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SUPREME COURT OF FLORIDA

DANIEL GIBBS,

Petitioner,

CASE NO. 38,409

vs.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

Respectfully submitted

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SUPREME COURT OF FLORIDA

DANIEL GIBBS,

Petitioner, CASE NO. 88,409

vs.

STATE OF FLORIDA,

Respondent.
_____/

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner, 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 Petitioner

(b) Asbury, Carol Cobourn - Assistant Attorney General

(c) The Honorable Larry Schack - Circuit Court Judge

(d) State Attorney for the Nineteenth Judicial Circuit

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

(f) Gibbs, Daniel E., Sr. - Petitioner

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

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

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PRELIMINARY STATEMENT

The Defendant, Daniel Gibbs, will be referred to as the "Defendant", "Appellant" or "Petitioner".

The Respondent, State of Florida, will be referred to as the "Respondent" or te "State".

The symbol "AB", followed by the page number, will refer to the Respondent's Answer Brief.

The symbol "IB", followed by the page number, will refer to the Petitioner's Initial Brief.

THE DOUBLE JEOPARDY CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTIONS PROHIBIT CONVICTIONS FOR TRAFFICKING BY POSSESSION OF A GIVEN SUBSTANCE, AND SIMPLE POSSESSION OF THAT SAME SUBSTANCE ARISING OUT OF A SINGLE TRANSACTION

Article I, Section 9 of the Constitution of the State of Florida, and Amendment 5 of the Federal Constitution prohibit citizens from being "twice put in jeopardy" for the same offense. The sole question presented here is whether the crimes of trafficking by possession and simple possession of a given controlled substance in a single transaction are subject to the protections afforded by those provisions.

Respondent seemingly proceeds on two (2) theories, to wit, that Appellant's convictions resulted from "two separate and distinct acts of possession" (Respondent refers to this theory as the "different evidence test") (AB9). Alternatively, Respondent argues, even if the controlled substance supporting both counts was "the same", no double jeopardy bar applies (AB10).

RESPONDENT'S "DIFFERENT EVIDENCE TEST"

The State posits that "where there is separate evidence of the two offenses, the offenses have not merged under the different evidence test". (AB9). Respondent further asserts that there exists "no evidence" that the two caches of cocaine are related. (AB10).

The State's reasoning is defective. First, Respondent's claim of "no evidence" is utterly devoid of record support. Appellant, at the time of his arrest for driving with a suspended license, was holding a piece of cellophane in his hand. (R237; 262; 280-281). The

trafficking amount of cocaine ultimately recovered inside of a white paper bag hidden behind the rear seat armrest likewise was "cellophane wrapped". (R260-261). At trial, the State presented the testimony of Forensic Chemistry Expert Robert Parsons. Parsons testified that the cellophane recovered from Appellant's hand contained cocaine residue, and that the white powder substance obtained from the white paper bag in the rear seat of the vehicle also was cocaine. (R362; 364-365).

Chapter 893.03(2)(a)4 establishes cocaine as a schedule II controlled substance, and includes not only cocaine, but any cocaine stereoisomer, salt, compound, derivative or preparation of cocaine, Chapter 893.03(2)(a), Fla. Stat, (1995). Respondent below, however, elected to present no evidence that the residue recovered from the cellophane on Petitioner's person was in any way a different compound, derivative, or preparation of the cocaine recovered from the rear area of the passenger compartment.

The burden of proof is on the State to prove that an accused has committed an act bringing him within any criminal statute. Johnson *v. Florida*, 391 U.S. 596 (1968), *on remand* 216 So.2d 7 (Fla. 1968); *Kilbee v. State*, 53 So.2d 533, 536 (Fla. 1951). The State, having elected below neither to present any evidence indicating that the two cocaine samples were somehow different from each other, or derived from separate sources, nor having made any argument below on that issue, is foreclosed from asserting that position to this court. *See: Steinhorst v. State*, 412 So.2d 332 (Fla. 1982); *Tillman v. State*, 471 So.2d 32 (Fla. 1985).

Secondly, there is no authority supporting the existence of a "different evidence test".

Respondent relies solely upon ***Chikitus v. Shands***[1] and ***United States v. Shaid***[2] to support its position that there is such a standard. In ***Chikitus,*** this Court addressed the question of whether **a** prior conviction for willful and wanton reckless driving pursuant to Chapter 316.029, Fla. Stat. (1975) bars a subsequent prosecution for vehicular homicide pursuant to Chapter 782.071, Fla. Stat, (1975). This Court found the reckless driving charge to be **a** lesser included offense of vehicular homicide, and that double jeopardy indeed prohibited the subsequent prosecution for the vehicular homicide. Additionally, this Court *specifically* ***rejected*** the State's claim that the reckless driving occurring immediately preceding the accident constituted "different facts" in such a way as to prevent the application of a double jeopardy bar. ***Chitikus*** Id ***at 905.***

In Shaid, the Defendant **was** convicted of eight (8) counts of making false statements to a federally insured bank. *Shaid* claimed six (6) of those counts were rnultiplicitous, since they only involved two ***(2)*** separate loans. ***Shaid Id.*** at 231. Respondent relies on ***Shaid*** to support the notion that separate and distinct prohibited acts may be separately punished. Respondent selectively ignores however **,** the 5th Circuit's unequivocal finding that "it is clear that each of the six counts involve completely different false statements in distinct and separate documents". ***Shaid*** at **231.**

In the instant case, the ultimate facts are not complex, and can be summarized as follows: Appellant was speeding, and subjected to a traffic stop. (R220). Subsequent to the

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[1] **373 So.2d 904 (Fla. 1979).**

[2] **730 F.2d 225, 231 (USCA 5th Cir. 1984).**

stop, the law enforcement officer determined that Appellant's driver's license was suspended, and arrested Appellant on that charge. **(R235-236).** Subsequent to the arrest, cocaine residue was discovered on a piece of cellophane in Appellant's hand, as well as in a cellophane wrapped package in the rear section of the passenger compartment of his vehicle.

Respondent attempts to distinguish ***Lundy v. State***[3]**,** ***Jackson v. State***[4]**,** and ***W.B.M. v. State***[5] by stating that in those cases, "the contraband found on the person ***was obviously*** the **same** contraband found near the defendant". **(AB16).** In ***Lundy*** however, cocaine was found in two **(2)** separate containers (a bag and a box) within a passenger compartment of the vehicle. *Lundy*, Id. at 1168. Likewise, in ***Jackson,*** a "nickel bag" of marijuana was recovered from the defendant's right front jacket pocket, while ***the defendant was outside of the automobile,*** and additional clear plastic bags containing marijuana were recovered from a blue jacket on the rear passenger side of the floor of the vehicle. ***Jackson*** Id. at ***457.***

Similarly, in W.B.M. the contraband (marijuana) was recovered from the Defendant's person, as well as from the rear of the police cruiser after the juvenile had been transported to the detention center.

The factual circumstances of those cases are ***indistinguishable*** from the Appellant's below. Respondent attempts to distinguish those cases merely by chanting without attribution, that in ***Lundy, Jackson*** and ***W.B.M.*** the contraband was **"obviously** the same".

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[3] **596 So.2d 1167 (Fla. 4th DCA 1992)**

[4] **418 So.2d 456 (Fla. 4th DCA 1982)**

[5] **452 So.2d 659 (Fla. 3rd DCA 1984)**

Respondent next claims that *Lundy*, *Jackson* and *W.B.M.* are inapplicable to the instant case because they were issued "prior to the change in the law, which invalidated *Carawan v. State*, 515 So.2d 161 (Fla. 1987)". (AB16). Respondent is mistaken. *Lundy v. State* was decided subsequent to the 1989 Amendments to Chapter 775.021(4), Fla. Stat. (1989), and in fact the amended statute was specifically addressed in the opinion. *Lundy Id.* at 1168.[6]

The more interesting question however, is what effect the 1989 Amendments to Chapter 775.021(4) have upon Respondent's argument. Respondent argues that those legislative changes "invalidated" *Carawan v. State*, 515 So.2d 161 (Fla. 1987). *Jackson* and *W.B.M.* however, were decided long before *Carawan*, and utilizing traditional *Blockburger*[7]/Due Process analysis. Even under the arguably stricter pre-*Carawan*, *Blockburger* approach, the *Jackson* and *W.B.M.* courts found that double jeopardy considerations prohibited multiple prosecutions for possession in different places on or about the Defendant's person or his premises, of disbursable contraband of a given kind. *Jackson*

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[6] Additionally, three other district courts of appeal have adopted the rationale espoused in *Jackson* and *Lundy* subsequent to the effective date of the amendment to the statute. In *Pasley v.* State, 625 So.2d 1303 (Fla. 1st DCA 1993), the 1st District Court of Appeal ruled that a prohibition against double jeopardy precludes simultaneous convictions of possession with intent to sell marijuana and simple possession of marijuana. *Also* see: *Graham* v. State, 631 So.2d 388 (Fla. 1st DCA 1994). And in *Mosely* v. State, 659 So.2d 1342 (Fla. 5th DCA 1995), the 5th District Court of Appeal, citing Lundy, ruled that double jeopardy would not prohibit simultaneous convictions of trafficking by possession and simple possession, where *crack* cocaine was found in the trunk of Mosely's automobile and *powdered* cocaine was found inside his wallet. Perhaps this is the kind of "different evidence" about which Respondent argues, but which clearly is not present in the instant case.

The 2nd District Court of Appeal likewise found a double jeopardy bar for dual trafficking and simple possession convictions arising from a single transaction in *Johnson v. State 538* So.2d 553 (Fla. 2nd DCA 1989). *Johnson* was decided subsequent to *Carawan*, but it is unclear whether the court considered the 1988 Amendments to Ch. 775.021(4) at the time the decision was rendered.

[7] *Blockburger v. United States, 284* U.S. 299 (1932)

Id. at 458.

NO JEOPARDY BAR IF THE "SAME" COCAINE

Respondent next argues that no double jeopardy violation arises from separate punishments based upon dual convictions for trafficking by possession of cocaine and simple possession where both charges are based upon "the same cocaine". (AB10). In support of that claim, Respondent asserts that because the *Sirmons* line of cases[8] does not make specific reference to drug cases, that the reasoning set forth in *Sirmons* is inapplicable to cases involving Chapter 893 violations. In sum, Respondent claims that the absence of any reference in *Sirmons* to State v. *McCloud*, 577 So.2d 939 (Fla. 1991), indicates that this Court did not intend for the *Sirmons*' rationale to apply in drug cases.

The reasoning is flawed. First, this Court in *Sirmons* specifically recognized that possession of contraband cases, as well as those involving theft, battery and homicide, are offenses which fall within the meaning of subsection 2 of Chapter 775.021(4)(b), Fla. Stat. (1995), prohibiting multiple punishments for offenses which are merely degrees of the same offense as provided by statute. *Sirmons Id.* at 155 (Kogan, J., concurring). Respondent's reliance upon *State v. McCloud is* similarly misplaced. The defendant in that case was charged with two (2) Informations, each alleging one (1) count of possession and one (1) count of *sale* of cocaine. *McCZoud Id.* at 940. This Court reasoned that because there exist situations where a sale of narcotics can occur without possession, that possession is not an

[8] *Sirmons* v. *State, 634* So.2d 153 (Fla. 1994); *Johnson* v. *State,* 597 So.2d 798 (Fla. 1992); *State v. Thompson,* 607 So.2d 422 (Fla. 1992).

essential element of the sale and is therefore not a lesser included offense. *Id.* at 941. The instant case however, does not involve a *sale* of narcotics. And Chapter 893.13(1)(a), Fla. Stat. (1987) did not permit proof of a "sale" merely by *possession* of narcotics. The offense of *trafficking* however, specifically provides that a person may be convicted of trafficking merely by being in actual or constructive possession of contraband. Chapter 893.13(5) et. seq., Fla. Stat. (1989). The sole difference between trafficking by possession, and simple possession of a given kind of contraband, is the *weight* of the contraband. Trafficking by possession is merely an aggravated form of the underlying offense of simple possession, distinguished only by the degree factor of possessing a greater amount of the drug. Sea: *Sirmons*, 634 So.2d 153 (Fla. 1994).

In his initial brief, Appellant argued that subsections 1, 2 and 3 of Chapter 775.021(4)(b), Fla. Stat. (1995) each describe exceptions, *in addition to traditional Blockburger analysis,* to Florida's stated policy of convicting and separately sentencing defendants for each criminal act they commit. (IB6-11). Respondent however, declines to address that issue in its Answer Brief, choosing instead to adhere to the position that traditional *Blockburger* analysis is the *exclusive* mode for determining whether multiple punishments for crimes arising from a single transaction are violative of state and federal due process prohibitions.

That position is entirely contrary to this Court's recent decision in *State v. Thompson*[9], *Johnson v. State*[10], and *Sirmons v. State*[11]. Respondent chooses to ignore rather than address

[9] 607 So.2d 422 (Fla. 1992)

[10] 597 So.2d 798 (Fla. 1992)

[11] 634 So.2d 153 (Fla. 1994)

the subject of this court's recent treatment of an emerging issue in the area of double jeopardy jurisprudence, to wit, the manner in which to apply constitutional double jeopardy safeguards in light of the enactment of comprehensive "omnibus" criminal statutes."

In *State v. Thompson*[13], this Court approved the 5th District Court of Appeal's decision prohibiting concurrent prosecution of felony petit theft and fraudulent sale of a controlled substance arising in the context of a single transaction. It is difficult to imagine the elements of these two crimes being *more* dissimilar, and traditional *Blockburger* analysis, i.e., determining merely whether each statutory offense has at least one constituent element that the other does not, mandates concluding that multiple punishments for both are not prohibited by double jeopardy considerations. This court however, adopted the conclusion that Chapter 775.021(4)(b) "bars concurrent prosecution of the general theft crime together with the specific crime". *Thompson v. State, 585* So.2d at 492 (Fla. 5th DCA 1991).

This *Court* in *Johnson* v. *State*[14] applied that reasoning to a case involving charges of grand theft of property and of a firearm, and in *Sirmons* v. *State*[15] to charges of grand theft of an automobile and robbery with a weapon.

Appellant suggests that Chapter 893.135, Fla. Stat. (1989), presents a similar problem for this Court's consideration, due to the fact that trafficking may be proved by a variety of

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[12] e.g., Chapter 812.005, et. seq., Fla. Stat., enacted in 1977, eliminated technical distinctions between various theft and theft related offenses, presumably in an effort to simplify prosecutions involving acquisition by one person, of the property of another. *Thomas v. State, 585* So.2d 492, 494 (Fla. 5th DCA 1991), *approved and adopted by State v. Thompson, 607* So.2d *422* (Fla. 1992).

[13] 607 So.2d 422 (Fla. 5th DCA 1992)

[14] 597 So.2d 798 (Fla. 1992)

[15] 634 So.2d 153 (Fla. 1994)

alternative ***methods including solely by proof of actual and/or constructive possession of the contraband.*** Appellant further suggests that when a prosecution proceeds exclusively on that theory, dual prosecution of both the trafficking and simple possession of a given kind of contraband in a single transaction violates double jeopardy prohibitions pursuant to the exceptions enumerated in Chapter 775.021(4)(b) 1 thru 3 ***and*** under traditional ***Blockburger*** analysis. [16]

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.

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[16] Appellant is mindful of the requirement, for purposes of *Blockburger* and Chapter 775.021(4)(a) analysis, that examination be limited solely to the statutory elements of the crime alleged, without *regard to the accusatory pleadings or the proof adduced at trial.* Appellant first responds that the limitation described above is not applicable to the exceptions enumerated in Section 775.021(4)(b) 1, 2 and 3. Appellant next offers that recent decisions applying double jeopardy analysis in the arena of indirect criminal contempt proceedings implicitly recognize that in certain circumstances, a limited inquiry into the accusatory pleadings is permissible and, in fact necessary. *See: State v. Miranda,* 644 So.2d 342, 344 (Fla. 2nd DCA 1994), *approved in State v. Johnson,* 21 FLW S154 (April 4, 1996). ["In order to apply *Blockburger* to the case before us, it is necessary to examine the elements of both the criminal contempt charge and the aggravated stalking charge to see if each requires proof of an element the other does not"]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 13th day of September, 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 Correctional Institution, Post Office Box 1100, Avon Park, Florida 33825-1100.

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