047

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 88,809

JAMES **R.** PACIONE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW
BASED ON QUESTION CERTIFIED

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, James Paccione, was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin 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.

SUMMARY ARGUMENT

The Fourth District Court of Appeal did not err in holding that a defendant may be convicted of both possession with the intent to sell marijuana, § 893.13(1)(a), Fla. Stat., and possession of marijuana in excess of twenty grams pursuant to § 893.13(6)(a), (b) Fla Stat.. The restrictive language of § 893.13(6)(b) establishes that in order to prove a felony charge of possession of a controlled substance pursuant to 893.13(6)(a) where cannabis is the control substance being possessed, it is a necessary element that the amount possessed was greater that twenty grams. On the other hand, a charge pursuant to 893.13(1)(a) contains the requisite element of possession with the intent sell, manufacture, or deliver. Applying the Blockberger[1] analysis codified in § 775. 021, Fla. Stat., there are independent elements required in convictions for possession of a controlled substance with the intent to sell, manufacture or deliver under 893.13(1)(a), and possession of controlled substance where the substance is Marijuana under § 893.13(6)(a) and (b).

[1] Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180,304 L.Ed. 2d 306 (1932).

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED ON DOUBLE JEOPARDY AND ADJUDICATING APPELLANT GUILTY OF POSSESSION OF MARIJUANA WITH INTENT TO SELL, MANUFACTURE OR DELIVER, § 893.13(1)(a) Fla. Stat (1993) **AND POSSESSION OF THE SAME MARIJUANA IN AN AMOUNT GREATER THAN TWENTY GRAMS,** § 893.13(6)(a) and (b) Fla. Stat. (1993) .

Petitioner asserts a double jeopardy violation based on his adjudication and sentencing for both possession of a controlled substance with the intent to sell, manufacture or deliver in accordance with § 893.13(1)(a) Fla. Stat (1993), and possession of a control substance marijuana in excess of twenty grams in accordance with §893.13(6)(a) and (b) Fla. Stat. (1993).

In ruling on this matter, the Fourth District Court of Appeal relied on Peterson v. State, 645 So. 2d 1028 (Fla. 4th DCA 1994), and Gibbs v. State, 676 So. 2d 100 1 (Fla. 4th DCA 1996), review pending Case No. 88,80. In Peterson, the court held that sale, delivery or possession of cocaine with the intent to sell and possession of cocaine did not violate the double jeopardy prohibition where the evidence at trial was that the defendant sold a cocaine rock to an undercover officer which he had obtained from a codefendant who took it from a vial containing 32 cocaine rocks. Likewise in Gibbs, the Fourth District held that there was no double jeopardy violation arising from separate convictions and punishments for offenses of trafficking in cocaine and simple possession of the same cocaine.

The Fourth District in Peterson and Gibbs relied upon this Court's holding in State v.

McCloud, 577 So. 2d 939 (Fla. 1991). McCloud line of cases following McCloud. is ____ s court concluded, pursuant to Fla. Stat. 775.021 (4), that convictions for possession and sale of the same quantum of cocaine did not violate double jeopardy. This Court stated as follows:

> **... section 775.021(4)(a) specifically 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." (Emphasis added.) Thus, section 775.021(4)(a) precludes the court from examining the evidence to determine whether the defendant possessed and sold the same quantum of cocaine such that possession is a lesser-included offense of sale in any one case.**

State v. McCloud, 577 So.2d 939, 941 (Fla. 1991)

The United States Supreme Court established the foundation for double jeopardy analysis in Blockberger 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 Blockberger 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 that "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."

Pursuant to § 893.13(1)(a), "[i]t is unlawful for any person to sell, manufacture, or deliver, or possess with the intent to sell, manufacture, or deliver, a controlled substance." § 893.13(6)(a) states that "it is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or be in actual or constructive possession of a controlled substance except as authorized in by this chapter." However, subsection (b) creates a distinctive element for possession of cannabis (marijuana). §893.13(6)(b) Fla. Stat. (1993) states ," if the offense is the possession of not more than 20 grams of cannabis, as defined in this chapter, the person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

The State submits that the restrictive language of subsection (b) establish by implication that in order to prove **a felonv charge aursuant to § 893.13(6)(a)** for possession of cannabis, it is a necessary element to establish that the amount of marijuana possessed was greater thaN twenty grams. **In terms of possession of cannabis,** there is an additional element not present in a charge of simple possession, or possession with the intent to sell, manufacture or deliver pursuant to 893.13(1)(a). A charge pursuant to 893.13(1)(a) contains the requisite element of possession with

the intent sell, manufacture, or deliver, A person must not merely be in possession of a controlled substance, but must possess that substance with a requisite intent to sell, manufacture, or deliver. With this construction, there is at least one additional element of proof not present in the other offense,

Petitioner relies on Burke v. State, 640 So. 2d 1222 (Fla. 5th DCA 1994) and Pasley v. State, 625 So. 2d 1303 (Fla. 1 st DCA 1992), wherein the Fifth District and First District Courts of Appeal have held that convictions for both possession of cannabis with intent to sell and possession of more than twenty (20) grams of that same cannabis is barred by double jeopardy. However, neither Burke, nor Pasley construed the requisite statutory elements needed to prove a charge pursuant of §893.13(1)(a) and §893.13(6)(a) as affected by §893.13(6)(b).

Further, Petitioner asserts that a charge pursuant to § 893.13(1)(a) must always necessarily include the charge of possession of controlled substance under § 893.13(6). This assertion is misplaced, where a review of the standard jury instructions reveals that there **are no necessarily lesser included offenses** for charges filed pursuant to § 893.13(1)(a). This court stated in Baker v. State, 456 So. 2d 419,420 (Fla. 1984), and again in State v. McCloud, 577 So. 2d 939, 941 (Fla. 199 1), that "an offense is a lesser-included offense for purposes of § 775.02 1(4) **only if** the greater offense necessarily includes the lesser offense." (emphasis added) In St., the First District court of Appeal quoting Baker stated:

> ... section 775.02 1(4) excluding lesser included offenses "refers only to necessarily lesser included offenses", that "the Brown category four [now category 2] lesser included offense analysis, while still possibly viable for jury alternatives, has nothing to do with double

jeopardy," and that in determining whether separate convictions may flow from a single event, "one looks at the statutory elements of the charged crimes, as opposed to the language of the charging document" (emphasis in the original),

548 So.2d 797, 798-799 (Fla. 1 st DCA 1989) (foot note omitted)

Taking into consideration this Court's ruling as to the consideration of only necessarily lesser-included offense under § 775.02 1(4), respondent's assertion that the charge of possession of marijuana in excess of twenty grams is always necessarily lesser-included to a charge under § 893.13(l)(a) is without merit.

The State would also submit for consideration of this court that the standard jury instruction for § 893.13(1)(a), which lumps possession with the intent to sell, manufacture, or deliver as one element does not carry out the intention of the legislature. See Fla Std. Jury Inst. Crim. § 893.13(1)(a), pp. 219-220. The crimes prohibited by § 893.13 (l)(a), particularly to the charge of possession with the intent to sell, manufacture, or deliver, a controlled substance, in proper application requires proof of the following: (1)possession of a controlled substance, (2) the substance is possessed with the intent to sell, manufacture or deliver, and (3) knowledge as to the presence of the substance. The "with intent to" language of § 893.13(1)(a) has been deemed as requiring the State to establish as a separate element the "intent to sell, manufacture, or deliver." See Johnson v. State, 569 So. 2d 872 (Fla. 2d DCA 1990). However, the current standard jury instruction subsumes the "with the intent to' language as a part of the first element of the instructions applicable to § 893.13(1)(a).

A proper consideration of the actual statutory elements to be proven reflects that the

legislature clearly intended that convictions under § 893.13(1)(a), are separate from convictions under § 893.13 (6)(a),and (b). Felony possession of marijuana in excess of twenty grams in accordance with § 893.13(6)(a) and (b) requires specific proof that (1) possession of marijuana, (2) and the marijuana totaled more than twenty grams. As such, the State submits that the constructions indicated herein are plausible under the constraints of double jeopardy. The Fourth District Court of Appeal's holding is correct. A defendant may properly be convicted of possession of a controlled substance with the intent to sell, manufacture, or deliver, and possession of marijuana in excess on twenty grams.

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 and answer the question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished to TATJANA OSTAPOFF, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 October 9, 1996.

AUBIN WADE ROBINSON
Counsel for Appellee

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