IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 87,290

DANIEL MAXWELL,

Respondent.

_____/

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent, Daniel K. Maxwell, was convicted in circuit court of three firearm charges - possession of 1) a concealed weapon, 2) a short-barreled shotgun, 3) by a convicted felon. The trial proceedings were held in Leon County before Circuit Judge William L. Gary.

On appeal, the First District Court reversed two of the convictions on double jeopardy grounds. Maxwell v. State, 666 So.2d 951 (Fla. 1st DCA 1996). The state appeals to this court.

The pleading volume of the record on appeal, which includes transcripts of two hearings, will be referred to as "R" and the one-volume trial transcript as "T."

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably accurate.

III SUMMARY OF ARGUMENT

Respondent's convictions of three firearm offenses for a single possession of a single firearm violate double jeopardy, and the district court's reversal of two of the convictions should be affirmed. Illegal possession of a gun is the core offense, and the three offenses merely add various aggravating factors to the core offense.

IV ARGUMENT

ISSUE PRESENTED

RESPONDENT'S TRIPLE CONVICTIONS FOR POSSESSION OF A SINGLE FIREARM VIOLATE DOUBLE JEOPARDY (restated).

Respondent, Daniel Keith Maxwell, was convicted of possession of a short-barreled shotgun, possession of a firearm by a convicted felon and carrying a concealed weapon, all for possession of a single gun. The First District Court of Appeal vacated two of the convictions on double jeopardy grounds, and let the possession of a short-barreled shotgun conviction stand. Maxwell v. State, 666 So.2d 951 (Fla. 1st DCA 1996). Maxwell contends his triple convictions violated double jeopardy, and this court should affirm the district court opinion.

This court has held that a defendant cannot be punished twice for the same firearm. In State v. Stearns, 645 So.2d 417 (Fla. 1994) (Stearns II), the defendant entered a plea to both armed burglary with a firearm and carrying a concealed weapon. On appeal, the Fifth District held that he could not be convicted of both offenses, because armed burglary was a continuing offense, and the burglary was enhanced to a more serious felony by the firearm element. Stearns v. State, 626 So.2d 254 (Fla. 5th DCA 1993) (Stearns I). This court approved the district court's holding:

> We agree with the district court that armed burglary is a continuing offense. Thus, our recent decision in State v. Brown, [infra], resolves the case now before us. In Brown we

> held that a defendant could not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode. Id. At 1060-61. In the instant case, therefore, double jeopardy bars the state from convicting and sentencing Stearns for two offenses involving a firearm that arose out of the same criminal episode.

645 So.2d at 418.

The case relied upon by the court, State v. Kevin Bernard Brown, 633 So.2d 1059 (Fla. 1994), had held that the defendant could not be convicted and sentenced for use of a firearm in commission of a felony where he was also convicted of attempted first-degree murder with a firearm. See also Cleveland v. State, 587 So.2d 1145 (Fla. 1991). Here, Maxwell was convicted of carrying a concealed weapon, possession of a firearm by a convicted felon, and possession of a short-barreled shotgun. All are continuing offenses.

In A.J.H. v. State, 652 So.2d 1279 (Fla. 1st DCA 1995), the defendant was convicted of unlawful possession of a firearm by a minor, possession of a firearm by a delinquent, and carrying a concealed weapon. The second charge is the juvenile version of possession of a firearm by an adult convicted felon. A.J.H. argued on appeal that, because all the offenses arose out of a single episode, the adjudication of delinquency of all three cannot stand. The First District agreed, and vacated the convictions for carrying a concealed weapon and possession of a firearm by a minor, on the authority of this court's opinion in Stearns II, supra.

Likewise, in Everett Brown v. State, 670 So.2d 965 (Fla. 1st

DCA 1995), the defendant was convicted of attempted robbery with a firearm, carrying a concealed firearm, and possession of a firearm by a minor. Because the firearm element was common to all three crimes, the district court vacated the concealed weapon and possession by a minor convictions on the authority of Stearns II. (The court also certified the same question as in the instant case, but the state chose not to pursue it.)

Other decisions of this court support the conclusion of A.J.H. and Stearns II. For example, Sirmons v. State, 634 So.2d 153 (Fla. 1994), is also on point and requires reversal. In Sirmons, this court banned multiple convictions for crimes arising from the same "core offense" based on a single act.

Sirmons was convicted of auto theft and robbery with a weapon when he took a car from the victim at knifepoint. This court held:

> These offenses are merely degree variants of the core offense of theft. The degree factors of force and use of a weapon aggravate the underlying theft offense to a first-degree felony robbery. Likewise, the fact that an automobile was taken enhances the core offense to grand theft. In sum, both offenses are aggravated forms of the same underlying offense distinguished only by degree factors. Thus, Sirmons' dual convictions based on the same core offense cannot stand.

634 So.2d at 154.

Maxwell was convicted of possession of a short-barreled shotgun, possession of a firearm by a convicted felon, and carrying a concealed weapon. The three convictions cannot stand because illegal possession of a single firearm is the core

offense, to which various aggravating factors - a) concealment, b) prior felony conviction, and c) short length - were added. The Legislature did not intend for possession of a single gun to be prosecuted under all three statutes. Rather, the legislature intended that a single possession of a single firearm be punished under a single statute.

In Thompson v. State, 585 So.2d 492 (Fla. 5th DCA 1991) (Thompson I), the defendant was convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft when he sold a piece of fake cocaine to a police officer. Although the elements of the two offenses were different, and so dual convictions were not prohibited by Blockburger and section 775.-021(4), Florida Statutes, the court found dual convictions were not authorized because both were theft offenses. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

The district court reasoned that the sale statute was really a specific type of theft by fraud, which was also prohibited by the general theft statute and the definitions in section 812.012(2), Florida Statutes. The court held:

> At present, Florida's criminal code still retains specific theft statutes regarding particular property or practices, such as the fraudulent practices defined in Chapter 817. It appears that the specific statutory offense -- of theft, such as those contained in Chapter 817, are different degrees (or more specific descriptions) of the general statutory offense of theft defined by Chapter 812. Accordingly, an act of criminal fraud should be prosecuted either under Florida's Anti-Fencing Act or under a more specific statute contained in Chapter 817, if applicable, but the legislature did not intend for the same act of criminal

> fraud to be prosecuted under both statutes by separate offenses. (footnotes omitted; emphasis added)

Thompson, 585 So.2d at 494. The court continued:

> All specific theft by fraud offenses are theoretically subsumed in the general Anti-Fencing Act, not in terms of comparing the essential elements of each offense, but in substance and by definition, since the Anti-Fencing Act broadly encompasses and proscribed these criminal frauds.

Id. This court approved the district court decision, and specifically said it agreed with the analysis that this fraudulent sale was a theft crime. Thompson v. State, 607 So.2d 422 (Fla. 1992) (Thompson II).

The application of Thompson to the instant case is obvious. The three Chapter 790 offenses of which Maxwell was convicted are nothing more than aggravated types of weapons offenses, and so, they cannot all be punished beyond the single core offense of illegal possession. The Legislature did not intend for a person to be prosecuted under all three statutes. They are, in the language of Sirmons, degree variants of the same core offense of illegal possession of a gun.

In this context, by the way, "degree variant" refers to the extent of variation from a standard, not a degree of felony. Although this state endorses the Blockburger test, and § 775.-021(4), Florida Statutes, is on the books, they do not prohibit this argument. The discussion in Anderson v. State, 669 So.2d 262 (Fla. 5th DCA 1995) (question certified), is helpful to rebut the state's Blockburger argument.

Anderson was convicted of perjury in an official proceeding and giving false information in support of an application for bail. He lied about the reason he was late for court. The district court held he could not be convicted of both offenses for making a single false statement, even though the two statutes have different elements. The important part of the opinion is the realization that the core element (telling a lie in court) need not be a crime:

> That the common core shared by the two offenses does not itself have to be a crime in order for the offenses to be degrees of the same offense is shown by the supreme court's decisions in Goodwin v. State, 634 So.2d 147 (Fla. 1994) and Thompson [supra]. Because of the cryptic language used in section 775.021(4), the phrase "degrees of the same offense as provided by statute" has required construction. "Degrees of the same offense" is not limited to "third degree," "second degree" or "first degree'; it appears to mean the scope or extent of crimes identified anywhere in the Florida Statutes that are essentially varieties of the same core offense. These are "degree factors" and they are different from "degrees of the crime." See also Sirmons [supra], State v. Chapman, 625 So.2d 838 (Fla. 1993). (Emphasis added)

Id. at 264. The district court said of Goodwin:

> In Goodwin, the court held that vehicular homicide and unlawful blood alcohol level manslaughter (UBAL manslaughter) were "aggravated forms of a single underlying offense, distinguished only by degree factors." 634 So.2d at 157 (emphasis added in Anderson). Yet the only "core offense" shared by these two statutory crimes is killing someone while operating a motor vehicle. Causing a death while operating a motor vehicle is not a crime in and of itself. Only the addition of the various aggravating factors listed in these statutes elevates such deaths to the status of a crime. (emphasis added; footnote omitted)

Id. The court continued:

> Similarly, in the recent Thompson decision, the supreme court found that, based on a single sexual act, a defendant could not be convicted of sexual battery on a physically incapacitated victim in violation of section 7945.001(4)(f), Florida Statutes (1991), and sexual activity while in custodial authority of a child in violation of section 794.041(2)(b), Florida Statutes (1991). The court held that the two offenses were "distinguished only by degree elements" within the meaning of Sirmons and Goodwin. (emphasis added; footnote omitted)

Id.

The same is true in the instant case. The core element is possession of a firearm, and whether it is concealed or short-barreled or is possessed by a convicted felon create the degree degrees of crime.

The Anderson court concluded:

> Even if the foregoing effort to find a path through the statute and case law is wrong, we conclude, as have many other appellate judges of this state, that the legislature "could not have intended" that by telling a single lie at a single hearing - that he was late for an earlier court appearance because he had to take his girlfriend's child to the hospital - Anderson committed two third-degree felonies. See Goodwin, 634 So.2d at 157-158 (Grimes, J., concurring); State v. Chapman, 625 So.2d 838, 839 (Fla. 1993); Thompson, 585 So.2d at 494; Kurtz, 564 So.2d at 522-523. The legislature plainly intended to punish the making of a false statement in an official proceeding. It is only due to the overlap of these two statutes at the point where the false statement designed to gain release is made during sworn testimony in a bail hearing that both statutes apply. Even absent the rule of lenity, it does not appear to have been the legislature's intent in enacting these statutes to transform this event of making one false statement into two discrete crimes. We accordingly vacate the conviction. . . (emphasis added)

Id. at 265.

The application of Anderson to the instant case is obvious. The core element in Maxwell's three crimes is possession of a firearm, which by itself is not a crime. They become crimes only by the addition of various aggravating factors. The legislature did not intend to punish all three separately.

The same result must follow in the instant case, on either the Stearns double jeopardy theory, or the Sirmons core offense theory, or both. The opinion of the district court, which vacated Maxwell's convictions of carrying a concealed firearm and possession of a firearm by a convicted felon, must be approved.

As an alternative way of viewing this matter, the triple convictions also violate the double jeopardy clause of the Florida Constitution, article I, section 9. In Carawan v. State, 515 So.2d 161 (Fla. 1987), this court excerpted a 104-year-old United States Supreme Court opinion to express its view of the constitutional ban on double jeopardy. Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). The Lange passage concluded with these words: "[W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as being twice tried for it." 21 L.Ed. at 878, cited in Carawan, 515 So.2d at 164.

In context, the word "offense" should be construed as a criminal act, not as a contemporary statutory offense, for Lange speaks of being "put to actual punishment twice for the same thing." 21 L.Ed. at 878. Thus, in determining whether multiple

convictions violate double jeopardy, the focus is on whether the convictions twice put an offender to punishment for the same act, not whether particular enhanced offenses contain congruent statutory elements.

If not based on section 775.021(4)(b)3, Cleveland, supra, may be understood as erecting "one act" analysis to determine whether multiple convictions violate the double jeopardy clause. See Wilkins v. State, 543 So.2d 800, 802 (Fla. 5th DCA 1989) (reading Carawan as suggesting that Lange defines scope of protection under the double jeopardy clause of state constitution), review denied, 554 So.2d 1170 (Fla. 1989). The First District has interpreted Cleveland as a decision that "does not utilize section 775.021(4). . .but rather focuses on whether a person should be subjected to two penalties for committing the same act." Kevin Bernard Brown v. State, 617 So.2d 744, 747 (Fla. 1st DCA 1993), approved, 633 So.2d 1059 (Fla. 1994); see also Lamont v. State, 597 So.2d 823 (Fla. 3d DCA) (citing Cleveland for statement that double jeopardy clauses of state and federal constitutions bar dual convictions and sentences for murder with firearm and improper exhibition of same firearm), quashed on other grounds, 610 So.2d 435 (Fla. 1992).

Here, as in the double punishment for the firearm in Cleveland, Maxwell is being thrice punished for the single continuing possession of a gun. The triple convictions violate double jeopardy and must be reversed.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court affirm the district court opinion, which vacated two of his three convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Vincent Altieri, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Daniel K. Maxwell, inmate no. 562431, Holmes Correctional Institution, P.O. Box 190, Bonifay, Florida 32425, this 23 day of May, 1996.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
	:	
Petitioner,	:	
	:	
vs.	:	CASE NO. 87,290
	:	
DANIEL MAXWELL,	:	
	:	
Respondent,	:	
	:	
	:	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

DANIEL MAXWELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 94-2953

Opinion filed January 4, 1996.

An appeal from the Circuit Court for Leon County.
William L. Gary, Judge.

Nancy A. Daniels, Public Defender; Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Vincent Altieri, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

In this direct criminal appeal, appellant raises three issues: (1) whether he could be convicted of, and sentenced for, carrying a concealed firearm, possession of a short-barreled shotgun and possession of a firearm by a convicted felon when all arose out of a single episode and all involved the same act of possession; (2) whether the evidence was legally sufficient to sustain the conviction for carrying a concealed firearm; and (3)

whether the habitual offender statute is unconstitutional as applied because it violates the right of black defendants to equal protection of the laws. We affirm in part and reverse in part.

We agree that appellant may not be convicted of, and sentenced for, carrying a concealed firearm, possession of a short-barreled shotgun and possession of a firearm by a convicted felon because all three offenses arose out of a single episode and all involved the same act of possession. M.P.C. v. State, 659 So. 2d 1293 (Fla. 5th DCA 1995); A.J.H. v. State, 652 So. 2d 1279 (Fla. 1st DCA 1995). See State v. Stearns, 645 So. 2d 417, 418 (Fla. 1994) (interpreting State v. Brown, 633 So. 2d 1059 (Fla. 1994), as standing for proposition that "a defendant could not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode"). Accordingly, while we affirm the conviction and sentence for possession of a short-barreled shotgun, we reverse the other two convictions and sentences, and remand with directions that the trial court enter an amended judgment and sentence reflecting conviction of possession of a short-barreled shotgun only. Our resolution of this issue renders moot appellant's second issue.

By his third issue, appellant asserts that the habitual offender statute is unconstitutional as applied, because black defendants are sentenced pursuant to its provisions some three times more often than are white defendants in the Second Judicial Circuit. However, appellant lacks standing to assert this equal protection claim, because he is white. Therefore, we do not reach the merits.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions.

ERVIN, and WEBSTER, JJ., CONCUR; BOOTH, J., SPECIALLY CONCURS WITH WRITTEN OPINION.

BOOTH, J., SPECIALLY CONCURRING.

I reluctantly concur under the cases cited in the majority opinion. However, as comprehensively addressed in Brown v. State, case no. 95-669, ____ So. 2d ____ (Fla. 1st DCA Dec. 18, 1995), I question why we cannot affirm all three of Maxwell's firearm convictions and sentences, as each of the underlying offenses contain unique statutory elements distinct from the others.