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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 88, 664

WILLIE JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Willie Johnson, was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the "State" or "Prosecution.".

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State of Florida substantially accepts Petitioner's Statement of the Case and Facts as it appears at page two (2) of the initial brief to the extent it represents an accurate, non-argumentative recitation of the proceedings below. The State would add the following facts:

The only evidence of any alcohol use by appellant came from a witness indicating that appellant had drank "just a little" beer (R. 131), and when asked on cross-examination if appellant was drunk the witness responded "a little." (R. 142) Another witness testified that appellant was "about half drunk." (R. 215) However, Appellant did not seek to present any evidence of intoxication. Appellant firmly asserted that he was not drinking. (R. 316)

SUMMARY ARGUMENT

I.

Taking into account the legislative intent and the elements of the independent statute sections, there was no double jeopardy violation in convicting appellant of trespass to a conveyance by utilizing a firearm found therein, and grand theft of the firearm from the conveyance. The elements of the both crimes reflect that separate and additional elements of proof is required to establish trespass to a conveyance by utilizing a firearm found therein, and grand theft of the firearm from the conveyance. The dual convictions fall within the Blockburger analysis, and §775.021 Fla. Stat.

II.

The trial court did not err by denying appellant's request for a voluntary intoxication instruction where appellant did not establish that he was intoxicated at the time of the offense. There was no conclusive basis to establish intoxication. Given the evidence before the trial court, there was no abuse of discretion by the trial court in concluding that the voluntary intoxication instruction was not required.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED ON DOUBLE JEOPARDY AND ADJUDICATING APPELLANT GUILTY

Petitioner asserts a double jeopardy violation based on his adjudication and sentencing for both armed trespass (Trespass to a conveyance while arming himself therein) and grand theft involving the taking of the firearm from the conveyance.

In ruling on this matter, the Fourth District Court of Appeal, did not accept appellant's reliance on the First District Court of Appeal in **Marrow v. State**, 656 So. 2d 579 (Fla. 1st DCA 1995) which interpreted **State v. Stearns**, 645 So. 2d 417 (Fla. 1994), to hold that double jeopardy barred the defendant's conviction of both armed burglary and grand theft of a firearm involving the same firearm. **Marrow v. State**, conflicts with **Gaber v. State**, 662 So. 2d 422 (Fla. 3d DCA 1995), rev. granted 675 So. 2d 120 (Fla. Apr. 20 1996). In Gaber, the Third District Court of Appeal held that it was not a double jeopardy violation to be convicted of armed burglary and grand theft wherein the firearm was

the object of the theft.

The State submits that Fourth DCA's agreement with the analysis of the Third District in **Gaber**, which tracks the elements of proof required in accordance with **§775.021(4)(a), Fla. Stat (1993)**, is proper. In **Gaber**, the court concluded that both armed burglary and grand theft required an additional element that the other does not.

The United States Supreme Court established the foundation for double jeopardy analysis in **Blockburger v. United States,** 284 U.S. 299, 52 S.Ct. 180, 304 L.Ed. 2d 306 (1932), by stating that "[t]he test for determining whether the same act or transaction constitutes two offenses or only one is whether conviction under each statutory provision requires proof of an additional fact which the other does not." The **Blockburger** test was codified by the Florida Legislature as a part of Fla. Stat. (1993).

Subsection (a) of §775.021(4) states,

> **whoever, in the course of one criminal transaction or episode, commits an act or acts which constitutes 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 be**

> **served concurrently or consecutively. For purposes of this subsection, offenses are separate if each requires proof of an element that the other does not, without regard to accusatory pleading or proof adduced at trial.**

§775.021(4)(b) Fla. Stat. (1993) states:

> **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 principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:**
>
> **1. Offenses which are identical elements of proof.**
>
> **2. Offenses which are degrees of the same offense as provided by statute.**
>
> **3. Offenses which are lessor offenses the statutory elements of which are subsumed by the greater offense.**

Here, appellant was charged with armed burglary and convicted of the lesser include offense of armed trespass(Trespass to a Structure or Conveyance while armed). Appellant was also convicted of grand theft involved in the taking of the firearm. A conviction for armed trespass requires that the defendant without being authorized, licensed or invited, willfully enters or remains in any structure or conveyance. § 810.08 Fla. Stat. (1993). The offense is reclassified a third degree felony if the offense is committed while armed, or arms are obtained while committing the

offense. § 810.08(2)(c) Fla. Stat. (1993). As to a conviction for grand theft, § 812.014 Fla. Stat. (1993) requires that a defendant knowingly obtained the property of another with the intent to either temporarily or permanently deprive the owner of its use. "It is grand theft of the third degree and a felony of the third degree, punishable as provided in Sec. 775.082, Sec. 775.083, or Sec. 775.084, if the property stolen is: A firearm."

Taking into account the legislative intent and the elements of the independent statute sections, there was no double jeopardy violation in convicting appellant of trespass to a conveyance by utilizing a firearm found therein, and grand theft of the firearm from the conveyance. Theft addresses continued possession of the firearm in a manner so as to deprive the owner of a property interest in the firearm, and not as an instrument of force as is the case when the firearm is used in a trespass to a structure or conveyance. Moreover, the elements of the both crimes reflect separate and additional elements of proof is required to establish trespass to a conveyance by utilizing a firearm found therein, and grand theft of the firearm from the conveyance. As such, the dual convictions fall within the Blockburger analysis, and §775.021.

Further, in **Maxwell v. State**, 21 Fla. L. Weekly S429 (October 10, 1996), this Court recently noted the confusion surrounding the dual convictions and sentencing for firearm offenses stemming from a single episode and involving the same act of possession. This Court stated that "in determining the constitutionality of multiple convictions and punishment for offenses arising from the same criminal transaction, the dispositive question is whether the legislature 'intended to authorize separate punishments for the two crimes.'"

In assessing appellant's argument on the double jeopardy implications of convictions for trespass to a conveyance with a firearm, and theft of the firearm, one would surmise that the removal of the firearm from the vehicle and the deprivation of such an item of personal property would merit no further legal punishment where the same weapon was used during the trespass. Appellant argues that this is presumptively so, however, such a conclusion goes against the legislative intent that can be gleaned from the statutory sections. In §810.08(trespass) the focus is on giving greater criminal punishment to the utilization of a firearm

during the commission of a trespass to a structure or conveyance.[1] While § 812.014 (theft), as it pertains to the taking of a firearm, shows an intent on the part of the legislative to give greater deference to the deprivation of a firearm from its owner. [2]

The critical analysis must focus on the statutory scheme that the Florida legislative has created to bring about the punishment and deterrence of independent crimes. The statutes reflect that the State mandated greater punishment for a person who seeks to utilize a firearm as an instrumentality of force by having a weapon while trespassing in a structure or conveyance.[3] Separately and distinctively, the legislature has deemed the **deprivation of the right to a firearm as personal property, or the benefit from that**

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[1] The greater punishment for the utilization of a firearm or weapon during the commission of a trespass to a conveyance seems to derive its basis from the inherent violent force found in crimes involving the use of weapon.

[2] The legislature's greater deference could be attributed to the firearm as a constitutionally recognize right of security (Fifth Amendment, United States Constitution), or the recognition that theft of a firearm often results in further violent crime. With either perspective, the legislature show specific consideration to the deprivation of a person's property right to own and utilize a firearm for legally beneficial purposes.

[3] The degree of crime is increased.

property merits greater consideration than merely theft.

A proper consideration of the actual statutory elements to be proven reflects that the legislature clearly intended that convictions under §810.08, trespass while armed, are separate from convictions under § 812.014, grand theft of a firearm. As such, the State submits that the constructions indicated herein are plausible under the constraints of double jeopardy. The Fourth District Court of Appeal is correct in holding that there was no violation of the constitutional restrictions against double jeopardy.

POINT II.

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST FOR A VOLUNTARY INTOXICATION INSTRUCTION.

Appellant asserts that the trial court erred by not reading the special jury instruction on the defense of voluntary intoxication (VI) as to the charges of aggravated assault and grand theft. The State would submit that the trial court did not err by denying appellant's request where appellant did not establish that he was intoxicated at the time of the offense.

The established law is that the standard on review of a trial court's refusal to give a requested instruction is abuse of discretion. **Robinson v. State**, 574 So. 2d 108, 111 (Fla. 1991). It must also be noted that the voluntary intoxication instruction **need not be given simply because a defendant consumed alcohol prior to** the commission of a crime. **Jacobs v. State**, 396 So. 2d (Fla. 1981). Further, if intoxication at the time of the offense is not established, the voluntary intoxication instruction is not required, even if prior use is shown. **Linehan v. State**, 476 So. 2d 1262 (Fla. 1985).

The State must note that the Fourth District Court has held that where there is some evidence **to support the theory of voluntary intoxication**, it is error to fail to give the requested instruction. Heddleson v. State, 512 So. 2d 957 (Fla. 4th DCA 1987). Appellant relies on **Mellins v. State**, 395 So. 2d 1207 (Fla. 4th DCA 1981) to assert that the VI instruction was required in this matter. However, unlike in Mellins and Heddleson, here appellant specifically **denied drinking at all** prior to the offense in question. In Mellins, the court noted that the defendant denied only the fact of being intoxicated and not the fact of drinking.

Here, the only evidence of any alcohol use by appellant came from a witness indicating that appellant had drank "just a little" beer (R. 131), and when asked on cross-examination if appellant was drunk the witness responded "a little." (R. 142) Another witness testified that appellant was "about half drunk." (R. 215) However, Appellant did not seek to present any evidence of intoxication. In fact, appellant firmly asserted that he was not drinking. (R. 316)

The trial court made a discretionary ruling based on statements that appellant had drank "just a little", "about half

drunk", "a little" drunk and **a blanket denial by appellant of any drinking.** As such, there was no conclusive basis to establish intoxication. Given the evidence before the trial court, there was no abuse of discretion by the trial court in concluding that the voluntary intoxication instruction was not required. The Fourth District Court did not err in affirming the trial court's denial.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Appellee respectfully requests this honorable Court to affirm the Fourth District Court's holding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished to Paul Petillo, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 November 25, 1996.

AUBIN WADE ROBINSON
Counsel for Appellee