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FILED *Reg App*

SID J. WHITE

JAN 5 1994

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By *JW*
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 82,826

RICHARD T. STEARNS, JR.,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent was charged in a three count information and subsequently entered pleas of nolo contendere to Burglary of a Structure While Armed, Grand Theft and Possession of a Firearm While Engaged in a Criminal Offense, to wit: Grand Theft. (R5-6, 36, 58-65) He received concurrent sentences of three years incarceration which included a three year minimum mandatory followed by five years probation. (R 41-52) The sentence imposed was within the guidelines. (R 53)

On appeal, the Fifth District Court of Appeal reversed Respondent's conviction and sentence for Carrying a Concealed Weapon While Committing a Felony upon finding that the State could not, consistent with double jeopardy principles, charge, convict and sentence a defendant for two offenses for the single act of possession of one weapon. Stearns v. State, 18 Fla. L. Weekly D2122 (Fla. 5th DCA October 1, 1993). The Fifth District subsequently denied the State's Motion For Rehearing but agreed to certification of the following question to the supreme court as one of great public importance:

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.

Stearns v. State, 18 Fla. L. Weekly D2395 (Fla. 5th DCA November 12, 1993).

Petitioner filed a notice to invoke the discretionary jurisdiction of this court. On December 8, 1993, this court postponed its decision on jurisdiction and ordered Petitioner to file its merits brief on or before January 3, 1994. This merits brief follows.

SURMMARY OF ARGUMENT

Convictions for Burglary of a Structure While Armed and Possession of a Firearm While Engaged in a Criminal Offense does not violate the constitutional prohibition against double jeopardy where the criminal offense Respondent was engaged in while possessing the firearm was not Burglary of a Structure While Armed but Grand Theft.

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 DOES
NOT VIOLATE DOUBLE JEOPARDY.

The Respondent in the instant case was charged and convicted of burglary of a structure while armed, grand theft and possession of a firearm while engaged in a criminal offense. The three offenses arose from the commission of two separate criminal acts -- burglary and theft. The Fifth District Court of Appeal reversed Respondent's conviction and sentence for carrying a concealed weapon while committing a felony upon finding that the State could not, consistent with double jeopardy principles, charge, convict and sentence a defendant for two offenses for the single act of possession of one weapon citing Cleveland v. State, 588 So.2d 1145 (Fla. 1991) and Brown v. State, 617 So 2d 744 (Fla. 1st DCA 1993).

It is the State's position that convictions for all three offenses are proper and do not violate double jeopardy principles. Two of the three charges were separate criminal acts: burglary of a structure and grand theft. The burglary of a structure was enhanced due to the possession of the firearm. The grand theft charge was not enhanced, therefore it was proper to charge and convict for possession of a firearm while engaged in a criminal offense because the criminal offense was the grand theft as indicated in the information. (R 5)

Cleveland, supra, is distinguishable from the instant case in that in Cleveland, the defendant had been convicted and sentenced for two offenses: attempted robbery with a firearm and use of a firearm while committing a felony. The charges in Cleveland stemmed from a single act. In the instant case, however, a third charge is involved -- grand theft. The convictions are proper because there are two underlying offenses only one of which was enhanced for use of the firearm. The possession of a firearm was made in connection with the unenhanced grand theft charge. In Cleveland, this court held that once the attempted robbery conviction was enhanced for the use of a firearm, the defendant had been punished for all of the elements contained in the possession charge. This is not so for the Respondent in the instant case. The Respondent was punished for carrying the firearm while committing the burglary because the burglary charge was enhanced. Respondent would not be punished for carrying the firearm while committing the grand theft unless the separate charge for possession of a firearm while engaged in a criminal offense were allowed to stand.

In reaching its decision, the Fifth District Court of Appeal also relied on Brown v. State, supra. In Brown, three charges were involved: possession of a firearm during commission of a felony, armed robbery with a firearm and attempted first degree murder. Although the First District reversed the charge of possession of a firearm during the commission of a felony, they certified the question 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 use of the firearm. Brown is currently pending before the court. State v. Brown, jurisdiction pending, No. 82,002. In reversing the possession of a firearm charge, the First District emphasized that multiple convictions analysis of criminal statutes in question must be made "without regard to the accusatory pleading or proof adduced at trial." Brown at 747. The State would agree with Judge Peterson below that in a double jeopardy analysis, reference to the accusatory pleading must be made at some point or no person would ever be convicted of more than one count of the same crime where various dates or victims were involved. Stearns v. State, 18 Fla. L. Weekly D2122 (Fla. 5th DCA October 1, 1993), Peterson, J., concurring in part; dissenting in part.

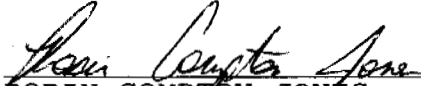
Respondent's convictions and sentences for all three offenses were proper. The decision below should be quashed and Respondent's conviction and sentence for possession of a firearm while engaged in a criminal offense should be reinstated.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner requests this court quash the decision of the Fifth District and remand with directions to reinstate Respondent's conviction and sentence for possession of a firearm while engaged in a criminal offense.

Respectfully submitted,

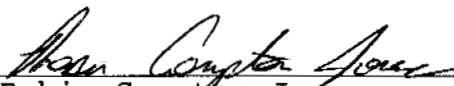
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by interoffice mail/delivery to Lyle Hitchens, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114 this 3rd day of January 1994.


Robin Compton Jones
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