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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DANIEL MAXWELL,

Respondent.

CASE NO. 87,290

PETITIONER'S INITIAL BRIEF ON THE MERITS

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ATTORNEY GENERAL

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecution and Appellant below, will be referred to as "the State." Daniel Maxwell, the defendant and Appellant below, will be referred to as "Respondent." The record on appeal will be referred to by the symbol "R[volume number]/7," followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the instant case pursuant to article V, section 3(b)(3) of the Florida Constitution.

STATEMENT OF THE CASE AND FACTS

On July 6, 1991, the State charged Respondent with carrying a concealed firearm, possession of a short-barreled shotgun and possession of a firearm by a convicted felon, based on the same act of possession. Maxwell v. State, 666 So. 2d 951 (Fla. 1st DCA 1996); (R 455). At trial, Respondent was convicted and sentenced for all three offenses. (R 493-95, 590-99).

Respondent appealed his firearm convictions arguing that decisions of this Court and district courts required that two of his convictions be vacated on double jeopardy grounds. (Respondent's district court brief at 32-38). The State argued

that the convictions did not violate double jeopardy because of clearly stated legislative intent otherwise, and a successful Blockburger, infra, test. (State's district court brief at 4-12). On January 4, 1996, the First District rendered its decision, holding that "[Respondent] may not be convicted of, and sentenced for, [all three offenses] because [they] all . . . arose out of a single episode and all involved the same act of possession." Maxwell, supra. Accordingly, the district court affirmed Respondent's conviction and sentence for possession of a short-barreled shotgun, but reversed the other two convictions and sentences. Id.

On January 29, 1996, the State timely filed notice to invoke this Court's discretionary jurisdiction. On February 8, 1996, the State filed its jurisdictional brief, arguing that this Court should accept jurisdiction in this case because it presents the same issue presented in M.P. v. State, 662 So. 2d 1359 (Fla. 3d DCA 1995), rev. pending (Fla. case no. 86,968). Finally, on April 11, 1996, this Court issued an order accepting jurisdiction, and establishing a briefing schedule.

SUMMARY OF ARGUMENT

Respondent's three convictions and sentences arising out his possession of one firearm did not violate double jeopardy. Respondent was properly convicted and sentenced on all three offenses because the legislature clearly specified its intent that multiple convictions may arise out of one act. The convictions are also valid because the statutory requirements of each offense includes a unique element. Finally, this Court's decisions in State v. Brown, infra, and State v. Stearns, infra, are not dispositive of the instant case. Accordingly, Respondent's double jeopardy protections were not violated; thus, the two convictions and sentences reversed by the district court must be reinstated.

ARGUMENT

ISSUE

WHETHER RESPONDENT'S THREE CONVICTIONS AND SENTENCES ARISING OUT OF HIS POSSESSION OF ONE FIREARM, VIOLATED DOUBLE JEOPARDY?

Respondent's three convictions and sentences based on his possession of one firearm did not violate double jeopardy because the legislature clearly specified its intent that multiple convictions may arise out of one act. The convictions are also valid because the statutory requirements of each offense includes a unique element. Finally, this Court's decisions in State v. Brown, infra, and State v. Stearns, infra, are not dispositive of the instant case. Accordingly, Respondent's double jeopardy protections were not violated; thus, the two convictions and sentences reversed by the district court must be reinstated.

This double jeopardy issue requires a determination of law. Thus, the standard of review is de novo. Philip J. Padovano, Florida Appellate Practice § 5.4B, at 32 (1994 Supp.).

1. The Florida Legislature clearly intends that cumulative convictions and sentences may be imposed based on one act; thus, Respondent's cumulative convictions and sentences did not violate double jeopardy.

Clearly specified legislative intent controls the determination of whether a single act may result in multiple convictions without violating double jeopardy. Ohio v. Johnson, 467 U.S. 493, 499, 104 S. Ct. 2536, 2541, 81 L. Ed. 2d 425 (1984); State v. Smith, 547 So. 2d 613, 616 (Fla. 1989). In Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d (1983), the United States Supreme Court held that when a legislature specifically authorizes cumulative punishments under two statutes for the same act, the trial court may impose cumulative punishments. Id. at 368-369. Cumulative punishments, based on legislative intent, do not violate double jeopardy even if the offenses fail the Blockburger[1] test. United States v. Moore, 43 F. 3d 568, 573 (11th Cir. 1995). E.g., United States v. Johnson, 32 F. 3d 82 (4th Cir. 1994)(convictions for carjacking with firearm and use or carrying of firearm during violent crime do not violate double jeopardy because of clear legislative intent, despite Blockburger failure); United States v.

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[1] Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932) (holding that to determine whether one act can result in multiple convictions, the offense statutes must be compared to determine "whether each [statute] requires proof of an additional fact which the other does not.").

Singeton, 16 F. 3d 1419 (5th Cir. 1994)(same); United States v. Sabini, 842 F. Supp. 1448 (S.D. Fla. 1994), affirmed, 48 F. 3d 536 (11th Cir. 1995)(Table). Adherence to legislative intent is based on the separation of powers doctrine, upon which this Court demands unequivocal adherence. B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994) (stating "without exception[,] . . . Florida's Constitution absolutely requires a 'strict' separation of powers"). Judges should only determine whether laws satisfy constitutional limits, and should not substitute their personal beliefs for the judgment of legislators, who are elected to pass laws. Kahn v. Shevin, 416 U.S. 351, 356 n.10, 94 S. Ct. 1734, 1737 n.10, 40 L. Ed. 2d 189 (1974); Sirmons v. State, 634 So. 2d 153, 156 (Fla. 1994)("This Court's obligation is to apply the statute as it is written.")(Grimes, J., dissenting). Thus, this Court must determine whether the Florida legislature specified its intent that multiple firearm convictions may arise out of one act of possession.

Applying the above rules of law to the facts in the instant case, it is clear that Respondent's multiple firearm convictions and sentences did not violate double jeopardy. The Florida Statutes clearly provide that "[w]hoever, in the course of one criminal transaction or episode, commits an act or acts which

constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense . . . ." § 775.021(4)(a), Fla. Stat. (1991). The statutes also provide that "[t]he intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to [apply] the [rule] of lenity . . . ." § 775.021(4)(b), Fla. Stat. (1991). This Court cannot substitute its beliefs for the legislative intent clearly specified in section 775.021. Accordingly, the legislature clearly specified its intent that Respondent may be convicted of each offense based on one act, without violating double jeopardy. Smith, supra at 616. Thus, Respondent's convictions did not violate double jeopardy.

2. Respondent's cumulative convictions and sentences satisfied Blockburger; thus, they did not violate double jeopardy.

This Court held that "offenses are separate, allowing for conviction and punishment for each, if a comparison of the statutory elements, without regard to the facts . . ., reveals that each offense requires proof of an element that the other does not[,]" where the legislature has not clearly specified its intent to allow multiple convictions based on one act. State v.

Henriquez, 485 So. 2d 414, 415-16 (Fla. 1986); Smith, supra at 616; see § 775.021(4)(a), Fla. Stat. (1991)("offenses are separate if each offense requires proof of an element that the other does not . . . ."))(codification of Blockburger, supra, as exception to general rule). Satisfaction of the above test shows that the legislature clearly intended separate convictions and punishments. Henriquez, supra at 416. This test is satisfied despite any overlap in elements between the offenses. Moore, 43 F. 3d at 571; see, e.g., Skeens v. State, 556 So. 2d 1113-14 (Fla. 1990)(holding that convictions for carrying concealed firearm and possession of firearm by felon, arising out of same act, did not violate double jeopardy because each had unique element). Thus, this Court must determine, in the absence of clearly stated legislative intent, whether the Blockburger test allows multiple firearm convictions and sentences based on possession of one firearm.

Turning to the facts in the instant case, it is clear that the trial court properly adjudicated Respondent guilty and sentenced him based on all three offenses because each offense contains a unique element. The offenses are: carrying a concealed firearm, § 790.01(2), Fla. Stat. (1991)("whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of the third degree . . . ."); possession of a short-barreled shotgun §

790.221, Fla. Stat. (1991)("It is unlawful for any person to own or to have in his care, custody, possession, or control any . . . short-barreled shotgun . . . ."); and possession of a firearm by a convicted felon, § 790.23, Fla. Stat. (1991)("It is unlawful for any person who has been convicted of a felony in the courts of this state . . . to own . . . or control any firearm . . . ."). (R 1/7 455). All of the offenses are different because they all have at least one unique element, even though all of the offenses are similar in that they each have a common firearm element. Section 790.01(2) requires that the weapon be "concealed," section 790.221 requires a "short-barreled shotgun," and section 790.23 requires that the accused in possession of the firearm previously have been "convicted of a felony." Accordingly, if this Court conducts the analysis required by statute and case law alike, it must find that each offense has unique elements; consequently, convictions for each offense arising out of the same transaction does not violate double jeopardy, despite the overlapping firearm elements. Skeens, supra; Moore, supra. Thus, Respondent's three convictions and sentences did not violate double jeopardy.

Federal application of Blockburger clearly allows multiple firearm convictions based on possession of one firearm.[2] E.g., United States v. Haggerty, 4 F. 3d 901, 904 (10th Cir. 1993)(holding convictions for reckless handling of firearm and possession of firearm by felon, based on one episode, proper because they involved different crimes); Johnson v. Howard, 963 F. 2d 342, 346 (11th Cir. 1992)(holding Blockburger allowed convictions for carrying pistol without license and possession of pistol after conviction for crime of violence based on possession of one pistol); United States v. Karlin, 852 F. 2d 968, 974 (7th Cir. 1988); United States v. Quimette, 798 F. 2d 47, 50 (2d Cir. 1986); United States v. Stewart, 780 F. Supp. 1366, 1369 n.8 (N.D. Fla. 1991). Accordingly, under federal interpretation of Blockburger, a defendant may be convicted of multiple firearm offenses based on one episode. Thus, Respondent's convictions and sentences did not violate double jeopardy.

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[2] The double jeopardy clause of the Florida Constitution mirrors the same clause in the United States Constitution. See U.S. Const. Amend. V; Art. I, § 9, Fla. Const.; Carawan v. State, 515 So. 2d 161, 164 (Fla. 1987), superseded by statute, Smith 547 So. 2d at 613.

3. This Court's decisions in State v. Brown, infra, and State v. Stearns, infra, do not support the contention that Respondent's three firearm convictions and sentences violate double jeopardy.

An application of State v. Brown, 633 So. 2d 1059, 1060-61 (Fla. 1994), does not forbid Respondent's three firearm convictions on double jeopardy grounds. In Brown, the jury convicted the defendant of four offenses arising out of one episode: (1) armed robbery; (2) attempted first-degree murder; (3) use of a firearm in the commission of a felony; and (4) shooting into a building. Id. at 1060. On appeal, the First District reversed the defendant's conviction for use of a firearm in the commission of a felony, holding that the defendant could not be convicted of possession of a firearm during the commission of a felony when he also received an enhanced sentence for carrying a firearm during the commission of a robbery, where both crimes took place in one criminal episode. Id. The district court stated that:

> The Legislature expressed its specific intent concerning separate convictions and sentences for two crimes committed during the same criminal transaction by the by the passage of . . . section 775.021(4)(b), Florida Statutes[.] The court stated in Smith, that 'absent a statutory degree crime or a contrary clear and specific statement of legislative intent . . . all criminal offenses containing unique statutory elements shall be separately punished and, thus, section 775.021(4)(a), Florida Statutes, should be strictly applied without judicial gloss.

Brown v. State, 617 So. 2d 744, 746 (Fla. 1st DCA 1993), approved, 633 So. 2d 1059 (Fla. 1994). However, the district court found that there was no distinction in the statutory elements of armed robbery and use of a firearm in the commission of a felony. 617 So. 2d at 747. Accepting this conclusion as valid, the district court's decision was proper because it was necessary to read the charging instrument to determine whether the possession of a firearm charge stemmed from the robbery or another offense. Because statutory offenses should be distinguishable just by comparing the statutory elements alone, defendant's conviction of both violated double jeopardy. See, e.g., Johnson, supra at 85 (holding that carjacking with a firearm and use or carrying of firearm during crime of violence failed Blockburger because of impossibility of use or carrying firearm and not, at same time, possessing it); Singleton, supra at 1423-25 (same). In contrast, in the instant case it is clear, just by reading the statutory elements of Respondent's offenses, that there are unique elements in each offense that are dispositive of a double jeopardy claim. See supra. Thus, the trial court properly convicted Respondent of the instant offenses.

Furthermore, State v. Stearns, 645 So. 2d 417, 418 (Fla. 1994), is not dispositive of the instant case for the same reason. In Stearns, the defendant was convicted of: (1) burglary of a structure while armed; (2) grand theft; and (3) carrying a concealed weapon while committing a felony. Stearns v. State 626 So. 2d 254, 255 (Fla. 5th DCA 1993). The issue on appeal was "whether a defendant, who commits an armed burglary of a structure and grand theft of property found therein, can also be convicted of carrying a concealed weapon while committing a felony." Id. The district court held that the defendant could not, and reversed his conviction for carrying a concealed weapon while committing a felony. Id. On review, this Court approved of the district court's decision, and expressly relied on its recent decision in Brown and, therefore, the First District's analysis below. State v. Stearns, 645 So. 2d 417 (Fla. 1994). However, even if the Brown analysis is applied to the convictions in the instant case, this Court must find that there are unique elements in each offense, thereby allowing Respondent's multiple firearm convictions. See supra. Accordingly, Brown and Stearns are inapposite to the instant case. Thus, Respondent's convictions and sentences for all three firearm offenses, based on the possession of one firearm, did not violate double jeopardy.

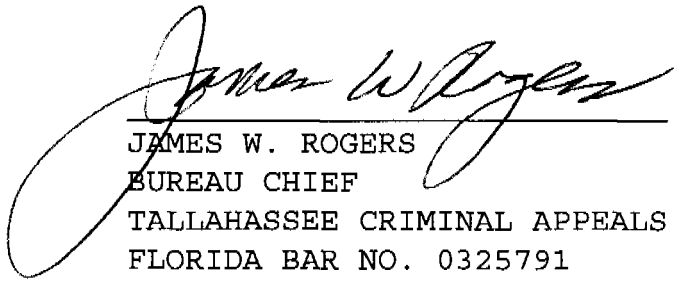
Finally, these two cases were the basis for the First District's decision in A.J.H. v. State, 652 So. 2d 1279 (Fla. 1st DCA 1995), upon which Respondent relied below. In A.J.H., the defendant was convicted of unlawful possession of a firearm by a minor, carrying a concealed firearm, and possession of a firearm by one found guilty of a delinquent act that would have been a felony if committed by an adult. Id. Instead of comparing the offenses for unique elements (i.e., "minor," "concealed," and delinquent act same as adult felony), the First District turned the analysis on its head and focused on the similarity of the firearm element of each offense and reversed the first two convictions. Id. Thus, the court ignored what was unique and, instead, singled out what was common, thereby avoiding the logical finding that the crimes were indeed separate because of their unique elements. Skeens, supra. Accordingly, A.J.H. is not dispositive of Respondent's three convictions and sentences. Thus, Respondent's convictions did not violate double jeopardy.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests that this Honorable Court reverse the First District's decision to vacate two of Respondent's three firearm convictions and sentences, and remand the case for reinstatement of the vacated convictions and sentences.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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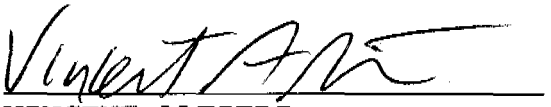

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Suite 401, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 9th day of May, 1996.

Vincent Altieri
Assistant Attorney General

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APPENDIX

mences, the offender is destined to endure the whole term.

I necessarily agree with *Baker* that it would constitute an interference with the performance of another branch of government for a judge to forbid DOC from recommending remission when those unforeseeable future events occur. The authority to make the recommendation is reposed with the executive branch, not the judicial branch. While the power to end the probation before term is with the judge, the duty to recommend remission lies elsewhere.

Sometimes sentencing judges retire, move on to other courts, or pass away. It seems to me a felicitous use of judicial powers for a sentencing judge to do what this judge did. Although the condition appears to be cast in imperative terms, I construe its effect to be in the subjunctive mood. The trial judge has simply provided in unmistakable words that if this case falls before a new judge on a new day with a request to end the grace of prison avoidance early, the successor judge will know precisely what the sentencing judge had in mind. Moreover, the offender will know and can guide his conduct accordingly.

Hence, reading the condition as a precatory condition, I can find no error. In addition to affirming the conviction, I would affirm the sentence in its entirety.

Daniel MAXWELL, Appellant,

v.

STATE of Florida, Appellee.

No. 94-2953.

District Court of Appeal of Florida, First District.

Jan. 4, 1996.

Defendant was convicted in the Circuit Court, Leon County, William L. Gary, J., of carrying concealed firearm, possession of short-barreled shotgun, and possession of firearm by convicted felon, and he appealed. The District Court of Appeal held that: (1) defendant could not be convicted for carrying concealed firearm, possession of short-barreled shotgun, and possession of firearm by convicted felon arising out of single criminal episode and involving same act of possession, and (2) defendant lacked standing to assert equal protection claim that habitual offender statute was unconstitutional as applied.

Affirmed in part; reversed in part; and remanded.

Booth, J., concurred with separate opinion.

1. Double Jeopardy ⇐140

Defendant could not be convicted for carrying concealed firearm, possession of short-barreled shotgun, and possession of firearm by convicted felon, consistent with double jeopardy clause, where all three offenses arose out of single episode and all involved same act of possession. U.S.C.A. Const.Amend. 5.

2. Constitutional Law ⇐42.1(3)

White defendant lacked standing to assert equal protection claim that habitual offender statute was unconstitutional as applied, on grounds that black defendants were sentenced pursuant to its provisions some three times more often than were white defendants. U.S.C.A. Const.Amend. 14.

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.

[1] 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.

[2] 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.

Daniel MAXWELL, Appellant,

v.

STATE of Florida, Appellee.

No. 94–2424.

District Court of Appeal of Florida, First District.

Jan. 4, 1996.

An appeal from the Circuit Court for Leon County; N. Sanders Sauls, Judge.

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

Robert A. Butterworth, Attorney General; James W. Rogers, Bureau Chief of Criminal Appeals, Tallahassee Division; Vincent Altieri, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

We affirm the order of revocation of probation. However, we remand with directions that the trial court enter an amended order specifying the violations found to have been committed, and deleting any reference to the convictions in circuit court case number 91–2126 for carrying a concealed firearm and possession of a firearm by a convicted felon, which convictions this court has set aside in *Maxwell v. State*, 666 So.2d 951 (Fla. 1 DCA 1996).