W00A 087

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TOMMIE V. JOHNSON,

Petitioner,

v. Case No. 90,494

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT
AND THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR
MARTIN COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

There were two kinds of controlled substances separately packaged found in Petitioner's car, so separate convictions for trafficking and possession with intent to sell do not violate double jeopardy. Even assuming that the same "quantum" of cocaine supports both offenses, double jeopardy does not prevent separate convictions and sentences for trafficking in cocaine and possession of cocaine with intent to sell. Each offense contains an element that the other does not, and none of the statutory exceptions apply. This Court's decision in Gibbs, infra, is distinguishable from this case because unlike simple possession, possession with intent to sell is a specific intent crime.

Contrary to Petitioner's assertion, this is not a constructive possession case. Mr. Johnson was driving his car when it was indisputably lawfully stopped. The cocaine was found in the trunk of the car, and the only key to the trunk was in Mr. Johnson's possession. His clothes and other belongings were in the trunk. He acted calm, not surprised, when the cocaine was found. Given these facts, Petitioner had exclusive possession of the trunk. Since he had exclusive possession, his knowledge of the cocaine may be inferred. The evidence created a question for the jury to resolve, and so the motion for judgment of acquittal was properly denied.

POINT ONE

DOUBLE JEOPARDY DOES NOT PRECLUDE SEPARATE CONVICTIONS AND SENTENCES FOR TRAFFICKING IN COCAINE AND POSSESSION OF COCAINE WITH THE INTENT TO SELL OR DELIVER.

At the outset, the State contends that no double jeopardy violation can be established in this case because there were two separate packages of cocaine found in Petitioner's spare tire. One package contained 69 grams of crack cocaine and the other contained 41 grams of powder cocaine. (T 32) Had there been a package of heroin and another package of cocaine, there could be no doubt that separate convictions for trafficking one substance and possession with intent to sell the other controlled substance could sustain a double jeopardy challenge. The same result should be reached here because there were two different kinds of cocaine. Either package is obviously more than 28 grams; the presence of a cutting agent is evidence of possession with intent to sell. The information did not specify the amount of cocaine in the trafficking count, only that it exceeded 28 grams. (R 6) The fact that two different kinds of cocaine were separately packaged renders separate convictions permissible. Bello v. State, 547 So. 2d 914 (Fla. 1989) (Two separate containers support convictions for delivery and

possession of marijuana because the marijuana was 'different".)

Even assuming that the separate nature and packaging of the cocaine does not render the offenses separate, there is no double jeopardy violation. Legislative intent is the dispositive question in determining whether double jeopardy bars separate convictions and sentences for offenses arising from a single episode. State v. Smith, 547 So. 2d 613, 614 (Fla. 1989). "(T)he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Id. (Quoting Missouri v. Hunter;, 459 U.S. 359, 366; 103 S. Ct. 673; 74 L. Ed. 535 (1983)). Where a legislature specifically authorized cumulative punishments under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end. Missouri v. Hunter, 103 S. Ct. at 679. This is so because the power to define crimes and prescribe punishments for those found guilty of them resides solely with the legislature. Albernaz v. United States, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).

In Boler v. State, 678 So. 2d 319 (Fla. 1996), this Court reiterated the well established rule that there is only one analysis for determining whether a successive prosecution or multiple punishment is prohibited by the double jeopardy clause:

the Blockburger "same elements" test. This test inquires whether each offense contains an element not contained in the other. If each crime contains an element not contained in the other, there is no bar to multiple punishment. It is equally well established that this analysis is conducted without regard to the allegations in the information or the proof adduced at trial.

In this instance, these two crimes are separate because each requires proof of an element the other does not: trafficking requires proof that the cocaine was at least 28 grams, while possession of cocaine with intent to sell requires proof of this specific scienter. This minimum weight for trafficking is an element of the offense according to the Standard Jury Instructions for this offense. but see, Gibbs, infra. There is no minimum weight required for possession with intent to sell. McGee, 509 so. 2d 1102 (Fla. 1987). Additionally, the scienter requirement for these two offenses is completely different. Unlike simple possession, possession with intent to sell is a specific intent crime. Trafficking, on the other hand, requires knowledge of the substance and its illicit nature. This difference alone differentiates this case from Gibbs.

It is not the specific facts of this case, but rather, the statutory elements which are the subject of this Court's inquiry.

It is possible to commit the offense of trafficking in cocaine without having actual or constructive possession of the cocaine. "Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of 28 grams or more of cocaine..." §893.135(1)(b), Fla. Stat. (1995). To be guilty of possession with intent to sell, there must be proof of possession, actual or constructive. These two crimes are not the **same** crime under the Blockburger test.

The State respectfully suggests that this Court's decision in Gibbs, infra **strays** from this analysis when examining the alternative conduct prohibited by the trafficking statute. The question is whether it is possible to commit one offense without committing the other, not whether each statute could arguably contain the **same** conduct. Under this analysis, convictions for felony murder and the underlying felony could violate double jeopardy, because it is not just any felony, but the charged felony that must be compared, but this Court has repeatedly and consistently held otherwise. Boler v. State, 678 So. 2d 319 (Fla. 1996); State v. Hegstrom, 401 So. 2d 1343 (Fla. 1981). The dicta in Gibbs which refuses to look at the alternative conduct, but improperly focuses instead on the conduct common to each statute is

inconsistent this Court's prior decisions applying a traditional Blockburger analysis.

There are three statutory exceptions to the rule that the legislature intends multiple punishments: 1) offenses which require identical elements of proof; 2) offenses which are degrees of the same offense as provided by statute; and 3) offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. §775.021(4)(b)(1) Fla. Stat. (1995) As this Court observed in State v. Johnson, 676 So. 2d 408 (Fla. 1996), the Blockburger test by its very nature is designed to distinguish between crimes that are lesser included offenses and crimes that are not; if two crimes are separate under this test, then one cannot be a lesser of the other. See also State v. Weller, 590 So. 2d 923, 926 (Fla. 1991).

Therefore, the real question is the meaning of the phrase "offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense". Petitioner contends that the "core offense" is possession of cocaine, and so he cannot be punished for possession of cocaine with intent to sell and trafficking in cocaine. However, this argument overlooks the fact that it is possible to commit trafficking without possessing the controlled substance; that is but one of the methods by which this

crime can be committed. A person is guilty of trafficking if he knowingly arranges for more than one ounce of cocaine to be delivered. Since there is no 'core offense" of possession, this argument must fail.

Petitioner relies on this Court's decisions in Gibbs v. State, 22 Fla. L. Weekly S 504 (Fla. Aug. 21, 1997) and Paccione v. State, 22 Fla. L. Weekly S 502 (Fla. Aug. 21, 1997). In Gibbs, this Court held that dual convictions for the offenses of trafficking possession and simple possession of cocaine violated double jeopardy, while in Paccione, the offensive crimes were possession with intent to sell and simple possession.[2] In these cases, this Court held that simple possession had no element not contained in either trafficking or possession with intent to sell. This Court stated in Gibbs that the quantity requirement of trafficking was not a separate element. The State respectfully suggests that this finding is at odds with the Standard Jury Instructions.

As stated previously, the State respectfully takes issue with certain dicta in Gibbs. This Court acknowledged that no double jeopardy violation would occur in the situation in which "...the

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[2]The State agrees that the statutory elements of simple possession are subsumed by the greater offense of possession with intent to sell. §775.021(4)(b)(1) Fla. Stat. (1995)

defendant is charged with both trafficking sale and simple possession, because the sale element of the trafficking statute differs from the elements in the simple possession statute." Gibbs v. State, 22 Fla. L. Weekly S 504, 505 (Fla. Aug. 21, 1997). That means that double jeopardy is dependent upon the charging document, which is at odds with a traditional double jeopardy analysis.

Although a double jeopardy analysis of a statute such as trafficking that prohibits alternative conduct is admittedly more problematic, Gibbs strays from a Blockburger analysis by refusing to consider the entire range of conduct, focusing instead on the similar conduct. "The conduct element of the trafficking statute is not compared by considering the entire range of conduct including possession, sale, purchase and delivery, but rather by comparing only trafficking possession with simple possession." Gibbs v. State, supra. This dicta is inconsistent with this Court's prior decisions on double jeopardy. The *entire range of conduct" is precisely the focus. Otherwise, felony murder and the underlying felony would arguably violate double jeopardy, yet this Court has repeatedly held to the contrary. State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Boler v. State, 678 So. 2d 319 (Fla. 1996).

Even assuming that this dicta in Gibbs is consistent with traditional double jeopardy analysis, this case should nevertheless

be affirmed. The scienter element for these two offenses are different. Possession with intent to sell is a specific intent crime. See, Shackelford v. State, 567 So. 2d 30 (Fla. 1st DCA 1990). Trafficking requires knowledge of the substance and its illicit nature. State v. Dominiquez, 509 SO. 2d 917 (Fla. 1987). The scienter elements for simple possession and trafficking are the same. Therefore, Gibbs is distinguishable and does not control the result of this case.

There were two kinds of controlled substances separately packaged found in Petitioner's car, so separate convictions for trafficking and possession with intent to sell do not violate double jeopardy. Even assuming that the same "quantum" of cocaine supports both offenses, double jeopardy does not prevent separate convictions and sentences. Each offense contains an element that the other does not, and none of the statutory exceptions apply. This Court's decision in Gibbs is distinguishable from this case because unlike simple possession, possession with intent to sell is a specific intent crime.

POINT TWO

THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL. PETITIONER HAD EXCLUSIVE CONTROL OF THE TRUNK AS HE WAS DRIVING HIS OWN CAR AND HAD THE ONLY KEY.

Petitioner contends that the evidence in this case was insufficient to prove constructive possession, and therefore the trial court erred in failing to grant his motion for judgment of acquittal. The motion for judgment of acquittal was made at the close of the State's case and renewed shortly thereafter. (T 85-86, 93) The sole ground advanced was, "...the State has failed to produce any evidence to indicate that Mr. Thomas--Mr. Johnson had knowledge that the narcotics were in the trunk and we would argue that knowledge is an essential element of each of the offenses." (T 86) The State responded that knowledge could be presumed from Petitioner's exclusive possession. (T 86) This issue is arguably preserved for review. The issue was raised on appeal in the fourth district, and so the Court may consider this claim.

The State disagrees with the basic premise of Mr. Johnson's argument: this is not a constructive possession case. The evidence here established that Mr. Johnson was driving his own car when he was lawfully stopped. He had the only set of keys in his

possession, including the key used to open the trunk. The powder and crack cocaine was found separately packaged in the trunk of the vehicle inside the spare tire, underneath property belonging to Petitioner. This evidence establishes that Petitioner had exclusive possession of the trunk.

The facts of this case are most similar to Jordan, 548 So. 2d 737, 739 (Fla. 4th DCA 1989). In the Jordan case, the defendant borrowed a car rented by his girlfriend's aunt, and was driving the car when he and his passenger were validly stopped. Cocaine was found in the trunk of the car. The fourth district held,

> As to the cocaine in the trunk of the car, there is nothing in the record to indicate that Rolle, the passenger, had access to the trunk since Jordan had the keys in his possession....Since Jordan had exclusive possession of the trunk the rules governing joint possession cases are not applicable. In Wale y. State, 397 So. 2d 738 (Fla. 4th DCA 1981), the court explained that if the premises, area, structure or vehicle in which a contraband substance is found is within the exclusive possession of the accused, the accused's guilty knowledge of the presence of the contraband, together with his ability to maintain control over it, may be inferred. Here guilty knowledge could be inferred....At the very

> least the question of whether Jordan had exclusive possession of the trunk was for the jury to resolve, as were the issues of control and knowledge. Id.

Where, as here, the owner of the vehicle is driving it when he is lawfully stopped, he is in actual possession and control of the vehicle, including the trunk. Fedor v. State, 483 So. 2d 42 (Fla. 2d DCA 1986). The fact that other persons may have access to the place where the controlled substance is found does not alter the fact that an actual possession analysis is performed. Gartrell v. State, 626 So. 2d 1364 (Fla. 1993).

, Many of the cases relied upon by Petitioner predate the Jordan decision, including Manning v. State, 355 So. 2d 166 (Fla. 4th DCA 1978). The other cases are distinguishable because either the passenger had an equal right of possession of the vehicle as the driver/defendant, or else the defendant was the passenger in someone else's vehicle. The State does not disagree with the general principles espoused in the Petitioner's brief, for instance, that mere proximity is insufficient to establish possession. Rather, Respondent contends that these rules are inapplicable to this case because the evidence established exclusive possession of the vehicle by Petitioner.

Since the Mr. Johnson was in exclusive possession of the trunk of the car, his knowledge of the cocaine found therein can be inferred. At the very least, the factual question was properly submitted to the jury. Gartrell v. State, supra; Jordan v. State, supra.

While Petitioner is correct that this evidence constitutes circumstantial evidence of knowledge, he introduced absolutely no evidence to rebut this inference. In addition to the fact that Mr. Johnson was the owner and driver of the vehicle in possession of the only key to the trunk, the State introduced evidence that he was calm, not surprised, when the cocaine was discovered, which is additional evidence of his knowledge of its presence. See, Parker v. State, 641 So. 2d 483 (Fla. 5th DCA 1994).

The State is not required to conclusively rebut every variation of events which could possibly be inferred from circumstantial evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. State v. Law, 559 So. 2d 187 (Fla. 1989). Once that initial burden is met, it becomes the jury's duty to determine whether the evidence excludes every reasonable hypothesis of innocence.

> In sum, the sole function of the trial court on motion for directed verdict in a circumstantial-evidence

> case is to determine whether there is prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories. If there is such inconsistency, then the question is for the finder of fact to resolve. The trial court's finding in this regard will be reversed on appeal only where unsupported by competent substantial evidence. Orme v. State, 677 So. 2d 258, 260 (Fla. 1996).

In this case, viewed in the light most favorable to the State, there is evidence which is inconsistent with the alleged hypothesis of innocence. The passenger, Mr. Thomas, could not have placed the cocaine in the trunk of the car as the defense suggested because he did not have access to that area of the vehicle. None of the personal belongings in the trunk belonged to Mr. Thomas, nor did he have any possessory interest in the vehicle. Therefore, the case was properly submitted to the jury. As there is competent, substantial evidence to support the jury's verdict, this Court should affirm.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to affirm the judgments and sentences in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing motion has been furnished by United States Mail to Susan D. Cline, counsel for Petitioner, at 421 Third Street, 6th Floor, West Palm Beach, FL 33401, this 10th day of October, 1997.

Belle B. Turner
Assistant Attorney General