W00A

IN THE SUPREME COURT OF FLORIDA

TOMMIE V. JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 90,494

PETITIONER'S REPLY BRIEF ON THE MERITS

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
(561) 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.

STATEMENT OF THE CASE

Petitioner relies on the Statement of the Case contained in his Brief on the Merits.

STATEMENT OF THE FACTS

Petitioner relies on the Statement of the Facts contained in his Brief on the Merits.

ARGUMENT

POINT

DOUBLE JEOPARDY PRINCIPLES PRECLUDE SEPARATE CONVICTIONS AND SENTENCES FOR POSSESSION OF COCAINE IN AN AMOUNT OVER 28 GRAMS (TRAFFICKING) AND POSSESSION OF COCAINE WITH INTENT TO SELL/DELIVER THE SAME QUANTITY OF COCAINE.

Petitioner strenuously disagrees with Respondent's position that dual convictions for possession of more than 28 grams of cocaine (trafficking) and possession of cocaine with intent to sell/deliver can be supported herein as the total quantum of cocaine located in a brown bag under the tire in the trunk consisted of both powder and crack cocaine.

Obviously, this argument must fail. First, the prosecutor conceded in the trial court that the state charged two counts as it believed that the possession of the total amount of cocaine under the circumstances presented supported convictions for two separate offenses as it contended that the elements were not the same (T 87-88). The state below never contended that two offenses were charged because there were "different" types of cocaine seized. Further, and quite significantly, the information at bar alleged only that the substance possessed was "cocaine or a mixture containing cocaine" (Count I) and "cocaine or preparation of cocaine" (Count II) and did not differentiate between the powder and crack cocaine (R 6-7).

One can only assume that Respondent suggests that this Court arbitrarily select which felony offense it should attribute to possession of the "powder" cocaine and which offense to attribute to possession of the "crack" cocaine?

Finally, the case cited by Respondent in support of this argument is totally distinguishable and does not support Respondent's claim herein. In *Bello v. State, 547 So.* 2d 914, 918 (Fla. 1989), this Court rejected Bello's argument that his separate convictions and sentences for delivery and possession of the same marijuana violated the double jeopardy clause of the United States Constitution. This Court found that Bello was properly convicted of *delivery* of some of his marijuana, and *possession* of the rest, where the evidence showed that in addition to the drugs *delivered* to the undercover officer, Bello also possessed at least one other container of drugs. Those circumstances are totally different from the circumstances at bar, where Petitioner was alleged to be in possession of a brown bag containing a quantity of cocaine. This cause does not concern a delivery or sale, it concerns only the possession of cocaine.

Moving on to Respondent's "difference in scienter" argument, assuming *arguendo* that this Court would find it meritorious in any respect, Petitioner notes that although it is true that in *Shackelford* v. *State,* 567 So. 2d 30 (Fla. 1st DCA 1990), the state therein **conceded** that possession with intent to sell is a specific intent crime, another district court of appeal has held to the contrary. After an exhaustive analysis of the issue, the second district held in *Gordon v. State,* 528 So. 2d 910, 913 (Fla. 2d DCA 1988), that the crime of possession with intent to sell is a general intent crime.

In conclusion, Petitioner reiterates that *Paccione v. State,* 22 Fla. L. Weekly S502 (Fla. Aug. 2 1, 1997), is most instructive at bar. The offenses in *Paccione v. State* are particularly comparable to those at bar and likewise require a reversal herein. In *Paccione,* this Court addressed virtually identical offenses wherein it prohibited dual convictions for possession of

marijuana with intent to sell and possession of more than 20 grams of marijuana for the same quantity of marijuana. At bar, Petitioner has been convicted of possession of more than 28 grams of cocaine (trafficking) and possession with intent to sell/deliver the same quantity of cocaine in a single criminal episode. The offenses are not identical only because they involve different controlled substances, And again, the offense characterized by this *Court* in *Paccions* as simple possession was possession of more than 20 grams of marijuana (a third-degree felony), as reflected by the statute cited in footnote *2* in *Paccione* as well as the record in *Paccione.*

Thus, Petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District Court of Appeal in part, wherein it affirms dual convictions for possession of the same cocaine arising out of a single act, and remand this cause to the district court for further proceedings.

POINT II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE STATE'S EVIDENCE WAS WHOLLY INSUFFICIENT TO PROVE CONSTRUCTIVE POSSESSION.

Petitioner relies on the arguments and authorities contained in his Brief on the Merits for a through discussion of this issue.

As there is insufficient evidence to support Petitioner's convictions for possession of cocaine in an amount in excess of 28 grams (trafficking) and possession of cocaine with intent to sell/deliver, the trial court erred in denying his motions for judgment of acquittal. The instant decision of the Fourth District Court of Appeal must be quashed, Petitioner's convictions and sentences vacated and Petitioner discharged.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Honorable Court to **quash** the decision of the Fourth District and remand this cause with appropriate directions.

Respectfully Submitted,

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
(561) 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 3rd day of November, 1997.

Attorney for Tommie V. Johnson