.03, Fla. Stat.) should be reversed and the one felony conviction under Section 800.04, Fla. Stat. should be affirmed.

Likewise, sentencing Appellant multiple times for the same offense, in violation of double jeopardy principles, cannot be allowed. The state cannot, consistent with double jeopardy principles, charge, convict and sentence a defendant for two offenses for the single act of possession of one weapon.

Accordingly, the Fifth District Court's reversal of Respondent's conviction and sentence for carrying a concealed weapon while committing a felony should be upheld.

CONCLUSION

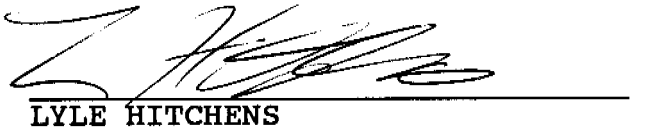
For the reasons expressed herein, Respondent respectfully requests that this Honorable Court answer the certified question:

> WHETHER A DEFENDANT WHO, IN THE COURSE OF ONE CRIMINAL TRANSACTION OR EPISODE, COMMITS AND IS CONVICTED OF BURGLARY OF A STRUCTURE WHILE ARMED AND GRAND THEFT OF PROPERTY FOUND THEREIN MAY, CONSISTENT WITH DOUBLE JEOPARDY PRINCIPLES, ALSO BE CONVICTED OF CARRYING A CONCEALED WEAPON WHILE COMMITTING THE GRAND THEFT

...in the negative.

Respectfully submitted,

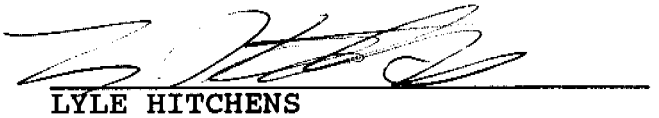
JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0147370
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to the Respondent, Richard T. Stearns, P.O. Box 39, Tarpon Springs, FL 34688 on this 24th day of January, 1994.



LYLE HITCHENS
ATTORNEY FOR PETITIONER