

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT. 1

STATEMENT OF THE CASE. 2

STATEMENT OF THE FACTS 6

SUMMARY OF THE ARGUMENT. 11

ARGUMENT

MULTIPLE CONVICTIONS AND SENTENCES FOR ARMED
BURGLARY AND GRAND THEFT OF A FIREARM DO NOT
VIOLATE DOUBLE JEOPARDY WHERE THE THEFT OF THE
FIREARM PROVIDES THE BASIS FOR THE ARMED BURGLARY
CONVICTION. 12

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995),
review granted, (FSC Case No. 86,990) 13,16

Hunter v. State,
21 Fla. L. Weekly D900 (Fla. 2d DCA Apr. 12, 1996) 1,13

Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA),
review denied, 664 So. 2d 249 (Fla. 1995) 13

State v. Stearns,
645 So. 2d 417 (Fla. 1994) 13

MISCELLANEOUS

§ 775.02(4)(a), Fla. Stat. (1995) 11,13,17

§ 777.04, Fla. Stat. (1995) 2

§ 782.04, Fla. Stat. (1995) 2

§ 784.045, Fla. Stat. (1995) 2

§ 790.19, Fla. Stat. (1995) 2

§ 790.23, Fla. Stat. (1995) 2

§ 810.02, Fla. Stat. (1995) 12,14

§ 812.014, Fla. Stat. (1995) 12,15

PRELIMINARY STATEMENT

Petitioner, the State of Florida, will be referred to as "Petitioner." Respondent, Jeffrey Allen Hunter, will be referred to as "Respondent." Citations to the record on appeal will be referred to by the symbol (R) followed by the appropriate page number(s). Citations to the transcript of the trial will be referred to by the symbol (T) followed by the appropriate page number(s). The opinion of the Second District Court of Appeal is reported at Hunter v. State, 21 Fla. L. Weekly D900 (Fla. 2d DCA Apr. 12, 1996).

STATEMENT OF THE CASE

The State charged Respondent by Amended Information with two counts of armed burglary in violation of section 810.02(2)(b), Florida Statutes, two counts of attempted first degree murder in violation of sections 777.04 and 782.04, Florida Statutes, one count of grand theft (a handgun and other personal property) in violation of section 812.014(2)(c), Florida Statutes, one count of aggravated battery in violation of section 784.045, Florida Statutes, one count of possession of a firearm by a convicted felon in violation of section 790.23, Florida Statutes, and one count of shooting within a private building in violation of section 790.19, Florida Statutes. (R.22-28). All of the offenses were alleged to have been committed between February 9 and 10, 1994. (R.22-28).

Respondent's counsel moved to sever the count charging Respondent with possession of a firearm by a convicted felon. (R.29-30). The trial court granted Respondent's motion and severed Count Eight of the Amended Information. (R.33-35). The State subsequently nolle prossed this count. (R.147). A jury trial was held on July 11-13, 1994, on the remaining counts of the Amended Information.

As to Counts One and Four of the Amended Information, the

jury found Respondent guilty of burglary of a dwelling and specifically found that Respondent "was armed or armed himself with a firearm in the course of the offense." (R.37, 40; T.416-417). On Count Two, the jury found Respondent guilty of "Grand Theft of property, including a firearm." (R.38; T.417). The jury also returned guilty verdicts on the charges of shooting within a private building, aggravated battery, and two counts of attempted murder in the second degree. (R.37-43; T.417-418).

On November 17, 1994, the trial court conducted a sentencing hearing and adjudicated Respondent guilty on all seven counts. (R.80-120, 123). The court sentenced Respondent as a habitual violent felony offender on all counts. (R.110-114, 133-139). As to Count One, the court sentenced Respondent to life imprisonment with a 15 year minimum mandatory and a concurrent 3 year minimum mandatory for the use of a firearm. (R.112, 126, 133). On Count Two, the court imposed a 10 year sentence with a 5 year minimum mandatory to run concurrent to the sentence for Count One. (R.112, 127, 134). The court imposed a 30 year sentence with a 10 year minimum mandatory for Count Three to run concurrent with the sentences for Counts One and Two. (R.112-113, 129, 135). Respondent received a life sentence with a 15 year minimum mandatory and a concurrent 3 year minimum mandatory for the use

of a firearm on Count Four, the sentence running consecutive to the sentences imposed on Count One, Two, and Three. (R.113, 129, 136). On Count Five, the court imposed a 30 year sentence with a 10 year minimum mandatory and a concurrent 3 year minimum mandatory for the use of the firearm to run concurrent with the sentence for Count Four, but consecutive to the sentences for Counts One, Two, and Three. (R.113, 130, 137). A 30 year sentence with a 10 year minimum mandatory and a concurrent 3 year minimum mandatory for the use of a firearm was imposed for Count Six to run concurrent with the sentences for Counts Four and Five, but consecutive to Counts One, Two, and Three. (R.113, 131, 138). The court also imposed a 30 year sentence with a 10 year minimum mandatory and a concurrent 3 year minimum mandatory for the use of a firearm on Count Seven to run concurrent with the sentences for Counts Four, Five, and Six, but consecutive to the sentences imposed on Counts One, Two, and Three. (R.113-114, 132, 139).

Respondent filed his Notice of Appeal on December 7, 1994. (R.148). The Second District Court of Appeal issued its opinion on April 12, 1996, vacating Respondent's grand theft of a firearm conviction based on double jeopardy. On or about April 15, 1996, Petitioner filed a Motion for Rehearing or Certification, which

was subsequently denied by the Second District Court of Appeal.

On or about May 16, 1996, Petitioner filed a Notice to Invoke the Discretionary Jurisdiction of this Honorable Court. This Court accepted jurisdiction on August 27, 1996.

STATEMENT OF THE FACTS

Jacqueline Hardy lived with her cousin, Terry Hardy, and Terry's boyfriend and daughter. (T.129-132; 169). During that time, Jacqueline Hardy had a relationship with Respondent. (T.131-132; 168-170). Respondent did not officially live at Terry Hardy's home, but according to Terry Hardy, "he was always there." (T.132).

Terry Hardy's boyfriend, James Poe, kept a loaded gun in Terry Hardy's bedroom for their family's protection. (T.158-159). Respondent knew where the gun was kept. (T.159). On one occasion, Mr. Poe retrieved the gun in Respondent's presence and went outside to check on a suspicious noise. (T.139-140).

On February 1, 1994, Jacqueline and Respondent had an argument that resulted in the termination of their relationship. (T.170). During their argument, Respondent beat Jacqueline and threatened to kill her. (T.170-171). A couple of days later, Jacqueline moved from her cousin's house and went to live with her brother and her twin sister. (R.173). From the night of the beating, February 1, until February 9, Jacqueline did not have any contact with Respondent. (T.172).

After Jacqueline and Respondent broke up, Respondent called Terry Hardy in an attempt to speak with Jacqueline. (T.134-136).

Respondent became mad at Terry Hardy and told her that "he was going to get [her]." (T.135). Respondent told Terry Hardy that "if he couldn't get [her], he would get what [she] loved the most," her daughter. (T.135-136).

On February 9, 1994, Terry Hardy got off from work around midnight and went to pick up her eight-year-old daughter. (T.137-138). Terry arrived at her home around 12:30 or a quarter of 1:00. (T.138). Terry noticed her bedroom light on and noticed that the screen and framing of a window were removed. (T.138). Terry went and found a policeman and returned to her home. (T.138-139). After the police entered the home, Terry and her boyfriend went inside and noticed that their gun and some clothing were missing. (T.139). Later that same night, Terry's daughter showed her mother a shell casing she found in her room and bullet holes in her bed and her pillow. (T.144-145).

During the late hours of February 9 and early hours of February 10, Jacqueline and her sister, Gwendolyn, arrived at her brother's house. (T.173-174). As Jacqueline was putting the key into the door, she heard a rumbling and saw Respondent jumping over a fence coming towards her. (T.174-175). Respondent approached Jacqueline with a gun pointed at her and struck her in the eye with the gun. (T.175). Respondent continued to beat

Jacqueline with his fists while she and her sister tried to get inside the house. (T.176-177). Respondent placed the gun to Jacqueline's temple and threatened to kill her. (T.177).

Jacqueline managed to get away from Respondent and run inside the house with her sister. (T.178).

While Jacqueline and her sister were standing behind the door, Respondent fired two shots through the door. (T.179). One of the bullets struck Jacqueline's sister in the leg. (T.179). Respondent crawled through a window and fired another shot when he was inside the house. (T.180). Jacqueline and her sister ran from the house and Respondent caught Jacqueline from behind and tackled her to the ground. (T.184-185). Respondent beat Jacqueline in the head with his fists. (T.185). Eventually, the police arrived at the scene and arrested Respondent. (T.186; 240-244).

The police searched the area and found a small black handgun approximately two feet from where Respondent had been arrested. (T.244). The gun was identified by Terry Hardy as the gun stolen from her residence. (T.141). The officers also found a .22 caliber bullet in Respondent's front pocket. (T.250). The officers searched Jacqueline's sister's residence and found several spent shell casings and one live cartridge in the carport

near the door, and one spent casing inside the residence.

(T.256).

Crime Scene Technician Tracy Grice testified that she found a bag of clothing under the window of the house where Respondent had entered Jacqueline's sister's residence. (T.261-262). These items were identified by Terry Hardy as the clothing stolen from her residence. (T.141-142). After Ms. Grice processed the scene at that residence, she proceeded to Terry Hardy's residence to process that crime scene. (T.274). She collected a shell casing and photographed a hole in the bed and pillowcases. (T.274-275).

Respondent testified that he did have a fight with Jacqueline Hardy, but that she had struck him first. (T.289). He also testified that he saw Jacqueline and Gwendolyn Hardy on February 9, 1994, at a laundromat, and they told him he could stop by their house if he needed a ride. (T.290-291). Respondent testified that he walked over to their house and the two women were under the carport and an argument broke out. (T.291-292). According to Respondent, Jacqueline Hardy had the firearm and was trying to load it when a bullet fell out. (T.292). Respondent testified that he then struck Jacqueline, and while they were struggling, the gun accidentally went off, striking Gwendolyn. (T.293-294). Respondent then broke into the

house and chased the women, all the while, Jacqueline had the gun in her possession. (T.294). Respondent testified that he chased the women and tripped Jacqueline in the field and hit her because he was mad at her for trying to shoot at him. (T.294).

SUMMARY OF ARGUMENT

The Second District Court of Appeal erred when it vacated Respondent's grand theft of a firearm conviction. The court held that double jeopardy bars conviction for armed burglary and grand theft of a firearm when the act of stealing the firearm converts the burglary into an armed burglary.

An examination of the statutory elements demonstrates that each of the offenses requires proof of different elements in order to sustain a conviction. Proving a violation of one of the offenses does not necessarily prove a violation of the other offense. The fact that the theft of a firearm converted the burglary into an armed burglary in this case does not bar dual convictions because such a determination could not be made without an examination of the facts alleged in the information and adduced at trial. Section 775.02(4)(a), Florida Statutes, states that offenses are separate if each offense requires proof of an element that the other does not without regard to the accusatory pleading or the proof adduced at trial. Accordingly, this Court should reverse the Second District Court of Appeal's ruling that double jeopardy bars dual convictions for grand theft of a firearm and armed burglary.

ARGUMENT

MULTIPLE CONVICTIONS AND SENTENCES FOR ARMED BURGLARY AND GRAND THEFT OF A FIREARM DO NOT VIOLATE DOUBLE JEOPARDY WHERE THE THEFT OF THE FIREARM PROVIDES THE BASIS FOR THE ARMED BURGLARY CONVICTION.

The State charged Respondent by an amended information with, *inter alia*, two counts of armed burglary in violation of section 810.02(2)(b), Florida Statutes, and one count of grand theft of a firearm in violation of section 812.014(2)(c), Florida Statutes.

The testimony at trial established that Respondent broke into Terry Hardy's house and stole some clothing and a loaded .22 caliber handgun. Respondent then went to find his ex-girlfriend at her sister's residence. When he arrived at that house, he approached his ex-girlfriend, Jacqueline Hardy, and struck her in the face with the firearm. Jacqueline and her sister managed to get inside the house and shut the door on the Respondent. Respondent shot through the door striking Jacqueline's sister in her leg. Respondent then broke a window out of the house and entered the house and fired another shot at the women. The women escaped the house, and Respondent tracked them down in an adjacent field and tackled Jacqueline Hardy and began to beat her. At that point, the police arrived and arrested Respondent. Terry Hardy's stolen gun was found only a few feet from where

Respondent was arrested.

On appeal to the Second District Court, Respondent argued, *inter alia*, that his convictions for armed burglary and grand theft of a firearm violated double jeopardy because the burglary was enhanced to armed burglary based on the theft of the firearm. The Second District held that double jeopardy bars conviction for both offenses when the act of stealing the firearm converts the burglary into an armed burglary. Hunter v. State, 21 Fla. L. Weekly D900, 900 (Fla. 2d DCA Apr.12, 1996) (citing Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), review denied, 664 So. 2d 249 (Fla. 1995) and State v. Stearns, 645 So. 2d 417 (Fla. 1994)). The Second District's holding directly and expressly conflicts with the recent decision of Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995), review granted, (FSC Case No. 86,990).

In Gaber, the First District Court of Appeal thoroughly examined the statutory elements of each of the offenses and held that armed burglary is a completely separate offense from grand theft of a firearm. Gaber, 662 So. 2d at 424. Each of the offenses requires proof of an element that the other does not. Id. Accordingly, the offenses must be considered separate for double jeopardy purposes. See § 775.021(4)(a), Fla. Stat. (1995) (stating that offenses are separate "if each offense requires

proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial").

Petitioner submits that armed burglary and grand theft of a firearm are entirely separate and distinct offenses, and convictions for both do not violate double jeopardy. Respondent was convicted of two counts of armed burglary pursuant to section 810.02(2)(b), Florida Statutes, and one count of grand theft of a firearm pursuant to section 812.014(2)(c), Florida Statutes.

Section 810.02 provides in relevant part:

(1) "Burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein,

(2) Burglary is a felony in the first degree, . . . if in the course of committing the offense, the offender:

. . . .
(b) Is or becomes armed within such dwelling, structure, or conveyance, with explosives or a dangerous weapon.

§ 810.02, Fla. Stat. (1995). By its plain language, a conviction for burglary requires the State to prove that the offender entered into a structure with the intent to commit an offense therein. The offense is reclassified to a first degree felony if in the course of committing the burglary, the offender is armed or arms himself once inside the structure.

Florida's theft statute, section 812.014, provides in

relevant part:

(1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriate the property to his own use or the use of any person not entitled thereto.

(2)

(c) It is grand theft of the third degree and a felony of the third degree, . . . , if the property stolen is:

. . . .

5. A firearm.

§ 812.014, Fla. Stat. (1995). In order to sustain a conviction under Florida's grand theft statute, the State must establish that the offender obtained or used, or attempted to obtain or use, the property of another with the intent to either temporarily or permanently deprive the owner of the use of, or benefit from, the property.

In comparing the two statutes and the elements necessary to sustain a conviction, it is apparent that these two statutes are entirely different and require proof of different and distinct elements. The armed burglary statute requires proof that the offender was armed, or armed himself, when he entered a structure. The plain language of the statute does not require that the offender commit a theft, or have the intent to commit a

theft. Additionally, it does not require that the weapon involved be a firearm.

Florida's theft statute, on the other hand, requires that the State establish a taking with the intent to temporarily or permanently deprive. Obviously, a theft can be committed without also committing a burglary. Furthermore, the grand theft statute does not require "that the object of the theft necessarily be a firearm." Gaber v. State, 662 So. 2d 423, 423 (Fla. 3d DCA 1995), review granted, (FSC Case No. 86,990).

For these reasons, the court in Gaber correctly found that the offenses required proof of different elements and did not violate double jeopardy. Id. at 424. The court stated that in this type of situation, the offender is being punished for taking the weapon with the intent to deprive, not for just the possession of the weapon. Id.

The fact that Respondent committed a burglary and stole a firearm does not prevent a court from imposing separate convictions and sentences. Respondent was being punished under the grand theft of a firearm statute for the theft of the weapon with the intent to deprive, not for the possession of the weapon. Under the armed burglary statute, Respondent was punished for the separate and distinct offense of entering into a structure with

the intent to commit an offense therein while armed or while arming himself with a dangerous weapon.

Section 775.02(4)(a), Florida Statutes, states that offenses are separate and if each offense requires proof of an element that the other does not without regard to the accusatory pleading or the proof adduced at trial. Disregarding the accusatory pleadings and testimony at trial, it is clear that the armed burglary and grand theft of a firearm statutes require proof of different elements. Based on the differences in the elements of the crimes, Petitioner submits that the Second District Court of Appeal erred when it vacated Respondent's grand theft of a firearm conviction on double jeopardy grounds.

CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, Petitioner respectfully requests that this Honorable Court reverse the Second District Court of Appeal's opinion vacating Respondent's grand theft of a firearm conviction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law
Fla. Bar No. 0238538



STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 0014087
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

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 20th day of September, 1996.


COUNSEL FOR PETITIONER