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IN THE SUPREME COURT OF FLORIDA

TOMMIE V. JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 90,494
DCA Case No. 96-0469

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

RICHARD L. JORANDBY
Public Defender
Fifteenth Judicial Circuit of Florida

SUSAN D. CLINE
Assistant Public Defender
Florida Bar No. 377856
Attorney for Tommie V. Johnson
Criminal Justice Building
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida, and the Appellant in the Fourth District Court of Appeal. Respondent was the Prosecution and the Appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used:

R = Record on Appeal Documents

T = Record on Appeal Transcripts

A = Petitioner's Appendix.

STATEMENT OF THE CASE AND FACTS

Petitioner, Tommie V. Johnson, was charged by Information filed in the Nineteenth Judicial Circuit with Count I, trafficking in cocaine in an amount in excess of 28 grams; Count II, possession of cocaine with intent to sell/deliver; and Count III, driving while license suspended (R 6-7).

Petitioner proceeded to a trial by jury on November 27 and December 1, 1995. After the state rested, the trial court granted Petitioner's motion for judgment of acquittal as to Count III, driving while license suspended (T 88; R 30). The jury found Petitioner guilty as charged as to Counts I and II (R 25) and he was so adjudicated (T 146; R 32-33). At sentencing on January 11, 1996, the court sentenced Petitioner to concurrent sentences on Counts I and II of 64.37 months in prison with credit for 128 days time served (T 146-148; R 34-37).

Petitioner timely appealed (R 43). Petitioner's convictions and sentences were affirmed by the Fourth District Court of Appeal on February 19, 1997 (A 1-2). *Johnson v. State,* Case No. 96-0469 (Fla. *4th* DCA Feb. *19,* 1997), *rehearing denied,* April 2, 1997. The district court rejected Petitioner's double jeopardy challenge to his convictions for trafficking in cocaine in excess of 28 grams and possession of cocaine with intent to sell/deliver the same quantity of cocaine, citing to *Gibbs v. State, 676 So.* 2d 1001 (Fla. 4th DCA), *review granted, No. 88,409* (Fla. Nov. 4, 1996).

On March 6, 1997, Petitioner timely requested rehearing and/or certification of conflict and/or certifrcationof a question of great public importance. The district court denied rehearing on April 2, 1997 (A 3).

Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction on May 2, 1997. This brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

Petitioner respectfully submits that this Honorable Court has discretionary jurisdiction to review the instant cause on two separate grounds.

First, the Fourth District Court of Appeal affirmed Petitioner's convictions and sentences on the authority of a case pending before this *Court, Gibbs* v. *State,* 676 So. 2d 1001 (Fla. 4th DCA), *review granted, No. 88,409* (Fla. Nov. 4, 1996). Hence, discretionary jurisdiction is provided pursuant to *Jollie v. State,* 405 So. 2d 4 18 (Fla. 198 1). Second, the fourth district's decision is in express and direct conflict with *Ricks v. State, 687 So.* 2d 13 13 (Fla. 1st DCA 1997).

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN *JOHNSON V.* STATE CITES TO A DECISION PRESENTLY PENDING REVIEW BEFORE THIS HONORABLE COURT AND DIRECTLY AND EXPRESSLY CONFLICTS WITH *RICKS V. STATE, 687 SO.* 2D 1313 (FLA. 1ST DCA 1997).

Petitioner respectfully submits that this Honorable Court has discretionary jurisdiction to review the instant cause on two separate grounds.

First, in the instant decision, *Johnson v. State,* Case No. 96-0469 (Fla. 4th DCA Feb. 19, 1997), *rehearing denied,* April 2, 1997, the Fourth District Court of Appeal affirmed Petitioner's convictions and sentences on the authority of a case pending before this *Court, Gibbs v. State,* 676 So. 2d 1001 (Fla. 4th DCA), *review granted,* No. 88,409 (Fla. Nov. 4, 1996). In *Gibbs,* the fourth district held that there was no double jeopardy violation based on convictions for trafficking in cocaine in excess of 28 grams and simple possession of the same quantity of cocaine, but certified the following question to this Court as a question of great public importance:

> **May a person be separately convicted and punished for trafficking possession of cocaine and simple possession of a controlled substance for the same quantity of cocaine?**

Gibbs v. State, 676 So. 2d 1006.

Gibbs is presently pending before this Court. Thus, discretionary jurisdiction is established by reference to the cited case. *Jollie v. State,* 405 So. 2d 4 18 (Fla. 198 1). In *Jollie,* this Court recognized that the "randomness of the District Court's processing" should not control

a party's right to Supreme Court review. *Jollie*, 405 So. 2d at 42 1. Hence, this Honorable Court has discretionary jurisdiction to accept review of the instant cause from the fourth district because the cited authority, *Gibbs,* is presently pending before this Court.

Second, the instant decision of the fourth district in *Johnson* v. *State* is in express and direct conflict with *Ricks* v. *State,* 687 So. 2d 13 13 (Fla. 1 st DCA 1997).

In the instant cause, the fourth district rejected Petitioner's double jeopardy challenge to his dual convictions for trafficking in cocaine in excess of 28 grams and possession of cocaine with intent to sell/deliver the same quantity of cocaine. The fourth district's holding in *Johnson* is in express and direct conflict with *Ricks v. State.* In *Ricks,* the first district held that double jeopardy principles prohibit multiple convictions and sentences for possession of more than 20 grams of cannabis and possession of cannabis with intent to sell, relying on *Blockburger v. United States*, *284* U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932), and *C.M. v. State, 672 So.* 2d 632 (Fla. 1st DCA 1996). Although the offenses are not identical only because they involve different controlled substances, the nature of the offenses are the same.

Thus, Petitioner submits that the instant decision of the Fourth District Court of Appeal is in express and direct conflict with *Ricks* v. *State.* Accordingly, this Court has discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the *Florida Constitution.*

As this issue has a continuing statewide significance, this issue is appropriate to be resolved by this Honorable Court. Thus, on the basis of either or both of the grounds cited by Petitioner, this Honorable Court has discretionaryjurisdictionover the instant cause. Therefore,

this Court should exercise its discretionary review jurisdiction and resolve this ***frequently*** recurring issue.

CONCLUSION

Whereas, Petitioner prays this Honorable Court will exercise its discretion to review the decision of the fourth district court.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
Fifteenth Judicial Circuit of Florida

Susan D Cline

SUSAN D. CLINE
Assistant Public Defender
Florida Bar No. 377856
Attorney for Tommie V. Johnson
Criminal Justice Building
42 1 3rd Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Belle B. Turner, Assistant Attorney General, 444 Seabreeze Blvd. 5th Floor, Daytona Beach, Florida 32 118, this 6th day of May, 1997.

Susan D Cline

Attorney for Tommie V. Johnson

IN THE SUPREME COURT OF FLORIDA

TOMMIE V. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No._____
	)	DCA Case No. 96-0469
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1997

TOMMIE V. JOHNSON,

Appellant,

v.

STATE OF FLOFUDA,

Appellee.

CASE NO. 96-0469

Opinion filed February 19, 1997

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Joe Wild, Acting Circuit Judge; L.T. Case No. 95-890-CFA.

Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for appellee.

PARIENTE, J.

Defendant appeals from his convictions and sentences for trafficking in cocaine more than 28 grams and possession of cocaine with intent to sell/deliver. Defendant received concurrent sentences of 64.37 months in prison with credit for 128 days time served and was ordered to pay a $50,000 he for trafficking in cocaine together with a surcharge of $2,500. We affirm both the convictions and sentences.

The issue of defendant's constructive possession was properly submitted to the jury. The jury could have found, based on the facts of this case, that defendant was the driver/owner of the vehicle and in sole possession of the key to the trunk where the cocaine was found under the spare tire. See Jordan v. State, 548 So. 2d 737,739 (Fla. 4th DCA 1989).

Defendant also attacks his convictions for trafficking in cocaine and possession with intent to sell/deliver because both charges arose from one underlying core offense of possession of cocaine. Defendant concedes that affirmance on this point is required based on Gibbs v, State, 676 So. 2d 1001 (Fla. 4th DCA), review granted, No. 88,409 (Fla. Nov. 4, 1996). In Gibbs, our court held that there is no double jeopardy violation based on convictions for trafficking in cocaine in excess of 28 grams and simple possession.

Our court in Gibbs relied on State v. McCloud, 577 So. 2d 939 (Fla. 1991), which rejected a double jeopardy attack on dual convictions for sale of cocaine and possession of the same quantum of cocaine. Our supreme court in McCloud concluded that because sale of cocaine can occur without possession, possession is not an essential element of sale and is therefore not a necessarily included lesser offense. Id. at 940-41.

This case is a stronger case than Gibbs for rejecting a double jeopardy challenge because the second offense here is not simple possession as in Gibbs but possession with intent to sell/deliver. There are several ways to analyze the differences between these crimes.

Pursuant to section 893.135(1)(b), Florida Statutes (1995), a person traffics in cocaine either by knowingly selling, delivering or bringing into this state 28 grams or more of cocaine or by being in actual or constructive possession of 28 grams or more of cocaine. It is thus possible to commit the offense of trafficking in cocaine without having actual or constructive possession of the cocaine, or, alternatively, without actually intending to sell the cocaine. See Gibbs, 676 So. 2d at 1008 (Gross, J., concurring). Trafficking in cocaine also requires proof that the quantity of cocaine was at least 28 grams.

For the crime of possession with intent to sell/deliver cocaine, section 893.13(1)(a), an essential element is proof of specific scienter; i.e., intent to sell or deliver the cocaine. This element is not an essential element of trafficking. Possession with intent to sell/deliver thus requires an essential element that is not an essential element of trafficking.

In this case, the trial court instructed only on simple possession as a lesser included offense of both charges. Possession with intent to sell/deliver cocaine is neither a necessarily included lesser offense nor a permissive lesser included offense of trafficking. See § 775.021(4)(b)(3).

As to defendant's third point on appeal, that the five percent surcharge was not orally pronounced, section 960.25 establishes a five percent surcharge which shall be imposed for any criminal offense. Because the surcharge is mandatory, the trial court was not obligated to announce it orally to include it in the written sentence. See Reyes v. State, 655 So. 2d 111, 116-17 (Fla. 2d DCA 1995).

POLEN and SHAHOOD, JJ., concur.

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IN TEE DISTRICTCOURT OF APPEAL OF THE STATE'OP FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

TOMMIE V. JOHNSON

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 96-00469

L.T. CASE NO. 95-890 CFA
MARTIN

April 2, 1997

BY ORDER OF TEE COURT:

ORDERED that appellant's motion filed March 6, 1997, for rehearing, and/or request to certify conflict and/or request for certification of question of great public importance is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Public Defender 15
Attorney General-W. Palm Beach
Attorney General-Daytona

/CH

SC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Belle B. Turner, Assistant Attorney General, 444 Seabreeze Blvd. 5th Floor, Daytona Beach, Florida 32118, this 6th day of May, 1997.

Susan A. Cline

Attorney for Tommie V. Johnson