

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellee/Petitioner,

v.

FSC Case No.

2d DCA Case No. 94-0426

88076

JEFFREY ALLEN HUNTER,

Appellant/Respondent.

_____ /

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Citations to the record on appeal will be referred to by the symbol (R) followed by the appropriate page number. Citations to the transcript of the trial will be referred to by the symbol (T) followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On May 5, 1994, the State filed an amended information charging Respondent with numerous crimes including grand theft of a firearm and armed burglary. (R.22-28). A jury trial was conducted on July 11-13, 1994, before the Honorable Daniel Andrews, Circuit Court Judge in and for the Tenth Judicial Circuit, Polk County, Florida. (T.1-423). The State introduced evidence that Respondent burglarized Terry Hardy's residence and stole a firearm. (T.138-141; 244-248). The jury convicted Respondent of armed burglary and grand theft of a firearm and specifically found that Respondent armed himself during the course of the burglary by stealing the firearm. (R.37-38).

As to Count One, armed burglary, the trial court sentenced Respondent to life with a minimum mandatory sentence of fifteen years, and a concurrent three year minimum mandatory for the firearm. (R.112; 126; 133). On Count Two, grand theft of a firearm, the court sentenced Respondent to ten years concurrent with Count One. (R.112; 127).

Respondent appealed to the Second District Court of Appeal and argued that double jeopardy barred Respondent's convictions for armed burglary and grand theft of a firearm arising from the same criminal episode. On April 12, 1996, the Second District

Court of Appeal vacated Respondent's grand theft conviction stating, "[d]ouble jeopardy bars conviction for armed burglary and grand theft of a firearm when, as here, the act of stealing the firearm converts the burglary into an armed burglary." Hunter v. State, 21 Fla. L. Weekly D900, D900 (Fla. 2d DCA Apr. 12, 1996) (Appendix A). Petitioner timely filed a Motion for Rehearing or Certification which the Second District Court of Appeal denied on May 13, 1996 (Appendix B). On or about May 16, 1996, Petitioner filed its Motion to Stay Mandate and Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

This Court has jurisdiction in the instant case because the Second District Court of Appeal's decision expressly and directly conflicts with the Third District Court of Appeal's decision in Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995), pending review (FSC Case No. 86,990). The two offenses at issue in this case, armed burglary and grand theft of a firearm, are subject to multiple punishment without violating double jeopardy because the two offenses require different elements of proof.

ISSUE

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE BECAUSE THE SECOND DISTRICT COURT OF APPEAL'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH A DECISION OF THE THIRD DISTRICT COURT OF APPEAL.

This Court has authority as the highest court of the state to resolve legal conflicts created by the district courts of appeal. The Florida Constitution, article V, section 3(b)(3), authorizes this Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal.

This Court has identified two basic forms of decisional conflict which properly justify the exercise of jurisdiction under section 3(b)(3) of the Florida Constitution. Either (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves "substantially the same controlling facts as a prior case. . . ." Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960). Furthermore, it is not necessary that a district court explicitly identify conflicting district court decisions in its opinion in order to create an express conflict under section 3(b)(3). Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981).

In the instant case, the Second District Court of Appeal's opinion did not explicitly identify conflict. Its decision, however, directly and expressly conflicts with Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995), pending review (FSC Case No. 86,990). The Second District Court of Appeal held that double jeopardy bars Respondent's conviction for armed burglary and grand theft of a firearm when the act of stealing the firearm converts the burglary into armed burglary. Hunter v. State, 21 Fla. L. Weekly D900 (Fla. 2d DCA Apr. 12, 1996); see also Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA 1995) (holding that convictions for both armed burglary and grand theft of a firearm violated double jeopardy). As the court in Gaber found, however, the statutory elements of theft and the elements of armed burglary are separate and distinct. 662 So. 2d at 423. As the court noted, the defendant was being punished for taking the firearm with the intent to deprive, not for possession of the weapon. Id. at 424. The defendant was also punished for the separate offense of armed burglary. Id.

In the instant case, the State charged Respondent with armed burglary in violation of Florida Statutes, section 810.02 and 775.087, and grand theft of a firearm in violation of Florida Statutes, section 812.014. (R.22-24). The evidence established


that Respondent burglarized the residence of Terry Hardy and stole clothing and a firearm while inside the residence. (T.138-141; 244-248). The Second District Court of Appeal ruled that double jeopardy barred Respondent's conviction for both offenses when the act of stealing the firearm converted the burglary to an armed burglary. This outcome directly and expressly conflicts with the Third District Court of Appeal's decision in Gaber. Based on the express and direct conflict between the district courts of appeal, the State respectfully requests that this Court accept jurisdiction and determine whether double jeopardy bars convictions for armed burglary and grand theft of a firearm when the theft of the firearm converts the burglary into armed burglary.

CONCLUSION

Based on the Second District Court of Appeal's opinion, as well as the foregoing arguments and authorities, the State respectfully requests that this Honorable Court accept jurisdiction in the instant cause.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John C. Fisher, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000 -- Drawer PD, Bartow, Florida, 33831, on this 23rd day of May, 1996.



COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellee/Petitioner,

v.

FSC Case No.

2d DCA Case No. 94-04426

JEFFREY ALLEN HUNTER,

Appellant/Respondent.

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MASTER INDEX TO APPENDICES

Appendix A

Hunter v. State, 21 Fla. L. Weekly D900 (Fla. 2d DCA Apr.
12, 1996) (Case No. 94-04426)

Appendix B

Order Denying Appellee's Motion for Rehearing or
Certification

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

AP
A

JEFFREY ALLEN HUNTER,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
_____)

Case No. 94-04426

Opinion filed April 12, 1996.

Appeal from the Circuit Court
for Polk County; Daniel True
Andrews, Judge.

REGISTERED
APR 12 1996
DEPT. OF LEGAL AFFAIRS
COMMERCIAL SERVICES
TALLAHASSEE, FL

James Marion Moorman, Public
Defender, and John C. Fisher,
Assistant Public Defender,
Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Stephen D. Ake, Assistant
Attorney General, Tampa, for
Appellee.

PATTERSON, Judge.

Jeffrey Hunter appeals from his judgment and sentence
for two counts of armed burglary, two counts of attempted second-
degree murder, aggravated battery, shooting within a private

building, and grand theft. We find merit only in Hunter's arguments regarding double jeopardy and the imposition of fees and costs.

Double jeopardy bars conviction for armed burglary and grand theft of a firearm when, as here, the act of stealing the firearm converts the burglary into an armed burglary. Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), review denied, 664 So. 2d 249 (Fla. 1995); see State v. Stearns, 645 So. 2d 417 (Fla. 1994) (double jeopardy bars convictions and sentences for two offenses involving a firearm that arise from same criminal episode). The state argues that the error is harmless; however, if the grand theft of a firearm conviction is not vacated, it can be scored as prior record in any later sentencing. Thus, we vacate Hunter's judgment and sentence for grand theft of a firearm.

The trial court imposed \$500 in attorney's fees pursuant to section 27.56, Florida Statutes (1993). As Hunter argues, the record contains no basis for the amount of the fee -- nothing reveals the hourly rate or time spent on the case. See Hankerson v. State, 464 So. 2d 700 (Fla. 2d DCA 1985) (attorney's fees must be based on estimated or actual costs, not arbitrarily imposed). Further, Hunter had no prior notice of the imposition of attorney's fees or the amount, and no notice of his right to contest the fees; thus, we strike the attorney's fees without prejudice to reimpose them in compliance with Florida Rule of Criminal Procedure 3.720(d)(1). See Farmer v. State, 617 So. 2d

447 (Fla. 2d DCA 1993); Jones v. State, 623 So. 2d 627 (Fla. 5th DCA 1993).

With respect to costs, we strike the \$2 discretionary cost the trial court imposed pursuant to section 943.25(8), Florida Statutes (1993), because the trial court did not announce it at sentencing. Reves v. State, 655 So. 2d 111 (Fla. 2d DCA 1995) (en banc). We also strike the \$33 "cost/fine" imposed without citation to statutory authority. Barnes v. State, 658 So. 2d 538 (Fla. 2d DCA 1995).

Accordingly, we vacate the grand theft conviction and strike certain costs and the attorney's fees and remand for further proceedings; in all other respects, we affirm.

RYDER, A.C.J., and DANAHY, J., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKE LAND, FLORIDA

MAY 13, 1996

JEFFREY A. HUNTER,)
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)
 Appellant(s),)
)
 v.)
)
 STATE OF FLORIDA,)
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)
 Appellee(s).)

Case No. 94-04426

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BY ORDER OF THE COURT:

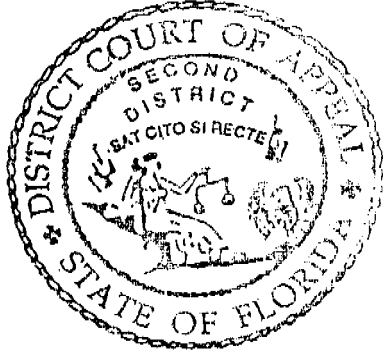
Counsel for appellee having filed a motion for rehearing
 or certification in this case, upon consideration, it is
 ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

[Handwritten signature]

WILLIAM A. HADDAD, CLERK
 c: John C. Fisher, A.P.D.
 Stephen D. Ake, A.A.G.

/PM



APP. B