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IN THE

SUPREME COURT OF FLORIDA

FILED

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CLERK, SUPREME COURT

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WILLIE JOHNSON,	)	
Petitioner,	)	
vs.	)	CASE NO. 88,664
STATE OF FLORIDA,	)	
Respondent.	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

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AUTHORITIES CITED

FLORIDA STATUTES

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts.

STATEMENT OF THE CASE AND FACTS

Petitioner, Willie Johnson, was charged by information with armed burglary, aggravated assault on Jeffrey O'Connor (count II) and Kathy Thomas (count III), and grand theft of a firearm (count IV) (R 431-432). He proceeded to jury trial on February 15, 1995 (R 1).

Testimony at trial revealed that on November 8, 1993, Kathy Thomas and Mr. Johnson were discussing the possibility of their reunification (R 130). Ms. Thomas and Johnson were involved in the past, but Johnson had been in jail on other charges just prior to the night in question (R 130). About 10:00 p.m. that same evening, Jeffrey O'Connor arrived in his car (R 133). O'Connor and Thomas had been romantically involved while Mr. Johnson was in prison (R 132-133). Upon his arrival, Thomas got into O'Connor's car and the two of them drove around the block (R 133).

When Thomas and O'Connor returned, Mr. Johnson approached the car (R 135). Words were exchanged and Mr. Johnson reached inside the car and took O'Connor's gun (R 135-136). According to Ms. Thomas, Johnson ordered both of them out of the car (R 135-136). Johnson ran to a nearby house and O'Connor ran down the street (R 138). Ms. Thomas stated that Johnson was pointing the gun at O'Connor as O'Connor ran away (R 138). The police arrived shortly thereafter and Mr. Johnson was arrested (R 153).

On cross-examination, Mr. O'Connor testified that Appellant had been drinking, and was "about half drunk" when this happened (R 215).
Ms. Thomas also testified that Mr. Johnson had been drinking and was a little drunk when this happened (R 142).

Mr. Johnson testified that on the night in question he and Ms. Thomas had been at a pool hall called the "Melody Inn" (R 300). Afterwards, they went went back to his mother's house (R 300). O'Connor pulled up and Thomas got in his car (R 300). They left, but returned shortly thereafter (R 301). Mr. Johnson and O'Connor had words (R 304). O'Connor got out of the car as if to fight, but then he backed up and ran away (R 307). Johnson denied taking O'Connor's gun (R 307, 314).

On cross-examination, Mr. Johnson denied drinking that night (R 316). Johnson said he was on control release from prison and that abstinence was one of the rules of that program (R 316).

After Mr. Johnson testified, the defense rested (R 324). A charge conference was held (R 324). Defense counsel requested a voluntary intoxication instruction because the state's witnesses testified that Mr. Johnson was drunk (R 324-325). The prosecutor opposed the instruction because Mr. Johnson denied drinking (R 325). The trial court denied Appellant's requested instruction on voluntary intoxication (R 324-325).

In closing, the prosecutor argued:

> Ladies and gentleman, he probably was drinking a couple beers that night, and everyone knows when people drink they get mad easier. They get irrational sometimes.
>
> Who knows, ladies and gentleman. He testified that he hadn't had anything to drink.
>
> Take it on face value. It doesn't matter. He committed the crime, ladies and gentleman.

(R 358). This argument prompted defense counsel to renew his request for a voluntary intoxication instruction (R 370). The trial court denied the renewed request (R 370).

Mr. Johnson was found guilty of armed trespass, a lesser included offense of count I, aggravated assault on Jeffrey O'Connor (count II), and grand theft of the firearm (count IV) (R 396). Johnson was acquitted of aggravated assault on Kathy Thomas (count III) (R 396).

Mr. Johnson appealed to the Fourth District Court of Appeal and argued that his dual convictions for armed trespassing and grand theft of the firearm violated double jeopardy. He also argued that a new trial should be ordered on the grand theft and aggravated assault charges because the trial court denied his requested jury instruction on intoxication, and yet allowed the prosecutor to use the evidence of Johnson's intoxication to obtain convictions.

The Fourth District Court of Appeal affirmed but acknowledged conflict with Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA), rev. denied, 664 So. 2d 249 (1995), on the double jeopardy issue. Johnson v. State, 677 So. 2d 71 (Fla. 4th DCA 1996). Notice of appeal to this Court was filed, and this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

POINT I

Appellant's dual convictions for armed trespassing and grand theft of a firearm violate double jeopardy because Appellant's single act of stealing the firearm was the act which converted his trespass into an armed trespass. Thus, one of these convictions must be vacated.

POINT II

There was evidence at trial that Mr. Johnson was intoxicated at the time of the crimes. Defense counsel requested a voluntary intoxication instruction. The prosecutor opposed the request and the trial court denied it because Mr. Johnson denied drinking. The prosecutor in closing argument used the evidence of Mr. Johnson's intoxication to obtain convictions. This prompted defense counsel to renew his request for the instruction. The trial court erred in denying this renewed request.

POINT I

JOHNSON'S DUAL CONVICTIONS FOR ARMED TRESPASSING AND GRAND THEFT OF A FIREARM VIOLATE DOUBLE JEOPARDY

Mr. Johnson reached inside a car and stole a gun. For this single act he received dual convictions for armed trespassing[1] and grand theft of a firearm.[2]

As a general rule, whether dual convictions violate double jeopardy hinges on the Blockburger[3] "same elements" test, i.e., whether each offense contains an element not contained in the other. See M.P. v. State, 21 Fla. L. Weekly S433 (Fla. Oct. 10,

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[1] **810.08 Trespass in structure or conveyance.**

(1) Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance.
(c) If the offender is armed with a firearm or other dangerous weapon, or arms himself with such while in the structure or conveyance, the trespass in a structure or conveyance is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

[2] **812.014 Theft.**

(1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or to 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 to the use of any person not entitled thereto.
(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

* * *

5. A firearm.

[3] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

1996); State v. Maxwell, 21 Fla. L. Weekly S429 (Fla. Oct. 10, 1996); § 775.021(4)(a), Fla. Stat. (1993).

Armed trespassing and grand theft of a firearm each have elements the other does not. However, there is a statutory exception to the Blockburger test: "Offenses which are degrees of the same offense as provided by statute." § 775.021(4)(b)2., Fla. Stat. (1993). In State v. Thompson, 607 So. 2d 422 (Fla. 1992), this Court agreed with the Fifth District Court of Appeal that section 775.021(4)(b)2., bars dual convictions for fraudulent sale and felony petit theft because these crimes are simply aggravated forms of the same underlying offense distinguished only by degree factors. In Goodwin v. State, 634 So. 2d 157 (Fla. 1994), this Court, citing § 775.021(4)(b)2., held that dual convictions for UBAL manslaughter and vehicular homicide were barred because they are aggravated forms of a single underlying offense distinguished only by degree factors.

In Sirmons v. State, 634 So. 2d 153 (Fla. 1994), this Court held that dual convictions for grand theft auto and robbery with a weapon were barred because:

> The degree factors of force and use of a weapon aggravate the underlying theft offense to a first degree felony robbery. Likewise, the fact that that an automobile was taken enhances the core offense to grand theft. In sum, both offenses are aggravated forms of the same underlying offense distinguished only by degree factors. Thus, Sirmons' dual convictions based on the same core offense cannot stand.

Sirmons, 634 So. 2d at 154.

Under Sirmons, a defendant who robs someone of an automobile cannot be convicted of both grand theft auto and robbery. It necessarily follows that a defendant who robs someone of a firearm cannot be convicted of both grand theft (of the firearm) and robbery. Likewise, a defendant who trespasses, and, while doing so, arms himself with the owner's firearm (thereby converting his misdemeanor trespass into a felony trespass) cannot be convicted of both armed trespassing and grand theft of the firearm.

This Court should reverse Mr. Johnson's dual convictions on the authority of Sirmons with instructions to vacate one of them.

POINT II

THE TRIAL COURT ERRED IN DENYING MR. JOHNSON'S RENEWED REQUEST FOR AN INSTRUCTION ON VOLUNTARY INTOXICATION MADE AFTER THE STATE IN CLOSING ARGUMENT USED THE EVIDENCE OF MR. JOHNSON'S INTOXICATION TO OBTAIN CONVICTIONS

Because there was evidence that Mr. Johnson was intoxicated, defense counsel asked for a voluntary intoxication instruction (R 324). The prosecutor opposed the instruction because Mr. Johnson denied drinking (R 325). The trial court denied Appellant's requested instruction on voluntary intoxication (R 324-325).

In closing, the prosecutor argued:

> Ladies and gentleman, he probably was drinking a couple beers that night, and everyone knows when people drink they get mad easier. They get irrational sometimes.
>
> Who knows, ladies and gentleman. He testified that he hadn't had anything to drink.
>
> Take it on face value. It doesn't matter. He committed the crime, ladies and gentleman.

(R 358). This argument prompted defense counsel to renew his request for a voluntary intoxication instruction (R 370). The trial court denied the renewed request (R 370). The trial court erred in denying defense counsel's renewed request for an instruction on voluntary intoxication.

In Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981), the Fourth District Court of Appeal held that a requested instruction on intoxication must be given, if there is any evidence to support it, even if the defendant denies being intoxicated. Mellins, 395 So. 2d at 1209-1210. Accord Randolph v. State, 526 So. 2d 931, 933 (Fla. 1st DCA 1988), rev. denied, 536 So. 2d 245 (Fla. 1988); Edwards v. State, 428 So. 2d 357, 358 (Fla. 3d DCA 1983). Rather illogically and inexplicably, the Fourth District Court of Appeal went on to add the following dicta to its opinion: "If appellant denied that she had been drinking, then the defense of voluntary intoxication would not have been available to her."

This dicta is impossible to square with the holding in Mellins which requires that a voluntary intoxication instruction even if the defendant denies being intoxicated. In each case, the defendant is disavowing the applicability of the instruction, yet the evidence reveals otherwise. The voluntary instruction should be given if there is some evidence of intoxication and even if the defendant denies drinking altogether. In order to make a correct decision, the jury should be properly instructed on the law as it applies to any facet of the evidence presented to it.

The instant case proves that the better course is to properly instruct the jury on any facet of the evidence that arises. That is because the prosecutor opposed the giving of the voluntary intoxication instruction (R 325), but went on to use the evidence of Appellant's intoxication in closing argument to obtain convictions (R 358). Due process is violated when a prosecutor opposes the giving of a proper jury instruction and then uses the lack thereof to his or her advantage. See Simmons v. South Carolina, 114 S.Ct. 2187 (1994) (due process violated when prosecutor opposed defendant's request to have jury instructed that life imprisonment meant life without parole, and then obtained death sentence by arguing to jury the defendant's future dangerousness).

Because there was evidence that Mr. Johnson was intoxicated, and because the prosecutor used this evidence in closing argument to convict him, the trial court reversibly erred in denying Appellant's renewed request for an instruction on voluntary intoxication. This Court should reverse Appellant's grand theft and aggravated assault convictions and remand for new trial.[4]

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[4] Voluntary intoxication is a defense to any crime requiring specific intent. Russell v. State, 373 So. 2d 97 (Fla. 2d DCA 1979). Grand theft and aggravated assault are specific intent crimes. Link v. State, 429 So. 2d 836 (Fla. 3d DCA 1983)

CONCLUSION

This Court should reverse Mr. Johnson's grand theft and aggravated assault convictions for new trial (Point II), with instructions that if he is again convicted of grand theft of a firearm, the state will be required to elect between armed trespassing or grand theft (Point I).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to AUBIN WADE ROBINSON, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 4th day of November, 1996.

Paul E. Petillo
Attorney for Willie Johnson

(grand theft); Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985) (aggravated assault). Trespass is a general intent crime and therefore the voluntary intoxication defense is not applicable to Appellant's armed trespassing conviction. See Rozier v. State, 402 So. 2d 539, 542 (Fla. 5th DCA 1981), approved, 436 So. 2d 73 (Fla. 1983); Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985).