SUPREME COURT OF FLORIDA

DANIEL GIBBS,

Petitioner,

CASE NO. 88,409

vs.

STATE OF FLORIDA,

Respondent.

APPELLANT'S INITIAL BRIEF

Respectfully submitted

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_____/

CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellant, DANIEL GIBBS, certifies that the following persons and entities have or may have an interest in the outcome of this case:

(a) Kirschner, Jonathan Jay - Counsel for Defendant-Appellant

(b) Asbury, Carol Cobourn - Assistant Attorney General

(c) The Honorable Larry Schack - Circuit Court Judge

(d) States Attorney for the Nineteenth Judicial Circuit

(e) Morris, Ellen - Assistant Public Defender for the Fifteenth Judicial Circuit

(f) Gibbs, Daniel E., Sr. - Defendant-Appellant/Defendant

(g) Stern, Lou, Trial Counsel for the State/Appellee

(h) Kaufman, Frederick, Trial Counsel for Defendant/Appellant

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

FLORIDA STATUTES

STATEMENT OF CASE

DANIEL **GIBBS** was arrested on April **10, 1991** and subsequently charged by Information on April **30, 1991** with one **(1)** count of trafficking in cocaine (Count I); one **(1)** count of possession of narcotics paraphernalia (Count II); one **(1)** count of assault on a law enforcement officer (Count 111); and one (1) count of refusal to sign a traffic citation (Count IV) **(R917-918).** An Amended Information subsequently was filed on June **5, 1994** adding Count **V** for possession of cocaine. (**R928-930**). At the conclusion of trial on December **5,** 1991 the jury found Appellant guilty on Counts I, **11,** IV and **V.** Appellant **was** acquitted of Count III. **(R1429-1430)**

A sentencing hearing was held on March 3, **1992,** wherein Appellant was adjudicated guilty in Counts I, 11, IV and V. The trial court additionally found Appellant to be an habitual offender, and accordingly sentenced him in Count I to thirty **(30)** years in the Department of Corrections with a three **(3)** year minimum mandatory sentence, and in Count V to ten **(10)** years in the Department of Corrections to run consecutive to the sentence imposed in Count **I.** (**R905-906**); (**R1499-1515**).

Appellant timely appealed the judgment of conviction and sentence, and same was affirmed per curiam by The Fourth District Court of Appeal on August **11, 1993.** (**R1643-1644).**

Appellant subsequently filed his pro se Petition For Writ of Habeas Corpus, and on March **24, 1994,** the Fourth District Court of Appeal entered it Order granting said Petition to the extent of permitting Appellant to "file an appeal and brief the issue of whether his

constitutional right against double jeopardy was violated by his dual convictions and sentences for trafficking in cocaine (Count I) and possession of cocaine (Count V).

On June 19, 1996 the Fourth District Court of Appeal issued its en *banc* opinion affirming the convictions and sentences for trafficking and possession, and certified to this Court the following question of great public importance:

> ***May a person be separately convicted and punished for trafficking possession of cocaine and simple possession of a controlled substance for the same quantity of cocaine?***

STATEMENT OF THE FACTS

On April **10, 1991,** Martin County Deputy Sheriff Restrelli was "working radar" on **1-95** near the Hobe Sound overpass. **(R219).** Deputy Restrelli observed Appellant's BMW traveling northbound at an excessive rate of speed. (R220). Restrelli initially estimated the vehicle was traveling at 75mph, and subsequently confirmed a speed of 76mph with radar **(R220).**

Restrelli testified that Appellant pulled over to the side of the roadway and stopped prior to any attempt by the Deputy to initiate a traffic stop, (R224). Restrelli retrieved Appellant's driver's license and "ran" the driver's license number through dispatch (R235-236). The Deputy was advised by the radio dispatcher that Appellant's license had been suspended on December 26, 1990. **(R236).** Restrelli placed Appellant under arrest for driving with a suspended license. (R236). After handcuffing Appellant, Deputy Restrelli noticed Appellant was holding a piece of cellophane in his hand. **(R237; 262; 280-281).**

Subsequent to the arrest and while still at the scene, Restrelli and Deputy Moore conducted **a** search of Appellant's vehicle and located a white paper bag hidden behind the rear seat center armrest. (R257-260; 376-380). Inside the white paper bag was a "cellophane-wrapped" object, which the officers, based upon their experience and a "field test", determined to be the controlled substance cocaine. **(R260-261).**

Robert Parsons, an expert in forensic chemistry, testified that the cellophane recovered from Appellant's hand (Trial Exhibit No. 21) contained cocaine residue (R362). Parsons further opined that the white powder substance obtained from the white paper bag

recovered from the BMW likewise was cocaine, and that the total weight of same was **151** grams **(R364-365).**

Appellant below argued the cocaine was "planted" in the vehicle by Deputies Moore and Restrelli. **(R813-824).**

The trial court sentenced Appellant as an habitual offender to thirty **(30)** years in the Department of Corrections in Count I (trafficking), and ten (10) years as an habitual offender in Count V (simple possession) to run consecutive with the trafficking sentence **(R903-908; 1499-1515).** Additionally, Appellant in Count II (possession of paraphernalia) was sentenced to one **(1)** year in the Martin County Jail consecutive to the sentences imposed in Counts I and V. In Count IV (refusal to sign traffic citation), Appellant was sentenced to sixty (60) days time served **(R906-907; 1499-1515).**

SUMMARY OF THE ARGUMENT

Appellant was in exclusive possession of a vehicle subjected to a traffic stop on *I-95.* As a result of the stop, Appellant was arrested for driving with a suspended license. At the point of arrest, a cellophane wrapper with cocaine residue on it was recovered from Appellant's person. A subsequent search of the vehicle yielded a cache of cocaine (151 grams) secreted behind the rear seat center armrest.

Appellant was charged and convicted of simple possession of cocaine for the cellophane wrapper residue, and trafficking for the cocaine recovered from the car. Dual convictions for trafficking possession and simple possession of the same quantity of cocaine, however, are violative of the double jeopardy prohibitions of both the Florida and United States Constitutions.

POINT I

THE TRIAL COURT ERRED BY CONVICTING APPELLANT OF TRAFFICKING AND SIMPLE POSSESSION OF THE SAME QUANTITY OF COCAINE

The United States Supreme Court has stated that an individual is protected against multiple punishments for the same offense. *Brown v. Ohio,* **432 U.S. 161 (1977).** It is likewise axiomatic that the State may prosecute and obtain convictions for separate offenses even though they arise from a single episode or transaction. Blockburger ***v. United States,*** **284 U.S. 299 (1932);** ***State v. Smith,*** **547** So.2d **613** (Fla. **1989).**

Blockburger established the rule that two offenses are separate and distinct if each contains an essential element that the other does not. The Blockburger rule has been codified in Section **775.021(4),** Fla.Stat. **(1995),** and is subject to certain exceptions. The parameters of those exceptions must be examined in order to ascertain whether given offenses are "separate" for purposes of determining whether the double jeopardy clauses of the Florida and United States Constitutions are violated by dual convictions.

A mere mechanistic recitation of the Blockburger rule is insufficient to assist courts in making that determination, because it fails to address the additional statutory exceptions established by the legislature in Section **775.021(4),** Fla. Stat. **(1995)** See: Bell ***v. State,*** **437 So.2d 1057, 1058** (Fla. **1983).**

Chapter **775.021(4),** Fla. Stat. **(1995)** provides:

> (a) Whoever, 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; and the sentencing judge may order the sentences to be served

> concurrently or consecutively. For the purposes of this subsection, 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.
>
> (b) The 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 allow the principal of lenity as set forth in subsection **(1)** to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Appellant asserts that his dual convictions not only survive traditional Blockburger analysis, but also fall within each of the statutory exceptions enumerated in Section 775.021(4)(b) 1through 3, Fla. Stat. (1995), thus rendering dual convictions for trafficking and possession of the same quantity of cocaine impermissible.

In the instant **case,** Appellant was arrested during a traffic stop for driving with a suspended license. (R236) While being handcuffed, the arresting officer discovered a piece of cellophane wrapping in Appellant's hand. (R237; 262; 280-281) During a subsequent search of the vehicle, a cellophane wrapped package containing one hundred fifty one (151) grams of cocaine was discovered secreted behind the rear center arm rest. (R257-260; 376-380). As to the trafficking charge, at trial below the prosecution proceeded solely on the theory that Appellant "trafficked" by actually or constructively possessing the contraband.

The essence of traditional Blockburger analysis is to examine the elements of each statutory offense, and if each offense requires proof of an element that the other does not,

then to allow dual convictions. At the time of Appellants, arrest, Florida's trafficking statute provided:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this State, *or who is knowingly in actual or constructive possession of,* 28 grams or more of cocaine...commits a felony of the first degree, which felony shall be known as "trafficking in cocaine. [emphasis added]

Section 893.135 (l)(b,) Fla.Stat. (1989). The simple possession statute provided:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance...Any person who violates this provision is guilty of a felony of the third degree.. ,

Section 893. 13(1)(f), Fla. Stat. (1989).

Although the trafficking statute permits prosecutions based upon several alternative theories, i.e., by delivery, purchase, manufacture, etc., in the instant case the *exclusive* theory relied upon by the State was that Appellant's trafficking was based upon actual or constructive possession. To be sure, *Blockburger* and its progeny mandate that double jeopardy analysis be limited to comparing the statutory elements of the crimes, and not to the charging documents or the evidence adduced at trial. *Blockburger v. United States, 284* U.S. 299 (1932); *State v. Baker,* 456 So.2d 419 (Fla. 1984) Where statutes provide for distinct alternative theories of prosecution however, review of the charging instruments and evidence presented at trial is unavoidable. The elements of trafficking by possession per Sec. 893.135(1)(b), Fla. Stat. (1989) are merely those of simple possession pursuant to Sec. 893.13(1)(f), Fla. Stat. (1989) with the additional component of a minimum contraband weight equal or greater than twenty-eight (28) grams. Because simple possession does not

require proof of any element not present in trafficking by possession, traditional ***Blockburger*** analysis and Sec. 775.021(4)(a), Fla. Stat. (1995) prohibit dual convictions of those crimes.

Florida's statutory scheme however, injects further criteria for evaluation. The legislature has crafted three (3) additional tiers of analysis to wit., Section 775.021(4)(b) 1, 2 and 3, Fla. Stat. (1995) in order to assist courts in determining whether offenses should be considered separate for purposes of jeopardy analysis. See: *Sirmons v. State, 634* So.2d 153 (Fla. 1994) Kogan, concurring.

The Sec. 775.021(4)(b) 1., Fla. Stat. (1995) exception applies to offenses which require ('identical elements of proof". As stated previously, the prosecution below proceeded solely on the theory of trafficking by actual or constructive possession. No evidence was presented supporting any other theory of trafficking.

But for the additional requirement of a minimum weight of twenty-eight (28) grams, the elements of trafficking by possession and simple possession are identical, and therefore within the exception enumerated in Sec. 775.021(4)(b) 1., Fla. Stat. (1995).

Section 775.021(4)(b) 2., Fla. Stat. (1995) applies to offenses "which are degrees of the same offense as provided by statute". This Court has interpreted that provision to prohibit simultaneous convictions of offenses which are simply "aggravated forms of the same underlying offense distinguished only by degree factors". *Sirmons v. State, 634* So.2d 153, 154 (Fla. 1994)

In *Sirmons*, the Defendant was convicted of grand theft of an automobile pursuant to Chapter 812.014(2)(c)4, Fla. Stat. (1989) and robbery with a weapon pursuant to Chapter 812.13(2)(a), Fla. Stat. (1989). The convictions arose from a single taking of an automobile

at knife point. *Sirmons, Id.* at 153. In quashing the decision of the Fifth District Court of Appeal, this Court found that dual convictions of offenses which are aggravated forms of the same underlying or core offense, distinguished only by degree factors, are impermissible. *Sirmons, Id.* at 154. *Also see, State v. Thompson,* 607 So.2d 422 (Fla. 1992) [Defendant cannot be convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft]; *Johnson* v. *State, 597* So.2d 798 (Fla. 1992) [Dual convictions for grand theft of cash and a firearm barred].

Trafficking in cocaine is merely an aggravated form of the underlying offense of actual or constructive possession of cocaine. The core offense is possession of cocaine, a third degree felony. Sec. 893.13(1)(f), Fla. Stat. (1989) If one possesses from twenty-eight (28) to two-hundred (200) grams of the contraband, the offense is (was) aggravated to a first degree felony punishable by a three (3) year minimum mandatory sentence. Sec. 893.135(1)(b)1.a., Fla. Stat. (1989) "Simple" possession of amounts exceeding two-hundred (200) grams are successively aggravated by additional fines and minimum mandatory prison sentences. Sec 893.135(1)(b)1. b and c., Fla. Stat. (1989).

Because trafficking in this instance is merely an aggravated form of the underlying offense of possession distinguished only by degree factors, the exception framed in Sec. 775.021(4)(b) 2., Fla. Stat. (1995). likewise applies to Appellant, and prohibits dual convictions.

The Sec. 775.021(4)(b) 3., Fla. Stat. (1995) exception applies to those offenses "which are lesser offenses the statutory elements of which are subsumed by the greater offense". This provision applies to those crimes that are cognizable as permissive lesser included

offenses, based upon the accusatory pleadings and evidence adduced at trial. *Sirmons v. State*, 634 So.2d 153, 155 (Fla. 1994) Kogan, concurring; Also see: *State v. Weller*, 590 So.2d 923, 926 (Fla. 1992); *Wilcott v. State*, 509 So.2d 261 (Fla. 1987) The State below presented, and the evidence adduced at trial supported, a theory of trafficking based solely upon actual or constructive possession of the contraband. Simple possession thus was cognizable as a permissive lesser included offense, and the Sec. 775.021(4)(b) 3., Fla. Stat. (1995) exception prohibiting dual convictions would apply.

CONCLUSION

Based on the foregoing argument and citation to authority, Appellant requests this Court to vacate Appellant's conviction and sentence for simple possession of cocaine in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 1st day of August, 1996 to Carol Cobourn Asbury, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, and to Daniel E. Gibbs, Sr., #902870 M.B. #558, Avon Park

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