IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,813

JOSEPH HAYES,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

****

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, Joseph Hayes, was the defendant in the trial court and respondent, the State of Florida, was the prosecution. Petitioner, in this brief, will be referred to as he stood before the trial court and respondent will be identified as the State or prosecution. The symbol "R" will be used to refer to the record on appeal and "SR" refers to the supplemental record on appeal. The symbol "T" will be used to refer to the transcript of the trial proceedings. The symbol "PB" refers to the Petitioner's initial brief on the merits and the symbol "A" refers to the Appendix attached to Petitioner's initial brief. Unless otherwise stated, all emphasis has been supplied by respondent.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New is used in this brief.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Statement of the Facts appearing on pages 1 through 6 of his initial brief on the merits to the extent that it is accurate and nonargumentative. Any additional facts which Respondent seeks to bring to the attention of the Court are contained in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

POINT I

Since the opinion of the Third District Court of Appeal certified that its decision was in direct conflict with two prior decisions rendered by the Fifth District Court of Appeal, the acceptance of discretionary jurisdiction by this Court is appropriate to resolve the conflict.

POINT II

Petitioner's right against double jeopardy was not violated by his convictions for the statutorily separate and distinct offenses of armed robbery and grand theft of a motor vehicle. Since the offenses of armed robbery and grand theft of an automobile each requires proof of an element that the other does not, separate convictions and sentences for these two offenses were permissible under §775.021(4)(a), Fla. Stat. (1997). Moreover, these two offenses are not merely degree variants of the core offense of theft so as to fall within the exception set forth in §775.021(4)(b)(2), Fla. Stat. (1997). Indeed, the crimes of armed robbery and theft of a motor vehicle are not degrees of the same offense "as provided by statute." Nowhere in the Florida statutes is grand theft made a degree of robbery, or vice versa. To the contrary, these two offenses are totally separate crimes involving separate intents. Consequently, since

no exception to the Blockburger rule reiterated in §775.021(4)(a), Fla. Stat., applies here, Petitioner's convictions and sentences for the separate crimes of armed robbery and grand theft of a motor vehicle did not violate the prohibition against double jeopardy.

POINT III

The Third District Court of Appeal correctly determined that Petitioner's conviction for the federal offense of possession of a firearm in relation to a drug trafficking crime was analogous to §790.07(2), Fla. Stat. (1993), which prohibits the carrying of a firearm during the commission of a felony, and, hence, properly held that this conviction was scoreable as a second degree felony for sentencing purposes.

ARGUMENT

POINT I

SINCE THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL CERTIFIED THAT ITS DECISION WAS IN DIRECT CONFLICT WITH TWO PRIOR DECISIONS RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL, THE ACCEPTANCE OF DISCRETIONARY JURISDICTION BY THIS COURT IS APPROPRIATE TO RESOLVE THE CONFLICT. (Restated).

As to this Court's decision to accept discretionary review of this case, the State agrees with Petitioner that it is appropriate for this Court to accept jurisdiction given the existing direct conflict between the Third and Fifth districts on the same question of law. The acceptance by this Court of discretionary jurisdiction of this case will necessarily resolve such conflict so as to insure the uniformity of decisions by the various district courts of appeal throughout the state on this issue.

POINT II

PETITIONER'S RIGHT AGAINST DOUBLE JEOPARDY WAS NOT VIOLATED BY HIS CONVICTIONS FOR THE STATUTORILY SEPARATE AND DISTINCT OFFENSES OF ARMED ROBBERY AND GRAND THEFT OF A MOTOR VEHICLE. (Restated).

Since the offenses of armed robbery and grand theft of an automobile each requires proof of an element that the other does not, separate convictions and sentences for these two offenses were permissible under §775.021(4)(a), Fla. Stat. (1997). §775.021(4)(a), which codified the applicable test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), provides as follows:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For purposes of this subsection, **offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.**

In applying the foregoing rule to the offenses involved here, it is clear that armed robbery requires proof of the element that Petitioner took the victim's property through "force, violence, assault, or putting in fear." See §812.13, Fla. Stat. (1997).

On the other hand, unlike the offense of robbery, the offense of grand theft requires proof that the property taken was of a *specific* value or type, e.g., a motor vehicle. See §812.014, Fla. Stat. (1997). Again, §775.021(4)(a), Fla. Stat., provides in pertinent part that "offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial." Accordingly, in the case at bar, separate convictions and sentences for armed robbery (count 1) and grand theft of an automobile (count 3) were permissible under §775.021(4)(a), Fla. Stat. (1997). See State v. Rodriguez, 500 So. 2d 120, 122 (Fla. 1986)(grand theft is not a lesser included offense of robbery and thus legislative intent is that there be convictions and sentences for both offenses, as each offense contained at least one element that the other did not); cf. Salazar v. State, 560 So. 2d 1207 (Fla. 3d DCA 1990) (conviction of burglary of occupied dwelling with firearm was not subsumed within conviction of robbery with firearm, since, by definition, each offense contained an element not common to the other).

Petitioner's contention that armed robbery and grand theft of an automobile are merely degree variants of the core offense of theft, and therefore fall under the exception set forth in §775.021(4)(b)(2), is inapposite. This statutory section

provides an exception for "[o]ffenses which are degrees of the same offense as provided by statute." Petitioner's argument ignores the fact that the crimes of armed robbery and theft of a motor vehicle are not degrees of the same offense "as provided by statute." Indeed, unlike §812.014(2), Fla. Stat., which enumerates three degrees of the offense of grand theft depending upon the value or type of the property stolen, nowhere in the Florida statutes is grand theft made a degree of robbery, or vice versa. To the contrary, as argued *supra*, these two offenses are totally separate crimes involving separate intents. See State v. Rodriguez, supra, 500 So. 2d at 122. The taking of property from another through the "use of force, violence, assault, or putting in fear" required by the robbery statute [§812.13(1), Fla. Stat.] is entirely different from the simple taking of a "motor vehicle" required for the crime of grand theft [§812.014(2)(c)6., Fla. Stat.]. Consequently, since no exception to the Blockburger rule reiterated in §775.021(4)(a), Fla. Stat., applies here, Petitioner's convictions and sentences for the separate crimes of armed robbery and grand theft of an automobile did not violate the prohibition against double jeopardy. Moreover, as the Third District Court of Appeal ruled in the opinion sub judice, this Court's decision in Sirmons v. State, 634 So. 2d 153 (Fla. 1994), cited by Defendant

for support, is distinguishable from the facts of the instant case. (A 3, n. 2). As the Third District noted, Sirmons involved a "single taking" of an automobile at knife point, i.e., the robbery and theft *occurred at the same time and place*. Id. at 153. Here, in stark contrast, the taking of the victims' personal belongings *inside* the residence, e.g., computers, cell phones, video cassette recorder, etc., was separate and distinct from the subsequent taking of the victims' van *outside* the residence. In short, there were *two* takings involving different property which occurred at a separate and discrete time and place. As such, the facts of the present case are more akin to those faced by the Third District in the case of Wilson v. State, 608 So. 2d 842, 843 (Fla. 3d DCA 1992), where the court upheld the defendant's convictions for both grand theft and armed robbery on double jeopardy grounds, since the theft of the robbery victims' automobile from *outside* the hotel was a separate, independent criminal act apart from the strong-arm robbery which occurred *inside* the victims' hotel room. Id., 608 So. 2d at 843. See also Howard v. State, 723 So. 2d 863, 864 (Fla. 1st DCA 1998) (double jeopardy did not bar convictions and sentences for both armed robbery and armed carjacking in connection with incident in which defendant took victim's car at gunpoint, and shortly thereafter, while in a different location,

took victim's personal effects), citing Smart v. State, 652 So. 2d 448 (Fla. 3d DCA 1995) (convictions for armed robbery and armed carjacking affirmed upon evidence showing that Smart robbed his victim of jewelry and his wallet next to an ATM machine, and then drove away in the victim's car); Mason v. State, 665 So. 2d 328 (Fla. 5th DCA 1995) (same); Waters v. State, 542 So. 2d 1371 (Fla. 3d DCA 1989).

Additionally, the instant case is extremely analogous to the recent decision of the Fourth District in Consiglio v. State, 24 Fla. L. Weekly D2575 (Fla. 4th DCA November 17, 1999), where the court was presented with the following facts in assessing the propriety of the defendant's convictions for robbery and carjacking against his double jeopardy claim:

> While beating the victim, appellant first demanded the keys to the victim's car after his accomplice jumped in the vehicle and noticed the keys were not inside. The victim reached into her pocket and gave appellant the keys. During the beating, appellant demanded that the victim give him money. She complied. At that point the robbery was complete. Subsequently, the appellant drove off in the victim's car, completing the offense of carjacking.

Id., 24 Fla. L. Weekly at D2575. In upholding Consiglio's convictions, the Fourth District quoted this Court's holding in Brown v. State, 430 So. 2d 446, 447 (Fla. 1983), in the double jeopardy context vis-a-vis multiple takings, that "[w]hat is

dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction." The court held that while the temporal separation was "very minimal" in the case, there were two separate acts that justified convictions for both crimes: (1) an intent and act to steal money from the victim; and (2) an intent and act to steal the victim's car. Interestingly, in support of its decision the Fourth District cited the decisions of the Fifth District in Simboli v. State, 728 So. 2d 792, 793 (Fla. 5th DCA 1999), rev. denied, No. 95-410 (Fla. August 19, 1999)(convicting defendant of separate crimes of robbery and carjacking did not violate double jeopardy principles, where defendant threatened to stab taxicab driver and demanded money, and then, after completing robbery by taking driver's money, defendant told driver to empty his pockets, forced driver out of taxicab, and drove away in cab), and Mason v. State, 665 So. 2d 328 (Fla. 5th DCA 1995) (where robbery occurs first then carjacking, two separate crimes are committed independently of each other).

At bar, similar to the foregoing cases, the facts show that two separate crimes occurred under two separate statutes - armed robbery under §812.13, Fla. Stat., and grand theft of a motor vehicle under §812.014, Fla. Stat. These two crimes involved

the taking of different property with two separate intents, to-wit: the intent to steal the property inside the victims' residence, and the intent to steal the van outside the residence. Accordingly, Petitioner's dual convictions for armed robbery and grand theft of a motor vehicle did not violate double jeopardy principles. The Third District Court of Appeal's decision to this effect should be approved.

POINT III

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT PETITIONER'S CONVICTION FOR THE FEDERAL OFFENSE OF POSSESSION OF A FIREARM IN RELATION TO A DRUG TRAFFICKING CRIME WAS ANALOGOUS TO §790.07(2), FLA. STAT., WHICH PROHIBITS THE CARRYING OF A FIREARM DURING THE COMMISSION OF A FELONY, AND, HENCE, PROPERLY HELD THAT THIS CONVICTION WAS SCOREABLE AS A SECOND DEGREE FELONY. (Restated).

The State initially maintains that this Court should decline to decide this non-certified issue, as the question presented was properly decided by the Third District.

Petitioner contends that the Third District Court of Appeal erred by determining that Petitioner's federal conviction for possession of a firearm in relation to a drug trafficking crime was analogous to §790.07(2), Fla. Stat.(1993), which prohibits the carrying of a firearm during the commission of a felony, and thus scoreable as a second degree felony for purposes of the trial court's departure sentence under Harris v. State, 685 So. 2d 1282 (Fla. 1996). As he unsuccessfully urged in the district court of appeal, Petitioner asserts that this federal conviction was analogous to §790.053, Fla. Stat. (1993), which merely prohibits the open carrying of weapons, and that this federal conviction therefore should have been scored as a misdemeanor.

The State submits that, contrary to Petitioner's contention,

the Third District did not err by determining that §790.07(2), Fla. Stat., was the "most analogous Florida Statute" to Petitioner's federal conviction for possession of a firearm in relation to a drug trafficking crime. (A 6). Indeed, in comparing a federal conviction to "the analogous or parallel Florida statute" as required by Rule 3.701(d)(5)(B) for scoring purposes, it is only reasonable to seek to find the Florida statute that is the closest or most analogous to the federal statute involved. For, while one Florida statute may have only one element in common with the federal statute in question, another Florida statute may have two or more elements in common.

Here, as the Third District correctly ruled, Petitioner's federal conviction was analogous to §790.07(2), Fla. Stat., which prohibits the display or carrying of a firearm during the commission of a felony. Like the federal statute, 18 U.S.C. §924(c)(1)(a), §790.07(2) involves both the open carrying, i.e., "display," of a firearm *as well as* the fact that the firearm is displayed during the commission of a felony offense. In contrast however, as the Third District noted in its decision, §790.053, Fla. Stat., "merely prohibits the open carrying of weapons, and does not in any respect address or criminalize the use of a firearm while committing a criminal offense." (A 7).

Thus, since §790.07(2)encompasses both of the two critical elements necessary for the federal offense of possession of a firearm in relation to a drug trafficking crime, and is therefore subsumed within such offense, it is unquestionably "the analogous or parallel Florida statute" within a reasonable construction of that phrase in Rule 3.701(d)(5)(B).

Petitioner's contention that the open "carrying" of a firearm is conduct that is not prohibited by §790.07(2), Fla. Stat., but which satisfies the federal statute at issue, is simply fallacious. As pointed out *supra*, §790.07(2) expressly prohibits, *inter alia*, the "display," i.e, the open carrying, of a firearm. As such, in contrast to the cases cited for support by Petitioner, this Florida statute does not require proof of an element that was not required to be proven for Petitioner's federal firearm conviction.

Lastly, since there is clearly no uncertainty or ambiguity concerning which Florida statute is the appropriate "analogous or parallel" statute for scoring purposes, the State maintains that the rule of lenity Petitioner seeks to have this Court apply is simply not applicable. Cf. Grappin v. State, 450 So. 2d 480, 482 (Fla. 1984) ("Where legislative intent as to punishment is clear, ..., the rule of lenity does not apply.");

§775.021(1), Fla. Stat. , which provides that"[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; ***when the language is susceptible of differing constructions***, it shall be construed most favorably to the accused."). Hence, the Third District's correct decision concerning the propriety of the scoring of Petitioner's federal firearm conviction should not be disturbed.

CONCLUSION

Based upon the foregoing reasons and authorities, the decision of the Third District Court of Appeal affirming the judgment of conviction and, in part, the sentence should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits was furnished by U.S. mail to Robert Godfrey, Asst. Public Defender, Counsel for Petitioner, 1320 N.W. 14th Street, Miami, FL 33125, on this ___ day of December, 1999.

_____
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