IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DANIEL MAXWELL,

Respondent.

CASE NO. 87-290

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. DANIEL MAXWELL, Respondent.	CASE NO. 87-290

PRELIMINARY STATEMENT

This is a petition for discretionary review, pursuant to article V, section 3(b)(3) of the Florida Constitution, based on the claim that the district court of appeal's decision that a defendant cannot be convicted of more than one firearm offense based on the possession of a firearm during the same criminal episode, expressly and directly conflicts with the decision of the Third District Court of Appeal in M.P. v. State, 20 Fla. L. Weekly D2569 (Fla. 3d DCA Nov. 22, 1995), rev. pending (Fla. case no. 86-968). Article V, § 3(b)(3) provides that this Court may exercise jurisdiction to review a district court of appeal's decision that expressly and directly conflicts with the decision of another district court of appeal, based on the four corners of the opinion. Reaves v. State,

485 So. 2d 829 (Fla. 1986). Thus, if the district court's decision expressly and directly conflicts with the M.P. decision, jurisdiction is proper.

In addition, this Court's conflict jurisdiction may be properly invoked where this Court has already granted review in a case that presents the same issue for review as in the conflict case. Jollie v. State, 405 So. 2d 418 (Fla. 1981). Thus, if this Court grants review in a case that presents the same question as the instant case, then this Court may properly grant jurisdiction to the case sub judice.

Respondent, Daniel Maxwell, defendant below, will be referred to as "Respondent." Petitioner, the State of Florida, will be referred to as "the State."

STATEMENT OF THE CASE AND FACTS

The opinion below shows that Respondent appealed, among other things, his convictions of carrying a concealed firearm, possession of a short-barreled shotgun and possession of a firearm by a convicted felon, all of which arose out of a single criminal episode, involving the same act of possession. Maxwell v. State, 21 Fla. L. Weekly D118 (Fla. 1st DCA Jan. 4, 1996). The First District held that "[Respondent] 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 the same 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)." 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 4, 1996, the court of appeal rendered its decision in the instant case. Then, on January 29, 1996, the State timely filed notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

The district court's decision that Respondent could not be convicted of more than one firearm offense based on the possession of one firearm during the same criminal episode, expressly and directly conflicts with the decision of the Third District Court of Appeal in M.P. v. State, 20 Fla. L. Weekly D2569 (Fla. 3d DCA Nov. 22, 1995). In M.P., the Third District held--where M.P. was adjudicated delinquent for carrying a concealed weapon and possession of a firearm by a minor based on the same weapon and the same incident--"that the dual adjudications do not violate M.P.'s constitutional right not to be placed in double jeopardy." Id. Accordingly, the First District's decision in Maxwell is in express direct conflict with the Third District's decision in M.P. Thus, this Court must grant its discretionary jurisdiction to resolve this conflict between the districts.

In addition, this Court's conflict jurisdiction may be properly invoked because this Court is pending review in M.P. and, therefore, may have the same issue before it. Jollie v. State, 405 So. 2d 418 (Fla. 1981). Thus, this Court should grant its discretionary conflict jurisdiction to review the decision rendered below.

ARGUMENT

ISSUE I

WHETHER THIS COURT SHOULD GRANT JURISDICTION TO REVIEW THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN MAXWELL V. STATE, 21 Fla. L. Weekly D118 (Fla. 1st DCA Jan. 4, 1996)?

The district court's decision that Respondent could not be convicted of more than one firearm offense based on the possession of a firearm during the same criminal episode, expressly and directly conflicts with the decision of the Third District Court of Appeal in M.P. v. State, 20 Fla. L. Weekly D2569 (Fla. 3d DCA Nov. 22, 1995). In M.P., the Third District held--where M.P. was adjudicated delinquent for carrying a concealed weapon and possession of a firearm by a minor based on the same weapon and the same incident--"that the dual adjudications do not violate M.P.'s constitutional right not to be placed in double jeopardy." Id. Accordingly, the First District's decision in Maxwell is in express direct conflict with the Third District's decision in M.P. Thus, this Court must grant its discretionary jurisdiction to resolve this conflict between the districts.

Article V, section 3(b)(3) of the Florida Constitution provides that this Court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision

of another district court of appeal . . . on the same question of law." The issue to be decided in a petition for conflict jurisdiction is "whether there is express and direct conflict in the decision of the district court before [this Court,] for [which a party seeks] review . . . ." Dodi Pub. Co. v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980). This Court has explained that:

> This Court in the broadest sense has subject-matter jurisdiction . . . over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself . . . . That is, the opinion must contain a statement of law or citation effectively establishing a point of law upon which the decision rests.

Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). Thus, this Court must determine whether the instant decision and the M.P. decision are in express and direct conflict.

Applying the above rules of law to the decisions relevant to the instant case, it is clear that the decisions are in express and direct conflict. The four corners of both decisions show that the respective defendants were convicted of multiple firearm/weapon offenses arising out of the possession of one firearm, within one criminal episode. See M.P., supra; Maxwell, supra. However, when determining the issue of whether multiple convictions are allowed in such cases, the courts diverged. In M.P., the Third District

Court of Appeal decided "that the dual adjudications do not violate M.P.'s constitutional right not to be placed in double jeopardy . . ." and, therefore affirmed M.P's convictions. M.P., supra. However, in Maxwell, the First District Court of Appeal decided, with respect to the same question of law, that "[Respondent] may not be convicted of, and sentenced for, [multiple firearms offenses] because all three offenses arose out of a single episode and all involved the same act of possession . . ." and, therefore, affirmed only one of Respondent's firearms convictions, while reversing the other two. Maxwell, supra. Accordingly, the latter decision is in express and direct conflict with the former decision. Thus, this Court should grant conflict jurisdiction in the case sub judice.

In addition, there is another basis upon which this Court may grant its discretionary jurisdiction. In Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981), this Court held that "a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court . . . constitute[s] [a] prima facie express conflict and allows this Court to exercise its jurisdiction." See, e.g., Taylor v. State, 601 So. 2d 540, 541 (Fla. 1992)(this Court granted conflict jurisdiction in per curiam affirmance where only one of

three cited cases had been granted review by this Court). This manner of finding conflict jurisdiction, however, is not limited to instances where a per curiam decision expressly relies on a cited authority that has been granted this Court's review, but also when the same issue has been granted this Court's review, albeit in a different case. State v. Rhodes, 623 So. 2d 470, 471 (Fla. 1993)(This Court granted conflict jurisdiction because the "district court cited its decision in Kelly[, where review had been denied,] . . . as the basis for reversal. The district court certified the issue raised in Kelly to this Court in Williams, . . . a case which we subsequently accepted for review. Thus, we accept jurisdiction . . . ."). The reason for this rule is that this Court must acknowledge its own actions when dispensing with cases before it. Jollie, supra at 418. Thus, this Court must determine whether it should exercise its conflict jurisdiction because the same issue that is involved in the instant case is pending review in another case.

Turning to the instant case, it is clear that this Court should exercise its jurisdiction to review the instant case if review is granted in M.P. In M.P., at the end of its decision, the Third District stated "that [its] holding[, concerning the same issue discussed above,] directly conflicts with that of the Fifth

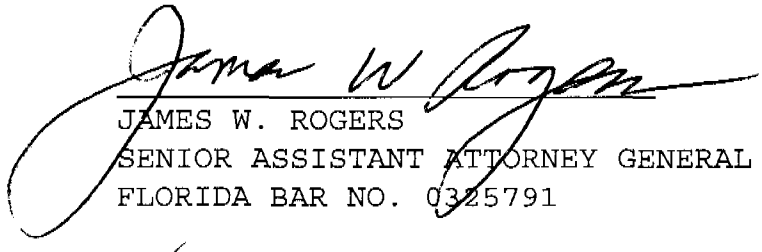
District in M.P.C. v. State, 659 So. 2d 1293 (Fla. 5th DCA 1995) and that of the First District in A.J.H. v. State, 652 So. 2d 1279 (Fla. 1st DCA 1995). Accordingly, [it] certif[ied] conflict with those decisions." M.P., supra. Furthermore, this Court is pending review in M.P.; thus, the same issue present in the instant case is pending review before this Court. M.P., supra, rev. pending (Fla. case no. 86-968). Accordingly, if review is granted in M.P., this Court should similarly exercise its jurisdiction in the instant case. Jollie, supra.

CONCLUSION

Based on the above cited legal authorities, the State respectfully requests that this Honorable Court accept jurisdiction in the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing 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 8th day of February, 1996.

Vincent Altieri
Assistant Attorney General

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find only one issue with merit. The Husband argues that the trial court abused its discretion by refusing to correct a $10,000 mathematical error in calculating the parties' equity in the marital home. We agree.

The marital home, awarded to the Wife, was found to have a fair market value of $105,000, encumbered by a mortgage with a balance of $20,000. The final judgment incorrectly reflected the home to have an equity of $75,000, instead of the correct amount of $85,000. The trial court refused to reconsider distribution of the marital assets when the math error was called to its attention on motion for rehearing.

We find that a mathematical error in the amount of $10,000 is significant when viewed in the context of a marital estate having a net value of less than $200,000, and may have materially affected an equitable distribution of the marital assets.

Accordingly, we REVERSE that part of the final judgment providing for equitable distribution and REMAND for reconsideration of an equitable distribution of the marital assets in view of the correct value of the marital home. The final judgment in all other respects is AFFIRMED. (WOLF, LAWRENCE and BENTON, JJ., CONCUR.)

* * *

Criminal law—Separate convictions and sentences for carrying concealed firearm, possession of short-barreled shotgun, and possession of firearm by convicted felon improper where offenses arose out of single episode and involved same act of possession—Sentencing—Habitual offender—White defendant lacks standing to assert equal protection challenge to habitual offender statute on ground that its provisions are applied disproportionately to black defendants

DANIEL MAXWELL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-2953. Opinion filed January 4, 1996. An appeal from the Circuit Court for Leon County. William L. Gary, Judge. Counsel: 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) [21 Fla. L. Weekly D10], 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.

* * *

Criminal law—Probation revocation—Order to be amended to specify violations committed and to delete reference to convictions which were set aside on appeal

DANIEL MAXWELL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-2424. Opinion filed January 4, 1996. An appeal from the Circuit Court for Leon County. N. Sanders Sauls, Judge. Counsel: 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*, Case No. 94-2953.

AFFIRMED and REMANDED, with directions. (ERVIN, BOOTH and WEBSTER, JJ., CONCUR.)

* * *

Criminal law—Counsel—Error to deny motion to withdraw in which public defender certified conflict of interest—Fact that public defender's representation of one of clients with allegedly conflicting interests had been concluded by time defendant's case came to trial does not matter

DAVID MINCEY, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-2495. Opinion filed January 4, 1996. An appeal from the Circuit Court for Duval County. R. Hudson Olliff, Judge. Counsel: Nancy A. Daniels, Public Defender and Fred Parker Bingham, II, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General and Richard Parker, Assistant Attorney General, Tallahassee, for Appellee.

(JOANOS, J.) In this direct appeal from a conviction and sentence for robbery, appellant raises three issues, one of which requires reversal and remand for a new trial.

A few days before trial was scheduled to begin, appellant's appointed public defender filed a motion to withdraw as counsel, certifying conflict based on information only recently acquired. The trial court denied the motion, rejecting the public defender's argument based on *Nixon v. Siegel*, 626 So. 2d 1024 (Fla. 3d DCA 1993), and determining that the court had the responsibility to go behind the certification of conflict and determine whether a conflict actually existed.

Subsequently, the supreme court issued its opinion in *Guzman v. State*, 644 So. 2d 996, 999 (Fla. 1994), in which it made specific reference to the pertinent language in *Nixon*:

> [O]nce a public defender moves to withdraw from the representation of a client based on a conflict due to adverse or hostile interests between the two clients, under section 27.53(3), Florida Statutes (1991), a trial court must grant separate representation. *Nixon v. Siegel*, 626 So.2d 1024 (Fla. 3d DCA 1993). As the district court stated in *Nixon*, a trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. This is true even if the representation of

Volume 20, Number 48
December 1, 1995

DISTRICT COURTS OF APPEAL

Criminal law—Juveniles—Dual adjudications for carrying concealed weapon and possession of firearm by minor do not violate double jeopardy rights notwithstanding that both charges were based on same weapon and arose from same incident—When it enacted statute proscribing possession of firearm by minor, legislature specifically articulated its intent to punish that offense in addition to other firearm-related offenses—Offenses contain unique prohibitions and are separate offenses for purposes of double jeopardy analysis—Conflict certified

M.P., a juvenile, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-675. Opinion filed November 22, 1995. An Appeal from the Circuit Court for Dade County, D. Bruce Levy, Judge. Counsel: Bennett H. Brummer, Public Defender, and Harvey J. Sepler, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Richard R. Polin, Assistant Attorney General, and Paul Savage, Certified Legal Intern, for appellee.

(Before SCHWARTZ, C.J., NESBITT, and JORGENSON, JJ.)

(JORGENSON, Judge.) M.P. appeals from an adjudication of delinquency. We affirm.

M.P. was adjudicated delinquent for carrying a concealed weapon in violation of section 790.01, Florida Statutes (1993), and possession of a firearm by a minor in violation of section 790.22(3), Florida Statutes (Supp. 1994). Both charges related to the same weapon and arose from the same incident.

We hold that the dual adjudications do not violate M.P.'s constitutional right not to be placed in double jeopardy. In determining the constitutionality of dual punishments for two offenses arising from the same criminal transaction, the dispositive question is whether the legislature "intended to authorize separate punishments for the two crimes." *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 1145, 67 L. Ed. 2d 275, ___ (1981); *see also Jeffers v. United States*, 432 U.S. 137, 97 S. Ct. 2207, 53 L. Ed.2d 168 (1977) (critical inquiry in double jeopardy analysis is whether Congress intended to punish each statutory violation separately); *State v. Smith*, 547 So. 2d 613 (Fla. 1989) (same). When the Florida legislature enacted section 790.22(3), it specifically articulated its intent to punish possession of a firearm by a minor in addition to other firearm-related offenses by providing that "[t]he provisions of this section are *supplemental* to all other provisions of law relating to the possession, use, or exhibition of a firearm." § 790.22(7), Fla. Stat. (Supp. 1994) (emphasis added). On that basis alone, the dual adjudications pass constitutional muster.

Furthermore, each offense requires proof of an element that the other does not; they are thus considered separate offenses for the purpose of a double jeopardy analysis. *See Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed.2d 306 (1932); *see also, Gaber v. State*, No. 94-2328 (Fla. 3d DCA Nov. 8, 1995) [20 Fla. L. Weekly D2492]; *State v. Smith*, 547 So. 2d at 616. Although the two offenses share the common element of possession of a firearm, each statute addresses separate societal evils; each contains a unique prohibition. Section 790.01 prohibits concealment of a weapon; section 790.22(3) prohibits possession of a firearm by a minor.

We recognize that our holding directly conflicts with that of the Fifth District in *M.P.C. v. State*, 659 So. 2d 1293 (Fla. 5th DCA 1995) and that of the First District in *A.J.H. v. State*, 652 So. 2d 1279 (Fla. 1st DCA 1995). Accordingly, we certify conflict with those decisions.

Finding no merit in the remaining points on appeal, we affirm.

Affirmed; conflict certified.

* * *

Criminal law—Post conviction relief—Statute does not permit defendant to be sentenced as habitual felony offender on conviction for unlawful possession of controlled substance—Defendant to be resentenced on conviction for unlawful possession of cocaine

LARRY CARLTON, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-2628. Opinion filed November 22,1995. An appeal from the Circuit Court of Dade County, Alejandro Ferrer and Arthur I. Snyder, Judges. Counsel: Larry Carlton, in proper person. Robert A. Butterworth, Attorney General, for appellee.

(Before HUBBART and BASKIN and JORGENSON, JJ.)

(PER CURIAM.) Upon the state's confession of error, with which we agree, we reverse the order under review denying the defendant Larry Carlton's motion to vacate judgment and sentence under Fla.R.Crim.P. 3.850 and remand the cause to the trial court with directions: (1) to grant the defendant's motion to vacate *solely* as to the habitual felony offender sentence of five years imprisonment imposed on the conviction for unlawful possession of cocaine, as Section 775.084(1)(a)(3), Florida Statutes (1993), does not permit a defendant to be sentenced as a habitual felony offender on a conviction for unlawful possession of a controlled substance under Section 893.13, Florida Statutes (1993), *Perez v. State*, 647 So. 2d 1007 (Fla. 3d DCA 1994), and (2) to resentence the defendant on the conviction for unlawful possession of cocaine to an appropriate sentence pursuant to the sentencing guidelines [the defendant need not be present in court for the resentencing]. We find no merit, however, in the remaining points raised on appeal by the defendant.

Reversed and remanded.

* * *

Criminal law—Sentencing—Correction—State laid sufficient predicate to support habitual violent felony offender classification—Error to impose consecutive habitual violent offender sentences

RUBEN SERRANO, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-516. Opinion filed November 22, 1995. An appeal from the Circuit Court of Dade County, Richard V. Margolius, Judge. Counsel: Bennett H. Brummer, Public Defender, and Julie M. Levitt, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Wanda Raiford, Assistant Attorney General, for appellee.

(Before HUBBART and JORGENSON and GERSTEN, JJ.)

(PER CURIAM.) This is an appeal by the defendant Ruben Serrano from a trial court order denying his motion to correct an illegal sentence under Fla.R.Crim.P. 3.800(a). We conclude, contrary to the defendant's contention, that a sufficient predicate was laid by the state for the trial court to declare the defendant a habitual violent felony offender under Section 775.084(1)(b),(4)(b), Florida Statutes (1989). Upon the state's confession of error, however, we conclude that it was illegal for the trial court to impose two consecutive habitual violent offender sentences of thirty years each on the two counts of aggravated battery for which the defendant was convicted, as only concurrent sentences were permissible in this case. *State v. Callaway*, 658 So. 2d 983 (Fla. 1995); *Hale v. State*, 630 So. 2d 521 (Fla. 1993), *cert. denied*, __ U.S. __, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994).

The trial court order denying the defendant's motion to correct an illegal sentence is reversed, and the cause is remanded to the trial court with directions to grant the subject motion and thereafter impose the sentences originally entered in all respects, except that the sentences imposed on the defendant's two convictions shall run concurrently, rather than consecutively.

Reversed and remanded.

* * *