IN THE SUPREME COURT OF FLORIDA

CHARLIE BROWN, JR.,

Petitioner,

v. CASE NO. 83,511

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLA. BAR NO. 197890
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE DIVISION
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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BRIEF OF PETITIONER ON THE MERITS

I. PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and the appellant in the lower tribunal. A one volume record on appeal will be referred to as "R," followed by the appropriate page number in parentheses. A four volume transcript will be referred to as "T." Attached hereto as an appendix is the "PCA cite" of the lower tribunal.

II. STATEMENT OF THE CASE

By information filed January 7, 1992, petitioner, Charlie Brown, Jr., was charged with robbery while wearing a mask and grand theft (R 7-8). He filed a motion to prohibit simultaneous jury selection (R 23-25), which was denied (T 2). A jury was selected for his case on April 6, 1992 by simultaneous jury selection (T 3-92). Trial began April 7, 1992, and at the conclusion thereof, petitioner was found guilty as charged on both counts (R 29-30).

The state had filed notice of habitual violent offender sentencing (R 13). At sentencing on April 21, 1992, the trial court reclassified the robbery with a mask charge from a second to a first degree felony (T 343). The court sentenced Mr. Brown as a habitual violent felon, on count I to life in prison with a 15 year minimum mandatory, and on count II to 10 years in prison, as an habitual violent offender, to run consecutively, with a five year minimum mandatory (R 47-51; T 342-45).

On appeal, the lower tribunal issued a "PCA cite" to Rock v. State, 622 So. 2d 487 (Fla. 1st DCA 1993), approved, 19 Fla. L. Weekly S333 (Fla. June 23, 1994). This Court accepted jurisdiction by order dated June 22, 1994.

III. STATEMENT OF THE FACTS

The victim Elsie Tison testified that on December 19, 1991, she was driving back from the grocery store and saw a black male walking down the street, wearing a white sweatshirt, sweat pants and a skull cap, and carrying a black plastic bag (T 115-16). The man was young and of husky build (T 116). She pulled in her driveway and got the groceries out of the car. As she went to lock the fence gate, that man, with a mask over his face, rushed up and put what she thought was a gun in her side (T 117, 199). He told her he wanted her car and to throw her pocketbook down (T 117). He told her to do as he said or he would shoot her (T 117). He picked up the pocketbook and she ran inside and called 911. From there she saw him backing out the driveway and he pulled off fast toward Clyde Drive (T 118-19).

Jacksonville Sheriff's Officer Evander Collier responded to the dispatch and while traveling east on Clyde Drive saw the stolen car coming toward him with one person, the driver, in it (T 127-29). He said that person was Mr. Brown (T 130). Collier made a U-turn and the driver accelerated southbound on Harborview, crashing into a tree as he turned the corner (T 131). Collier parked his car about 30 feet in front of the crashed car; the driver's door was on the side away from Collier's car (T 131, 159). The driver grabbed something out of the car and then started running, away from Collier's car, through a residential area (T 131, 159). Collier testified that the man who jumped out of the car was Mr. Brown (T 132).

At that point Collier called other units and Officer Richardson caught the alleged suspect at a nearby high school (T 134-35; 173-75).

Billy Tarkington, evidence technician for the Jacksonville Sheriff's Office, photographed the crash area and some of the evidence collected. He processed the driver's side of the car, but not the passenger's side, for prints, and processed the toy pistol found beside the car for prints (T 63, 170). He identified the mask, the toy gun and the shirt that were found at the scene and these items were admitted into evidence (T 165-68).

The State rested (T 198). Mr. Brown moved for a judgment of acquittal, arguing lack of identification of Mr. Brown as the perpetrator (T 190). Mr. Brown argued that the evidence only showed that he was in a vehicle and was captured a mile and a half from the offense location (T 190). The court, stating that there is nothing wrong with circumstantial evidence, denied the motion (T 191).

Mr. Brown testified, admitting that he had been convicted of a total of eight felonies (T 195). On the morning of December 19, 1991 he went by bus to Norwood Avenue to get a copy of his driver's license record but discovered that the office had moved to Dunn Avenue (T 195-96). He caught the wrong bus to go to Dunn Avenue and ended up walking on Clyde Drive toward the intersection with Lem Turner, a bus stop to which the bus driver had directed him (T 197-98).

While he was walking a car passed and he recognized the driver as an acquaintance named "Mike-Mike" (T 198-99). Mr. Brown asked him for a ride and he said he could give him a ride after he took care of some business (T 199-200). Mr. Brown got in the car, putting a bag that was in the seat down between his feet (T 200). Mike was wearing a white warm-up, tennis shoes and a white cap (T 216).

As they were going west on Clyde a police car passed in the opposite direction and Mike asked what it was doing. Mr. Brown told him the brakelights came on so it might be turning around. Mike said he wasn't worried about getting a ticket but the car was hot, meaning stolen, and he began to drive faster (T 204). As Mike drove around a curve fast he lost control and hit some object and then hit a tree (T 204-05). Mr. Brown hit the dashboard and windshield of the car (T 205).

A police car parked behind the crashed car (T 223). Mike got out and started to run as police pulled up and started chasing Mike (T 205). Mr. Brown got out and started walking north up the street in the opposite direction because it seemed like a situation that he wanted to get away from (T 205-08). As another police officer came to the scene briefly Mr. Brown went into a yard (T 207). Mr. Brown stayed in the yard area about five to ten minutes (T 209). A woman came home and saw him as she got out of her car (T 209-20).

As Mr. Brown walked back to the road someone started yelling so he panicked and started running (T 210). He started getting dizzy and his nose started bleeding. He recalled

running from an officer briefly but not for five or six minutes (T 219). He tried to run into the woods but he passed out (T 210-211). He never saw Officer Collier (T 211). He was unconscious when he was apprehended and did not make any statements to any officer at the arrest scene (T 220).

Mr. Brown denied robbing Ms. Tison or knowing anything about the robbery (T 216-17). Looking at State's Exhibit 4, he noticed that there was a crack in the windshield on the passenger side. That crack was not there when he got in the car so he assumed it happened when his head hit the windshield (T 217-18).

The defense rested and renewed the previous motion for judgment of acquittal which the court again denied (T 235). In rebuttal the State called Jacksonville Sheriff's Detective J.L. Rigdon. Rigdon said that Mr. Brown, after waiving his rights, told Rigdon that an unknown male gave him a ride and the next thing he remembered was waking up in a helicopter (T 240). Mr. Brown denied being involved in or knowing anything about the robbery or car theft (T 242), and said he thought he was picked up at a bus stop (T 243).

The court gave the instruction on recent possession of stolen property (T 250, 291). The jury found Mr. Brown guilty of robbery while wearing a mask and guilty of grand theft (T 306).

On April 21, 1992 the court denied Mr. Brown's motion for new trial (R 31-32, T 317-18). The State presented evidence of prior felonies, seeking to have Mr. Brown sentenced as an

habitual violent felon (T 322-30). The trial court queried whether the robbery charge should be reclassified as a first degree felony, because of the mask, before enhancing the sentence as habitual felon (T 331-337). Counsel argued that the mask statute was not a reclassification statute (R 332).

The court resolved its concerns by treating it as a first degree felony and then sentenced Mr. Brown as a habitual violent felon on both counts: count I, to life in prison with a 15 year minimum mandatory; and on count II, to 10 years consecutively, with a five year minimum mandatory (T 342-45).

IV. SUMMARY OF THE ARGUMENT

The question of simultaneous jury selection has been decided adversely to petitioner. Unless this Court wishes to grant rehearing in Rock and hold that a defendant does not have to show conflict or prejudice, petitioner cannot prevail on this issue.

However, when this Court grants jurisdiction over one issue, it grants jurisdiction over the whole case. There are three sentencing errors present here, which admittedly, were not raised below, but which are apparent from the record.

The first sentencing error occurred when the trial court reclassified robbery with a mask from a second degree to a first degree felony. The mask statute is not a reclassification statute, only an enhancement statute. Petitioner did not raise this issue in the lower tribunal because the First District had erroneously held to the contrary. The Second District recently held in accord with petitioner's position. This Court must resolve the conflict.

If robbery with a mask remains a second degree felony, the maximum habitual violent offender sentence petitioner could have received is 30 years with a 10 year mandatory. His present life sentence with a 15 year mandatory is blatantly illegal.

The second and third sentencing errors have arisen through recent cases decided by this Court. This Court has held that theft is the core offense of robbery, and so a dual convictions for both robbery and theft in the same episode are illegal.

This Court has also held that consecutive sentences as an habitual violent offender cannot be imposed for two crimes arising from the same criminal episode. Under the former argument, both the judgment and sentence for grand theft must be vacated. Under the latter, the consecutive 10 year habitual violent offender sentence for grand theft must be vacated.

V. ARGUMENT

ISSUE I: THE TRIAL COURT ERRED IN CONDUCTING SIMULTANEOUS JURY SELECTION FOR MR. BROWN'S CASE AND OTHER UNRELATED CASES INVOLVING OTHER DEFENDANTS, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY.

The question of simultaneous jury selection has been decided adversely to petitioner. Unless this Court wishes to grant rehearing in Rock, supra, and hold that a defendant does not have to show conflict or prejudice, petitioner cannot prevail on this issue. In hopes that that will occur, petitioner presents his argument here that the procedure is per se reversible error.

The trial court employed simultaneous jury selection by which Mr. Brown's jury and other juries for other defendants with unrelated cases were selected from a single pool of people. Counsel objected to this procedure, asserting that it violated petitioner's constitutional rights to a fair trial (R 23-25, T 2). Mr. Brown asserts that the simultaneous selection method itself violates his due process rights.

Trial begins at voir dire. See, e.g., State v. Singletary, 549 So. 2d 996 (Fla. 1989). Voir dire or jury selection is a crucial stage of trial with vital consequences for a defendant. See, e.g., Francis v. State, 413 So. 2d 1175 (Fla. 1982). Godwin v. State, 501 So. 2d 154 (Fla. 1st DCA 1987). "A defendant's right to a jury trial is indisputably one of the most basic rights guaranteed by our constitution...." Griffith v. State, 561 So. 2d 528 (Fla. 1990). The importance of jury selection is likewise indisputable; it is the cornerstone of a fair trial.

There is no authority for consolidating such a critical part of unrelated trials. Rule 3.151, Fla.R.Crim.P., permits consolidation of jury trials only if the offenses "are triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions." There is no provision for consolidating just jury selection, or any other segment of trial.

The benefit of consolidation is judicial economy, a more efficient processing of cases. However, "practicality and efficiency should not outweigh a defendant's right to a fair trial." State v. Vasquez, 419 So. 2d 1088, 1091 (Fla. 1982). The unauthorized simultaneous jury selection employed in Mr. Brown's case infringed upon his right to a fair trial.

Linking Mr. Brown with other accused persons could easily cause potential jurors to view him with a jaundiced eye.

The simultaneous selection process also has its own practical flaws. Any attorney questioning a large number of persons could have difficulty avoiding confusion among the various individual responses. The fear of an interminable jury selection may also have affected the venire.

"The objective of fairly determining a defendant's innocence or guilt should have priority over other relevant considerations such as expense, efficiency, and convenience." Crum v. State, 398 So. 2d 810, 811 (Fla. 1981). Constitutional rights have costs, but they are too valuable to compromise. This consolidated jury selection sacrificed Mr. Brown's right to a

fair and impartial jury trial for the sake of judicial efficiency.

This Court should remedy this error by reversing and granting Mr. Brown a new trial.

ISSUE II: THE TRIAL COURT ERRED IN RECLASSIFYING ROBBERY WITH A MASK FROM A SECOND DEGREE FELONY TO A FIRST DEGREE FELONY AND THEREBY ALLOWING IMPOSITION OF A LIFE SENTENCE AS AN HABITUAL VIOLENT OFFENDER BECAUSE THE MASK STATUTE IS AN ENHANCEMENT STATUTE AND NOT A RECLASSIFICATION STATUTE.

This Court obviously accepted jurisdiction to decide the Rock issue. However, when this Court grants jurisdiction over one issue, it grants jurisdiction over the whole case. This Court very often goes beyond the issue upon which jurisdiction is based to reach other meritorious issues. See, e.g., State v. Smith, 573 So. 2d 306 (Fla. 1990).

The first sentencing error occurred when the trial court reclassified robbery with a mask from a second degree to a first degree felony. The mask statute is not a reclassification statute, only an enhancement statute. Petitioner did not raise this issue in the lower tribunal because the First District had erroneously held to the contrary in Jennings v. State, 498 So. 2d 1373 (Fla. 1st DCA 1986).

The statute on wearing a mask provides:

> The penalty for any criminal offense, other than a violation of ss. 876.12-876.15, shall be increased as provided in this section if, while committing the offense, the offender was wearing a hood, mask, or other device that concealed his identity.
>
> * * *
>
> (4) A felony of the second degree shall be punished as if it were a felony of the first degree.

Section 775.0845(4), Florida Statutes (emphasis added).

The Second District recently held in accord with petitioner's position. In Spicer v. State, 615 So. 2d 725 (Fla. 2nd DCA 1993), the defendant, just like petitioner, was charged with unarmed robbery, a felony of the second degree. Section 812.12(2)(c), Florida Statutes. Because he wore a mask in the crime, the judge reclassified the crime upward to a first degree felony, and imposed a life sentence as an habitual offender, just like in the instant case. The court held:

> If the legislature had intended section 775.0845 to reclassify offenses, it would have so stated, as it did in section 775.087, Florida Statutes (1989): "Possession or use of a weapon; aggravated battery; felony reclassification; "and in section 775.0875, Florida Statutes (1989): "Unlawful taking, possession or use of a law enforcement officer's firearm; crime reclassification; ...." (Emphasis added.) In fact, section 775.0845 is similar to the habitual offender statute, in that neither of the enhanced penalty statutes reclassify the degree of the offense.

615 So. 2d at 726.

Other statutes, which are reclassification statutes, as opposed to enhancement statutes, use the words "reclassification" in the title and "reclassify" in the body: Section 784.07, Florida Statutes, which reclassifies an assault, battery, aggravated assault, or aggravated battery one degree upward if the victim was a law enforcement officer; and Section 784.08, Florida Statutes, which reclassifies an assault, battery, aggravated assault, or aggravated battery one degree upward if the victim was an elderly person.

Compare these statutes with Section 794.023, Florida Statutes, which imposes "enhanced penalties" on a sexual battery by multiple perpetrators. Also note the title to section 775.0845: "Wearing mask while committing offense; enhanced penalties." Thus, this statute is clearly an enhancement statute and not a reclassification statute.

The Spicer court did not discuss the lower tribunal's opinion in Jennings, supra. There the court erroneously read into the mask statute a reclassification element which is not present:

> The language of the mask statute requires that each offense, i.e., misdemeanor or felony, be punishable as it it were reclassified upward as an offense of the next higher degree.

498 So. 2d at 1374 (emphasis in original).

The First District's view ignores the principle that penal statutes are to be strictly construed in favor of the defendant and in light of their plain meaning. State v. Jackson, 526 So. 2d 58 (Fla. 1988). As noted in Spicer, if the legislature had meant the mask statute to reclassify the crime, instead of merely increasing the penalty, it would have specifically used the words "reclassification" or "reclassify." The First District cannot read language into a penal statute which was not placed there by the legislature. State v. Barnes, 595 So. 2d 22 (Fla. 1992).

If robbery with a mask remains a second degree felony, the maximum habitual violent offender sentence petitioner could have received is 30 years with a 10 year mandatory. Section

775.084(4)(b)2., Florida Statutes. His present life sentence with a 15 year mandatory is blatantly illegal.

This Court must resolve the conflict, approve Spicer, disapprove Jennings, and remand for resentencing.

ISSUE III: THE TRIAL COURT ERRED IN ENTERING JUDGMENTS AND SENTENCES FOR BOTH ROBBERY AND THEFT ARISING OUT OF THE SAME EPISODE.

Petitioner was charged with robbery of Ms. Tison, by taking her purse, and grand theft of her automobile (R 7). The evidence showed that she pulled in her driveway and got the groceries out of the car. As she went to lock the fence gate, that man, with a mask over his face, rushed up and put what she thought was a gun in her side (T 117, 199). He told her he wanted her car and to throw her pocketbook down (T 117). He told her to do as he said or he would shoot her (T 117). He picked up the pocketbook and she ran inside and called 911. From there she saw him backing out the driveway in her car and he pulled off fast toward Clyde Drive (T 118-19).

Thus, the two crimes occurred in the same criminal episode. In Sirmons v. State, 634 So. 2d 153 (Fla. 1994), this Court that theft is the core offense of robbery, and so dual convictions for both robbery and theft in the same episode are illegal.

Both the judgment and sentence for grand theft must be vacated on authority of Sirmons.

ISSUE IV: THE TRIAL COURT ERRED IN ENTERING CONSECUTIVE HABITUAL VIOLENT OFFENDER SENTENCES FOR BOTH ROBBERY AND THEFT ARISING OUT OF THE SAME EPISODE.

Again, petitioner's two crimes occurred in the same criminal episode. This Court has held that consecutive sentences as an habitual violent offender cannot be imposed for two crimes arising from the same criminal episode. Hale v. State, 630 So. 2d 521 (Fla. 1993); and Brooks v. State, 630 So. 2d 527 (Fla. 1993).

In the unlikely event that this Court does not vacate the judgment and sentence for grand theft in Issue III, supra, the consecutive 10 year habitual violent offender sentence for grand theft must be vacated.

VI. CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court dispose of this case along with Rock. Petitioner also requests that this Court exercise its jurisdiction over the entire case and hold that the mask statute does not reclassify the degree of crime. Petitioner must be resentenced on the robbery as a second degree felony because his present life sentence is illegal.

Petitioner also requests that this Court vacate the judgment and sentence for grand theft; in the alternative, petitioner requests that this Court vacate the consecutive habitual violent offender sentence for grand theft.

Respectfully submitted,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Fla. Bar No. 197890
Assistant Public Defender
Chief, Appellate Division
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bradley R. Bischoff, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, this 27th day of June, 1994.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHARLIE BROWN, JR.

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 92-1476

Opinion filed April 7, 1994.

An appeal from the circuit court for Duval County.
John Southwood, Judge.

Nancy A. Daniels, Public Defender; Josephine L. Holland, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

OPINION ON MOTION FOR CLARIFICATION

PER CURIAM.

The judgment of conviction appealed is affirmed on the authority of Rock v. State, 622 So. 2d 487 (Fla. 1st DCA 1993), review pending before the Supreme Court of Florida, Case No. 82,530.

SMITH, ALLEN AND DAVIS, JJ., CONCUR.