IN THE SUPREME COURT OF FLORIDA

HOWARD L. HAMILTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 91,013

PETITIONER'S INITIAL BRIEF ON THE MERITS

On a Petition for Discretionary Review from the District Court of Appeal, Fourth District of Florida.

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STATEMENT OF THE CASE

The state filed an amended information in the Fifteenth Judicial Circuit charging in Count I that on September 8, 1995, Howard Hamilton, petitioner, "did unlawfully and knowingly sell or manufacture or deliver or possess with intent to sell, manufacture or deliver cannabis, commonly known as marijuana, or a material, compound, mixture, or preparation which contained cannabis, a controlled substance, contrary to Florida Statute 893.13(1)(a)". R 11.[1]

Petitioner moved to dismiss Count I on double jeopardy grounds. His motion set out the following facts which were not disputed by the state:

> On September 8, 1995, Agent Haller and Agent Woronka of the Palm Beach County Sheriff's Narcotics Unit arrived at 1086 Peak Road, Lantana, Florida, to investigate an anonymous complaint that the residents were dealing in marijuana. After knocking at the door, resident Virginia Cartwright allowed Agent Haller and Agent Woronka inside and signed a consent form allowing them to search the residence, any containers therein, and the curtilage at 1086 Peak Road.
>
> Agent Haller and Agent Woronka found five suspected marijuana pipes inside a Crown Royal bag in the center console of the couch in the living room. They also found a Crown Royal bag containing suspected marijuana leaves. During the search, Howard Hamilton, also a resident, arrived at the home. Mr. Hamilton gave his consent to allow the Officers to continue their search. When Mr. Hamilton was asked about the pipes in the couch he stated that they were his for personal use. In concluding the search of the inside of the house, the Officers found a triple beam scale located in a bedroom. Outside of the house Agent Haller and Agent Cartwright found a suspected marijuana plant which was cut down and seized by the Officers. The top of the marijuana plant appeared to have been recently cut and the marijuana leaves found earlier appeared to have been from the plant.

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[1] Counts II and III (later dropped by the state) charged him with possession of narcotics paraphernalia. Id.

R 20-21. The state's probable cause affidavit set forth virtually identical facts, including that "The top of the marijuana plant showed that it had recently been trimmed back, and the marijuana leaves found in the center console of the couch had stems that appeared to have been cut from the same plant." R 2.

Petitioner also showed that on September 26, 1995, he had plead no contest to a misdemeanor possession of cannabis charge arising from the same incident. R 19, T 4. A copy of the plea agreement in the misdemeanor case was apparently attached to the motion, and a transcript of the misdemeanor plea hearing is in the supplemental record. The supplemental record shows at pages 2-3 that petitioner was ordered to pay court costs of $105 on the misdemeanor charge.

Without disputing any of the foregoing facts,[2] the state contended in response that: 1) cultivation of cannabis and possession of marijuana require proof of separate elements so that, under a Blockburger[3] analysis, there was no double jeopardy bar to the prosecution of Count I; and 2) the marijuana leaves in the house were separate from the plant outside. T 5-6. The state continued: "In this case we have got completely different elements that doesn't [sic] include possession in any manner and I'd also point to the Court again that there is case law that suggests that this is not from which [sic] the Court could determine that this is not possession of the same amount of marijuana because it is found in two different locations in two different forms. You have got leaves then you have got the entire plant outside of the house and I would ask the Court to look at the case of Mosely versus State, a Fifth District Court case on the basis of facts that it was not the same amount of drugs and they found drugs in two separate places ... ." T 6.

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[2] There was some dispute about a conversation that apparently took place between the prosecutor and defense counsel. T 5, 7.

[3] Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

After further argument from counsel, the court denied the motion to dismiss: "I'm going to rule that there is a difference between growing a plant and possessing a processed leaf and therefore this is not double jeopardy in this case, that he could still be charged with the cultivation." T 12. Petitioner then entered a plea of no contest to Count I reserving the right to appeal denial of the motion to dismiss, which the state stipulated was dispositive. T 12-17. As part of the factual basis for the plea, it was stipulated that the marijuana leaves in the house came from the plant. T 14-15. After the court entered orders withholding adjudication of guilt and placing petitioner on probation, R 29, 39-40, petitioner filed his appeal to the Fourth District Court of Appeal.

On May 21, 1997, the Fourth District affirmed. Hamilton v. State, 695 So.2d 436 (Fla. 4th DCA 1997). The opinion states in its entirety: "We affirm, but certify the same question as we did in Paccione v. State, 676 So.2d 529 (Fla. 4th DCA 1996)."[4] Petitioner timely moved for rehearing, relying on this Court's just-released decision in State v. Anderson, 22 Fla. L. Weekly S 300 (Fla. May 29, 1997). The court denied rehearing on July 2, 1997. 695 So.2d at 436. This cause is before this Court pursuant to petitioner's timely notice of intent to seek review in this Court, served on July 9, 1997. On July 22, 1997, this Court entered its order postponing its decision on jurisdiction and directing that the parties file briefs on the merits. Petitioner files this initial brief on the merits pursuant to that order.

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[4] In Paccione, the court certified this question: "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?" The court noted that it had certified the identical question in Gibbs v. State, 676 So.2d 1001 (Fla. 4th DCA 1996). This Court accepted jurisdiction in Paccione on February 7, 1997 (case 88,809 of this Court). The undersigned does not know the status of Gibbs.

SUMMARY OF THE ARGUMENT

The court erred in denying the motion to dismiss. Separate successive prosecutions for possession of cannabis and felony possession with intent to sell or manufacture cannabis were illegal and violated the Double Jeopardy Clauses of the state and federal constitutions.

ARGUMENT

WHETHER THE STATE COULD PROSECUTE PETITIONER FOR THE FELONY CANNABIS CHARGE WHERE HE HAD PREVIOUSLY PLEAD NO CONTEST TO MISDEMEANOR POSSESSION OF CANNABIS.

Petitioner's plea of no contest to the misdemeanor possession of cannabis charge bars the subsequent felony charge that he "did unlawfully and knowingly sell or manufacture or deliver or possess with intent to sell, manufacture or deliver cannabis, commonly known as marijuana, or a material, compound, mixture, or preparation which contained cannabis, a controlled substance, contrary to Florida Statute 893.13 (1) (a)".

A. STATE V. ANDERSON, 22 FLA. L. WEEKLY S 300 (FLA. MAY 29, 1997), REQUIRES REVERSAL OF THE LOWER COURT'S DECISION.

In State v. Anderson, this Court found improper convictions of both perjury in an official proceeding under section 837.02, Florida Statutes, and providing false information in an application of bail under section 903.035, Florida Statutes arising from the same false statement. This Court noted that the two statutes "punish the same basic crime (i.e., the violation of a legal obligation to tell the truth), and differ only in terms of the degree of violation." Id. at S 301. It then concluded: "Because the two crimes are degree variants of the same underlying crime, Anderson's dual convictions cannot stand. See generally Art. I, § 9, Fla. Const." Id. This Court so ruled because section 775.021(4)(b)(2), Florida Statutes bars separate convictions for offenses which are degree variations of the same offense.

Needless to say, misdemeanor possession of cannabis (a violation of section 893.13(6)(b), Florida Statutes) is a degree variation of the offense of sale or manufacture or delivery or possession with intent to sell, manufacture or deliver cannabis (a violation of section 893.13(1)(a), Florida

Statutes) under the analysis set out in State v. Anderson. Hence, the felony cannabis prosecution was improper.

B. THE DOUBLE JEOPARDY CLAUSES FORBID SEPARATE PROSECUTIONS FOR MISDEMEANOR POSSESSION OF CANNABIS AND SALE, MANUFACTURE, DELIVERY, OR POSSESSION OF THE SAME CANNABIS WITH INTENT TO SELL.

In United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), Alvin Dixon, while bonded out of jail with a condition that he would be subject to contempt proceedings if he committed any criminal offense while at liberty, was arrested and charged with possession of narcotics. The court which had released him on bond then convicted him of contempt by violating the terms of his release. He maintained, and the Supreme Court agreed, that the contempt prosecution constituted a double jeopardy bar to prosecution of the drug possession charge. On this point, Justice Scalia's opinion for the Court was joined by Justice Kennedy, with three other justices (White, Stevens, and Souter) joining in the judgment.

Rather than looking to the elements of the contempt and narcotics offenses in the abstract, the Court considered that the factual basis for the two charges was identical, and concluded: "Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy Clause." 509 U.S. at 699. In reaching this conclusion, the Court necessarily rejected the view espoused by the Chief Justice in dissent that: "Because the generic crime of contempt of court has different elements than the substantive criminal charges in this case, I believe that they are separate offenses under Blockburger." Id. 715 (Rehnquist, C.J., dissenting).[5] Thus, under United States v. Dixon, the court

[5] The Chief Justice continued in his dissent: "There [in Blockburger], we stated that two offenses are different for purposes of double jeopardy if 'each provision requires proof of a fact

is not to look strictly to the statutory elements of the offenses charged: it must look to what the prosecution must actually prove in order to sustain its theory of the case.

It appears that the judgment below was ultimately based on the Fourth District's en banc opinion in Gibbs holding that there is no double jeopardy bar to separate convictions and sentences for trafficking in cocaine and possession of the same cocaine. Gibbs is based on the notion that: "The trafficking possession of cocaine statute requires a knowing intent to possess more than 28 but less than 400 grams of cocaine. The simple possession statute requires mere possession of any controlled substance." 676 So.2d at 1005 (footnotes omitted).[6] The analysis of Gibbs was flawed in that it misapprehends Blockburger and ignores United States v. Dixon, and takes an abstract approach which is incorrect. The constitutional question under United States v. Dixon and Blockburger is whether each offense requires proof of an element that the other does not. United States v. Dixon, 509 U.S. at 696-97. Petitioner's misdemeanor possession charge did not require an element that the felony charge did not require -- it was a lesser included offense.

At bar, the parties stipulated that the leaves in the house came from the plant. T 14-15. The mere separation of the leaves from the plant did not form a separate crime from the possession of the plant. Hence, the court erred in denying the motion to dismiss. Cf. Rutledge v. United States,

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which the other does not.' 284 U.S., at 304 (emphasis added). Applying this test to the offenses at bar, it is clear that the elements of the governing contempt provision are entirely different from the elements of the substantive crimes. Contempt of court comprises two elements: (i) a court order made known to the defendant, followed by (ii) willful violation of that order. [Cit.] Neither of those elements is necessarily satisfied by proof that a defendant has committed the substantive offenses of assault or drug distribution. Likewise, no element of either of those substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court." 509 U.S. at 715-16.

[6] On this point, Gibbs is distinguishable from the case at bar. The misdemeanor possession crime at bar is specific to cannabis. § 893.13 (6) (b).

116 S.Ct. 1241 (1996) (dual convictions for conspiracy to distribute controlled cocaine and continuing criminal enterprise amounted to improper double punishment).

C. POSSESSION OF THE LEAVES IN THE HOUSE CONSTITUTED THE SAME OFFENSE AS POSSESSION OF THE PLANT OUTSIDE THE HOUSE.

In W.B.M. v State, 452 So.2d 659 (Fla. 3d DCA 1984), the court wrote:

> Where a juvenile was arrested for having a misdemeanor amount of marijuana on his person, and an additional felony amount of marijuana was found in the rear of the police cruiser after the juvenile had been transported to a detention center, there was a single offense for which he could not be twice prosecuted. See Jackson v. State, 418 So.2d 456 (Fla. 4th DCA 1982); see also Blockburger [cit.].

At page 458 of Jackson, the court approved the following from State v. Peavey, 326 So.2d 461, 462-63 (Fla. 2d DCA 1975), cert. denied, 336 So.2d 1184 (Fla. 1976): "... it matters not, we think, with respect to dispersible contraband of a given kind, such as here [cannabis], that it may be cached or located in different places on or about his person or on or about his premises. The several such contemporaneous 'possessions' constitute but one offense."

Under W.B.M., Jackson, and State v. Peavey, it was error for the trial court to treat separately the possession of the leaves in the house from the possession of the plant elsewhere on the premises. See also Lundy v. State, 596 So. 2d 1167 (Fla. 4th DCA 1992).[7] In this regard, Mosely v. State, 659 So. 2d 1342 (Fla. 5th DCA), rev. denied 666 So. 2d 144 (Fla. 1995), on which the state relied below, is readily distinguished. There the Fifth District upheld separate convictions for trafficking in crack cocaine (found in the trunk of Mosely's car) and possession of powdered cocaine (found in his wallet), specifically writing: "The powdered cocaine residue found in Mosely's wallet had nothing to do with the crack cocaine found concealed in the trunk of Mosely's automobile." 659 So.2d at

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[7] Gibbs disapproved of a separate holding in Lundy.

1344 (e.s.). At bar, on the other hand, the parties stipulated that the leaves in the house came from the plant. T 14-15.

From the foregoing, the felony cannabis prosecution was improper. This Court should vacate the ruling of the lower court with directions to remand this cause to the trial court with instructions to dismiss the felony cannabis charge.

CONCLUSION

The lower court and the trial court erred in allowing the successor felony cannabis prosecution. This Court should vacate the ruling of the lower court with directions to remand this cause to the trial court with instructions to dismiss the felony cannabis charge.

Respectfully submitted,

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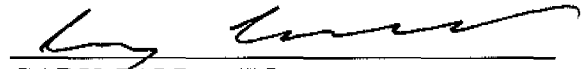

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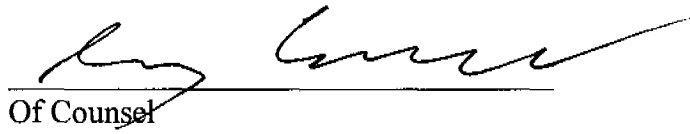
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joseph A. Tringali, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401, by courier July 29, 1997.



Of Counsel