IN THE SUPREME COURT OF FLORIDA

ANTHONY D. WHITE,

Petitioner,

v. FSC No. 89,998

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Second District. Petitioner, ANTHONY D. WHITE, was the defendant in the trial court and the Appellant in the District Court of Appeal.

SUMMARY OF THE ARGUMENT

The trial court's addition of eighteen points on the sentencing guideline score sheet was proper. A defendant may be convicted and sentenced for dual convictions of carrying a concealed firearm and possession of firearm by a convicted felon without a violation of double jeopardy. Thus, this Court should reject Petitioner's demand for relief. As for the motion to suppress, the Second District affirmed the trial court's ruling and this Court should not disturb the ruling, which is supported by the record.

ARGUMENT

ISSUE I

WHETHER THE TRIAL **COURT ERRED IN ASSESSING** EIGHTEEN POINTS FOLLOWING **THE DEFENDANT'S DUAL CONVICTIONS ON FIREARMS** VIOLATIONS? **[As Restated by Respondent.1**

In its opinion, the Second District affirmed the trial court's order denying the amendment of Petitioner's score sheet with eighteen points, but certified conflict with Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). Petitioner asserts the addition of the eighteen points violate double jeopardy, in that a firearm is an essential element of each offense on which his convictions were obtained. In the alternative, Petitioner argues this Court should apply the reasoning of the Fourth District because here, as in Galloway, no additional substantive crime was committed. The Respondent's position is that these points were properly added. Each offense has an element of proof that the other lacks, thus there is no violation of double jeopardy in the instant case.

In support of its position, Respondent would first point out that this Court has not established **a** per se rule forbidding multiple convictions and sentences, which stem from the same criminal episode. Allen v. State, 684 So. 2d 819 (Fla.

1996) (Emphasis added). Instead, this Honorable Court has ruled that dual convictions and sentences involving similar, if not the identical offenses charged in the instant case, 'do not necessarily violate double jeopardy." M.P. v. State, 682 So. 2d 79, 81-82 (Fla. 1996) (Juvenile's dual conviction for carrying a concealed firearm and possession of a firearm by a minor would be upheld: each offense contained element other lacked, and legislature intended cumulative punishment).

A double jeopardy inquiry requires that a court, pursuant to section 775.0-21(4)(a), Florida Statutes (1993), examine the elements of the offenses, rather than the facts of the case. State v. Maxwell, 682 So. 2d 83,84 (Fla. 1996). This is the 'same elements" test culled from Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). The offenses will be deemed separate where each offense requires proof of an element that the other does not. Maxwell, citing, State v. Johnson, 676 So. 2d 408 (Fla. 1996). Thus, the fact both of the convictions involve a firearm is not the critical query, as Petitioner contends.

In Maxwell, the defendant was convicted and sentenced on offenses identical to the instant case, and in addition for possession of a short-barreled shotgun. As in the present case,

all offenses arose from one occurrence and involved a firearm. On appeal, the district court reversed two of the convictions and sentences because the offenses stemmed from the same criminal episode-l

This Court found the three gun-related convictions did not violate double jeopardy. Maxwell, 682 So. 2d at 84. Each offense contained an element of proof that the other did not, even though, all three charges contained the 'common element of possession of a firearm." Id. Thus, under Blockburger, the multiple convictions and sentences were proper.

In the instant case, the offense of carrying a concealed firearm, lacks an element contained in possession of a firearm by a convicted felon. The former requires concealment, while the latter requires that the defendant be a convicted felon. Both elements must be proved to sustain convictions. Consequently, the result in Maxwell should be reached here, and Petitioner's claim of double jeopardy should be rebuffed.

This Court should likewise reject Petitioner's alternative argument that the ruling of the Fourth District in Galloway, 680 so. 2d 616 is applicable to his convictions and sentence. In

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1. Maxwell State, 666 So. 2d 951,952 (Fla. 1st DCA 1996)

Galloway, the Fourth District refused to permit dual punishment, concluding that Florida Rule of Criminal Procedure 3.702(d) (12) was applicable only where the offender was convicted of an additional substantive offense. The court reasoned that because the convictions involved no other crimes, but firearms violations, the additional points could not be added. Respondent disagrees that this a reasonable interpretation of the legislature's intent in promulgating rule 3.702(d) (12).

The provision plainly reads that it is the possession of a firearm while attempting or committing a crime, other than those enumerated felonies (in Section 775.087(2), Fla. Stat. (1993)), which will result in the additional points. There is no reason why the rule could not have been drafted excluding carrying a concealed firearm or other possessory crimes, and having failed to do so, it appears that eighteen points should be assessed where the offender commits "any felony" while in possession of a firearm. Respondent would urge that the Fifth District in Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995) was correct in finding that the language of rule 3.702(d)(12), means, 'any felony," including drug offenses.

Since gun control is a crucial issue in our community, it is certainly fair to interpret this provision as an intentional

effort to further penalize those who are convicted felons and illegally possess a firearm even if the crime itself is carrying a concealed firearm. The legislature of this state has adequately put convicted felons on notice that the act of outfitting oneself with a firearm and concealing it can lead to cumulative punishment.

Even if this Court finds the legislature's intent is not specifically declared, in rule 3.702(d)(12), or any other related provision, the addition of the eighteen points can nonetheless be upheld. [A]bsent an explicit statement of legislative intent to authorize separate punishments for two crimes, "the Supreme Court left *Blockburger* as the sole method for determining whether multiple punishments and successive prosecutions are subject to the double jeopardy bar." Maxwell, 682 So. 2d 83, at 85.

Petitioner wrongly asserts that Davidson can be distinguished from this case. There the defendant was charged with carrying a concealed firearm; a semi-automatic weapon. In order for the defendant to receive the additional twenty-five points on his guideline score sheet, he must have been in possession of a semi-automatic weapon, while attempting to commit or committing a felony (concealment) as rule 3.702 (d) (12) plainly reads.

similarly, in the present case, in order for eighteen points to be assessed to Petitioner's score sheet, he must have been in possession of a firearm, while attempting to commit or committing a felony, to wit: concealment.

Under rule 3.702(d)(12), Davidson received additional points because the critical element rested with the fact that he had committed or was attempting to commit a felony; concealment, while in possession of a firearm.

Likewise here, the essential element in both offenses is not the firearm. Rather, the state had to present proof that the defendant was a convicted felon, and that he was concealing the weapon. If the state had failed to prove these elements, the convictions could not stand.

Contrary to Petitioner's assertions, the additional points, assessed pursuant to rule 3.702(d)(12), cannot be compared to reclassification, or the kind of enhancement prohibited where use of a firearm is an essential element of the crime. Thus, Gonzalez, relied upon by Appellant is not helpful here.

This Court's recent decision in Garber v. State, 684 So. 2d 189 (Fla. 1996), further supports the State's position the additional points were properly imposed. There, a defendant's conviction for armed burglary and grand theft of a firearm,

arising from a single taking did not violate double jeopardy. The defendant broke into a home and armed himself with a firearm found inside. After the Third District found the dual convictions and sentences were proper, Garber unsuccessfully urged this Court to find the single act of taking the firearm was a critical component in both offenses and thus violated double jeopardy.

This Court found the statutory elements of each offense contained an element that the other did not. Garber, 684 So. 2d at 191. Therefore, the fact both involved one firearm and the single taking of that firearm was of no consequence. Here, White's claim of double jeopardy must be rejected since he cannot demonstrate that the elements of the offenses on which his convictions were obtained fail to meet the "same elements" test. Thus, he has failed to show the principles of double jeopardy have been violated. The trial court's ruling should be affirmed.

ARGUMENT

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS WHERE THE EVIDENCE WAS SUFFICIENT TO SHOW THE OFFICER HAD REASONABLE SUSPICION TO CONDUCT A STOP AND SEARCH OF THE DEFENDANT? [As Restated by Respondent.]

In its opinion, the Second District affirmed the order of the trial court denying the defendant's motion to suppress. Respondent adopts and incorporates the argument presented in the Answer Brief filed in the Second District Court of Appeal.

The trial court determined both the stop and frisk of Appellant by Officer Mosbach were lawful (R67-69). This ruling comes to the appellate court clothed in a presumption of correctness. Lee v. State, 392 So. 2d 615 (Fla. 2d DCA 1981). The role of an appellate court in reviewing a motion to suppress, is to interpret the evidence, and reasonable inferences therefrom, in a light most favorable to sustaining the trial court's ruling. Owen v. State, 560 So. 2d 207 (Fla. 1990); State v. Rravo, 565 So. 2d 857 (Fla. 2d DCA 1990)(Trial court's determination that defendant failed to give consent to search, would not be reexamined on appeal).

A. STOP OF APPELLANT WAS LAWFUL:

*1. Appellant drove **recklessly** in Officer's Presence -*

The state would contend the record supports a valid stop on two grounds. First, Appellant *was* observed driving recklessly, and at times exceeding the speed limit by more than 15 miles per hour (Rll-13). At one point, Appellant had to take evasive action to avoid colliding with cars at an intersection where the light had turned red (Rll-14). Appellant's own witness, and passenger on the night in question, admitted Appellant was speeding (R55). Moreover, this witness corroborated Mosbach's testimony that Appellant almost collided with another car while passing through an intersection (R57).

Certainly, these facts were sufficient, if believed by the trial court, that the defendant had committed, was committing, or about to violate a law, thereby justifying the stop. See, Pugh v. State, 635 So. 2d 999 (Fla. 2d DCA 1994) (Suppression of cocaine reversed: Defendant committed offense of driving while license suspended in presence of the officers, which supported basis for stop). See also, State v. Eady, 538 So. 2d 96 (Fla. 3d DCA 1989) (Suppression reversed: officer's observations were sufficient to support stop of defendant for speeding, though officer was unsure of actual speed limit and only intended to

give warning). Secondly, the officer properly stopped to investigate Appellant who appeared to match the description of a be-on-the-lookout (hereinafter BOLO) report.

2. ***Appellant, passenger and motorcycle matched BOLO*** -

Mosbach stopped Appellant some thirty minutes after receiving the BOLO (R10). Though he was unable to remember the details of the BOLO during his testimony, Mosbach did recall the report described two people on a black motorcycle (R8-9,11,16). [2]

A local retail store had reported that one of these individuals, ***a*** man dressed in a black leather jacket, had displayed a weapon inside of the store (R8,24). Then, before leaving on a motorcycle, the man was seen placing the gun inside of the leather jacket (R8,24-25,34-35). After spotting a motorcycle and its riders, which fit the descriptions of the BOLO, and observing the reckless manner of its operation, Mosbach effectuated ***a*** stop (R13-15,25,33). Black motorcycles, Mosbach testified, were a rare site in this area (R46).

These facts were sufficient for the trial court to find the officer articulated a reasonable suspicion to conduct an investigatory stop. See, State v. Webb, 398 So. 2d 820 (Fla.

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[2]. According to Mosbach, the BOLO described the clothing and the type of vehicle the suspects were riding (R8-9,16,22).

1981) (Stop of defendant some six hours after detailed BOLO issued was lawful: officers believed defendant matched description). Cf. Sanders v. State, 666 So. 2d 1035,1036 (Fla. 1st DCA 1996) (Unlawful stop: Officer testified he would have stopped any car with black males leaving the area where a robbery had just occurred based on BOLO, which merely described perpetrators as two black males, one wearing white t-shirt and the other wearing a black t-shirt).

Finally, there is no evidence that the stop in this case was based on a pretext to search for contraband, See Brown v. State, 577 so. 2d 708,709 (Fla. 2d DCA 1991)(Officer's stop and detention of defendant for alleged parking violation was pretextual);[3] nor is there evidence that the length of detention between the encounter and inquiry was unreasonable. See Bozeman v. State, 603 So. 2d 585,586 (Fla. 2d DCA 1992) (Continued detention following conclusion of traffic stop was illegal).

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[3]. The following case was not included in the State's Answer Brief to the Second District. Vehicle stops based on traffic violations are lawful regardless of subjective police motive. The United States Supreme Court in Whren v. United States, 517 U.S. _____, 116 S.Ct. 1769, 135 L.Ed.2d 89,97 (1996), reiterated that at no time has the Court found a search flowing from justifiable behavior invalid because of improper police motive. In other words, if there is a lawful reason to conduct a stop, the officer's motive is irrelevant. Id. at 98.

Therefore, the trial court properly found the stop was lawful. Moreover, the trial court likewise did not err in finding the pat down was reasonably under the totality of the circumstances.

B. PAT DOWN SEARCH OF APPELLANT WAS LAWFUL:

The law is well established that an officer may conduct a pat down for his safety where he has an articulable suspicion the defendant could be armed. Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Hetland v. State, 366 So. 2d 831 (Fla. 2d DCA 1979), *approved* 387 So. 2d 963 (1980) (Officers possessed probable cause to believe defendant armed after observing butt of gun in waistband following request to stand up).

Here, Mosbach had several factors leading him to be concerned for his safety. First, Appellant had openly disregarded traffic laws and the safety of others by his reckless driving and speeding (R13-15,25,33). Secondly, after the stop, Appellant quickly disembarked from the motorcycle, and made several attempts to reach into his jacket, allegedly for a cigarette (R16-18,33-34). See, State v. Vera, 666 So. 2d 576,577 (Fla. 2d DCA 1996)(Where this Court found a defendant's nervous behavior and body language gave an officer founded suspicion to believe the defendant was armed and had not been truthful about

inquiry), According to the BOLO, the driver had placed a loaded firearm inside of his leather jacket (R8,24-25,34-35).

Clearly, it was reasonable for Mosbach to conclude that if Appellant was the subject of the BOLO, he could still be armed, where as here, the stopped took place within thirty minutes of the report. This case is like Webb, supra, where an officer was justified in conducting a pat down of a defendant, after being advised the suspect was reportedly carrying a concealed weapon. Webb, 398 So. 2d at 822. See, State v. Hunter, 615 So. 2d 727,734 (Fla. 5th DCA 1993) (Where after responding to 911 telephone call, Officer conducted pat down of defendant, who was suspected of committing an armed robbery). Third, when he initiated the stop, the officer was alone with two suspects. Phillips v. State, 360 So. 2d 1310 (Fla. 1st DCA), cert. denied 368 So. 2d 1372 (Fla. 1978) (Factors to be considered in determining reasonableness of pat-down search are locale and time of detention and whether officer is alone at time of encounter). These facts show the officer articulated a reasonable suspicion the defendant could be armed and justified a protective pat down search.

Finally, the officer properly seized the object, which he immediately determined was a firearm (R19,42-43). The Stop and

Frisk Law as codified in section 901.151(5), Florida Statutes (1991), proscribes:

> Whenever any law enforcement officer authorized to detain temporarily any person under the provisions of section (2) has probable cause to believe that any person who he has temporarily detained, or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, he may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such a search discloses such a weapon or any evidence of a criminal offense it may be seized. (Emphasis added).

Here, Mosbach testified that after feeling a hard metal object in Appellant's leather jacket, which appeared to be a gun, he seized it (R19,42). The trial court rejected Appellant's argument that the search was illegal and this Court should affirm the trial court's findings (R67-69). State v. Smith, 532 So. 2d 1068 (Fla. 5th DCA 1994)(Trial court's ruling on a motion to suppress should be upheld, unless findings were clearly erroneous).

CONCLUSION

In light of the foregoing facts, arguments, and citation of authority, Petitioner respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Austin H. Maslanik, Assistant Public Defender, P. 0. Box 9000 - Drawer PD, Bartow, FL 33031, on this 21st day of April, 1997.

OF COUNSEL FOR RESPONDENT