IN THE SUPREME COURT OF FLORIDA,

HOWARD L. HAMILTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 91,013

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ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, and appealed an adverse ruling of that court to the Fourth District Court of Appeal. Respondent was the prosecution in the trial court and the appellee in the district court.

After due deliberation, the Fourth District Court of Appeal affirmed the trial court and certified the same question as it had in *Paccione v. State,* 676 So. 2d 529 (Fla. 4th DCA 1996), that is:

> MAY A PERSON BE SEPARATELY CONVICTED AND PUNISHED FOR POSSESSION OF MARIJUANA WITH INTENT TO SELL AND SIMPLE POSSESSION OF THE SAME QUANTITY OF MARIJUANA?

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State."

The following symbols will be used;

AB = Appellant's Initial Brief

R = Record on Appeal

SR = Supplemental record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of this appeal in so far as they present an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the additions and clarifications set forth in the argument portion of this brief which are necessary to resolve the legal issues presented upon appeal.

SUMMARY OF THE ARGUMENT

Section 893.13(1)(a) Florida Statutes (1995) makes it a crime for any person 'to possess *with intent to sell*' a controlled substance. Although subsection (6)(a) likewise makes it a felony to simply possess any controlled substance, subsection (6)(b) makes an exception for persons who possess 20 grams or less of cannabis. Under a given set of facts sections 893.13(1)(a) and (6)(b) may be mutually exclusive. On the other hand, there are circumstances under which a defendant may be found guilty of both offenses. Given the particular facts of the case at bar, where marijuana was apportioned by the defendant and found it two forms, in two separate batches and in two locations, a defendant could be found guilty of both possession with intent to sell and simple possession. The Fourth District Court's certified question must be answered in the affirmative.

ARGUMENT

A DEFENDANT MAY BE CONVICTED OF A FELONY CANNABIS CHARGE AFTER HE HAD PLEAD NO CONTEST TO A MISDEMEANOR POSSESSION OF CANNABIS CHARGE ARISING OUT OF THE SAME INCIDENT.

Petitioner, who plead nolo contendere to a charge of simple possession of marijuana (less than 20 grams), was subsequently charged with 'cultivation of marijuana' (R 11) under section 893.13(1)(a) Florida Statutes (1995) which makes it a third degree felony for a person to 'sell, manufacture, or deliver, or possess with intent to sell, manufacture or deliver, a controlled substance.' Petitioner's motion to dismiss on double jeopardy grounds was denied by the trial court which held that he had been charged with two separate offenses: growing a plant and possessing processed marijuana leaves in two separate places (T 10). Petitioner then plead nolo contendere to the additional charge, reserving his right to appeal the trial court's ruling. He did not dispute the state's factual basis for his plea: that in the course of a consensual search, officers of the Palm Beach County Sheriff's Office found some marijuana leaves inside Petitioner's home and a living marijuana plant growing outside near a fence. Petitioner now contends that prosecution and conviction for both offenses violates the constitutional prohibition against double jeopardy. Respondent respectfully disagrees.

It is well settled that it is constitutional for the state to prosecute multiple offenses separately even when those offenses arise from the same criminal transaction. *State v. Smith,* 547 So. 2d 613 (Fla. 1989). It is equally well settled that for double jeopardy analysis one looks only to the statutory elements of the crimes charged, and not to the charging documents or the evidence adduced. *State*

v. Baker, 456 So. 2d 419 (Fla. 1984). Given such an analysis, it is clear that under a given set of facts sections 893.13(1)(a) and (6)(b) may be mutually exclusive. On the other hand, there are circumstances under which a defendant may be found guilty of both offenses.

Section 893.13(1)(a) makes it a crime for any person 'to possess *with intent to sell*' a controlled substance. And although subsection (6)(a) likewise makes it a felony to simply possess any controlled substance, subsection (6)(b) makes an exception for persons who possess 20 grams or less of cannabis. This Court has said that in order to determine legislative intent, a court must read the entire statute. *State v. Rodriquez,* 365 So. 2d 157, 159 (Fla. 1978). Reading the entire statute in question leads to the inescapable conclusion that the Florida legislature intended to make a so-called 'personal use' exception to the statute. Subsection (6)(b) is that exception; a person who merely possesses only 20 grams or less of cannabis is guilty only of a misdemeanor.

Given a reading of the entire statute, there are three possible scenarios, leading to three different answers of the Fourth District's certified question. The first scenario is one in which a defendant is arrested for possession of more than 20 grams of marijuana in a single unit. In that case, he or she can be convicted of a felony, either 'possession' or 'possession with intent to sell,' because the weight is greater than the statutory exception. (The corollary to this situation is one in which the weight of the marijuana is 20 grams or less; the defendant can be convicted only of the misdemeanor. This is the subsection 6[b] "personal use" exception.) If the Fourth District's question had been worded completely in terms of possession rather than 'possession with intent to sell,' the question would have to be answered in the negative. Even as asked, whether one may be convicted of 'possession with intent to sell,' and mere possession of the same quantum of marijuana, given the facts postulated in the first scenario, the question must be answered in the negative. But

that is not the end of the matter; there are at least two other answers.

The second scenario envisions a case where a defendant possesses less than 20 grams of marijuana but intends to sell it. In such circumstances, Respondent submits, the language of sections 893.13(1)(a) and 893.13(6)(b) is clear: it is unlawful for any person to possess any amount of cannabis with intent to sell it, and one who does so is guilty of a felony regardless of the weight involved.[1] Given those facts, 'possession with intent to sell' 15 grams of marijuana is a felony, and mere possession of those 15 grams of marijuana would be a necessarily lesser-included offense of the crime of 'possession with intent to sell.' A defendant could be charged with both crimes, but could only be convicted of one.

The third scenario deals with the situation in which a defendant has 'possession' of two or more separate batches of marijuana with an aggregate weight of more than 20 grams. Once again, the outcome must depend on the facts. If the defendant is carrying a shopping bag full of smaller baggies each containing 15 grams of marijuana, no reasonable person would argue that he or she should be charged with 15 misdemeanors; the defendant must be charged with a felony, either 'possession' in violation of subsection (6)(a) or 'possession with intent to sell,' in violation of subsection (1)(a) depending on the evidence. Assume, however, this hypothetical defendant possesses the same shopping bag on the front seat of his car; that there is evidence of him selling marijuana out of that car; that he leaves the car to make a telephone call, and that before leaving he takes one baggie out of the shopping bag and puts it in his pocket. Respondent submits under those facts, the defendant is guilty of possession of marijuana "with intent to sell" -- that which remains

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[1]Section 893.13(3) makes another exception. It provides that anyone who delivers, without consideration, not more than 20 grams of cannabis, is likewise guilty of a misdemeanor.

in the car -- and less than 20 grams of marijuana -- that which is in his pocket.

The facts postulated in the third scenario are virtually identical to those in *Mosley v. State,* 659 So. 2d 1342 (Fla. 5th DCA), *rev. denied,* 666 So. 2d 1001 (Fla. 1995), and somewhat similar to the facts in *Gibbs v. State,* 676 So. 2d 1001 (Fla. 4th DCA 1996). In *Mosley,* the Fifth District Court of Appeal distinguished between possession of crack, or processed cocaine which was found in a defendant's automobile and possession of powdered cocaine residue which was found in his wallet. Significantly, in reaching its conclusion, the Fifth District pointed out "[t]his is not a situation where the State apportioned the same drugs came up with separate charges." In *Gibbs,* the Fourth District noted that it assumed the cocaine found in the defendant's hand and the cocaine found in his automobile was from a common source; and that fact made no difference in its opinion. *Gibbs,* id., at 1002 n.1.

Following the reasoning of the Fourth and Fifth Districts, Respondent respectfully submits that apportionment by the defendant is a key element. In the case at bar, as in *Mosley* and the third scenario, the defendant committed the felony 'possession with intent to sell' when he possessed the aggregate quantity; in *Mosley* it was crack cocaine in the trunk, in the third scenario it was the marijuana in the shopping bag, in the case at bar it was the four-foot tall plant in the back yard. In each case, the defendant, for whatever reason, separated a smaller 'personal use' amount from the aggregate quantity and held it in a separate batch.[2] At that point, Respondent submits, the defendant committed the misdemeanor.

Given the particular facts of the case at bar, where marijuana was apportioned by the

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[2]Note too, that in *Mosley,* as in the case at bar, the contraband in the smaller, 'personal use' batch was in a different form than the larger, aggregate quantity.) .

defendant and found it two forms, in two separate batches and in two locations, the Fourth District Court's certified question must be answered in the affirmative.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent respectfully contends the Fourth District Court of Appeal's certified question should be answered in the affirmative, and that its opinion in *Hamilton v. State,* 695 So. 2d 436 (Fla. 4th DCA 1997) should be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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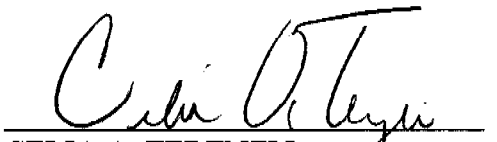

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been sent by courier to GARY CALDWELL, Esq., Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on August 18, 1997.

JOSEPH A. TRINGALI,
Assistant Attorney General
Counsel for Respondent