IN THE SUPREME COURT OF FLORIDA

MICHAEL CONSIGLIO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.SC99-125
	)	DCA No. 98-3528
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

On Review from the District Court
of Appeal, Fourth District,
State of Florida

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Paul E. Petillo
Assistant Public Defender
Attorney for Michael Consiglio

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED — PAGE

FLORIDA STATUTES

OTHER AUTHORITIES CITED

INTRODUCTION

This is the initial brief on the merits of petitioner/defendant Michael Consiglio on conflict jurisdiction from the Fourth District Court of Appeal.

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(T) - Trial Transcript

(SR I) - Sentencing Transcript

(SR II)- Transcript of Petitioner's Taped Statement

CERTIFICATE OF TYPE AND SIZE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2 (d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that has 10 characters per inch.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with carjacking in violation of § 812.133(3), Fla. Stat. (1995) (count I), attempted kidnapping (count II), and robbery in violation of § 812.13(1), Fla. Stat. (1995) (count III) (R 3). He proceeded to jury trial.

Diane Thompson testified that she had just finished pumping gas at a Circle K convenience store when petitioner hit her in the back of the head and tried to push her into her truck (T 86). Petitioner told her to get into the truck five or six times, but she refused (T 87). Ms. Thompson fell to the ground to avert her abduction (T 89). While on the ground, petitioner pulled her hair and punched her in the back, and he continued to demand that she get into the truck (T 89). He also said, "I want everything you have" (T 89).

Petitioner's accomplice got in the truck and told petitioner to get the keys (T 90). Ms. Thompson told petitioner to take them (T 90). Petitioner said, "[A]ll right. Give me the keys. Give me everything you have" (T 90-91). Ms. Thompson testified:

> And, I opened my pocketbook which had money in it and my keys and he took off. He finally let me go and got in the truck[.] He couldn't start it at first. So, I got out of [the] way, and they took off. He finally, I guess, realized how to start the truck and took off out of there.

(T 91). Asked whether petitioner got off her after she gave him the keys, Ms. Thompson testified, "After he -- no, he was still on me for my money" (T 105). Asked how long she was on the ground,

Ms. Thompson said, "Maybe a minute" (T 112). Ms. Thompson gave petitioner the keys from her pocket and $60 or $70 dollars from her pocketbook (T 91, 104, 106).

Detective David Nicholson took a taped statement from petitioner (T 130). On the tape, petitioner said he needed the car to get crack cocaine (SR II 4). Petitioner said he told Ms. Thompson to give him the keys but she refused (SR II 5). Petitioner stated: "We just started scuffling with each other and she said here, take it; take it. And, I said give me your money, and she gave me her money and I left" (SR II 5). Petitioner denied that he tried to pull Ms. Thompson into the truck, and he denied hitting her (SR II 5).

After Detective Nicholson testified, the state rested (T 156). Petitioner rested without putting on any evidence (T 162).

Petitioner was found guilty as charged of carjacking and robbery, and guilty of the lesser included offense of attempted false imprisonment (T 243). He was sentenced pursuant to the 1995 guidelines to 78.5 months in state prison (SR I 24).[1]

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal, arguing that his dual convictions for robbery and carjacking violated double jeopardy.

On November 17, 1999, the Fourth District affirmed the dual convictions. The Fourth District stated:

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[1] Petitioner's offense date is March 2, 1997 (R 3).

> As the supreme court stated in Brown v. State, 430 So.2d 446, 447 (Fla.1983), "[w]hat is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction." While the temporal separation was very minimal in this case, there were two separate acts: (1) an intent and act to steal money from the victim; and (2) an intent and act to steal the victim's car. See, e.g., Simboli v. State, 728 So.2d 792, 793 (Fla. 5th DCA 1999), rev. denied, 741 So.2d 1137 (Fla.1999); Mason v. State, 665 So.2d 328, 329 (Fla. 5th DCA 1995). Conviction for both crimes under these circumstances does not violate principles of double jeopardy.

Petitioner filed a timely notice to invoke discretionary jurisdiction based on conflict between the decision in petitioner's case and Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999). This court accepted jurisdiction on April 6, 2000.

SUMMARY OF THE ARGUMENT

POINT I

Petitioner's's dual convictions for carjacking and robbery violate double jeopardy, and the robbery conviction must be set aside. Petitioner applied a single continuous use of force to obtain the keys, money, and truck from Ms. Thompson. This is one offense.

POINT II

Petitioner was sentenced under the 1995 guidelines held unconstitutional by this court in Heggs v. State, 25 Fla. L. Weekly S137 (Fla. Feb. 17, 2000). Petitioner's offense date of March 2, 1997, falls outside the window period established by the Fourth District but within the period established by the Second and Third Districts. Petitioner urges this Court to adopt the position of the Second and Third Districts, which would place petitioner's case within the window.

POINT I

PETITIONER'S DUAL CONVICTIONS FOR CARJACKING AND ROBBERY VIOLATE DOUBLE JEOPARDY

Petitioner told Ms. Thompson, "Give me the keys. Give me everything you have" (T 90-91). Ms. Thompson gave petitioner the keys from her pocket and the money from her purse (T 91, 104, 106). Petitioner got in Ms. Thompson's truck and fled (T 91). Petitioner was convicted and sentenced for both carjacking and robbery. Dual convictions violate the double jeopardy provisions of both the United States and Florida Constitutions, and petitioner's robbery conviction and sentence should be set aside.[2]

For double jeopardy purposes, robbery and carjacking are the same offense. The robbery statute, § 812.13, Florida Statutes (1995), states:

> **812.13 Robbery --**
> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

The carjacking statute, § 812.133, Florida Statutes (1995), states:

> **812.133 Carjacking -**

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[2] The appropriate procedure in cases involving dual convictions for the same conduct is to vacate the lesser crime. See Fjord v. State, 634 So.2d 714, 716 (Fla. 4th DCA 1994). Robbery is a second degree felony and carjacking is a first degree felony. §§ 812-.13(2)(c) & 812.133(2)(b), Fla. Stat. (1995).

> (1) "Carjacking" means the taking of a motor vehicle which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the motor vehicle, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

The elements of the two offenses are identical, except that robbery involves the taking of "money or other property", while carjacking is limited to the taking of "a motor vehicle." Every carjacking is also a robbery because the motor vehicle is "other property." In Ward v. State, 730 So. 2d 728 (Fla. 1st DCA 1999), the state conceded that all the elements of carjacking are subsumed by the offense of robbery. In Fryer v. State, 732 So. 2d 30 (Fla. 5th DCA 1999), the Fifth District concluded that the offense of robbery was subsumed within the more limited offense of carjacking in that every carjacking is also a robbery, albeit a specialized form of robbery, and held that robbery, a second degree felony, is a necessarily lesser included offense of carjacking. The court then held it was error to refuse to give a requested jury instruction on robbery as a lesser included offense of carjacking.

The test for determining whether offenses arising out of a single criminal transaction or episode may be separately punished is the Blockburger test, adopted in Florida in § 775.021(4)(a), Fla. Stat. (1995), which states 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 in

trial. See Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180 (1932). Under this test, it is clear, as the courts in Ward and Fryer noted, that robbery and carjacking do not each require proof of an element the other does not and that they are not separate offenses under Blockburger. Accordingly, a defendant may only be convicted of one of the two offenses unless each offense arose out of a separate criminal transaction or episode. § 775.021(4)(a), Fla. Stat. (1995).

Here, there is only one criminal transaction or episode. In Brown v. State, 430 So.2d 446, 447 (Fla. 1983), the defendant robbed one cashier and then ordered her to open another cash register. The cashier did not have the key so she summoned the employee who did. This employee refused to believe a robbery was in progress and would not open the register until Brown displayed his firearm to her. When Brown obliged, so did she. This court held this was two robberies. "[W]here property is stolen from the same owner from the same place by a series of acts, if each taking is a result of a separate independent impulse, it is a separate crime." Brown, 430 So.2d at 447 (citation omitted). "What is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction." Id. Thus, each offense arose out of a separate criminal transaction or episode.

In Castleberry v. State, 402 So.2d 1231, 1232 (Fla. 5th DCA 1981), the Fifth District observed: "Whether an item is taken as

part of one theft or robbery, or two, necessarily depends upon chronological and spatial relationships. If a defendant thrusts a pistol into a victim's ribs and says, 'Give me your watch, your wallet, and your tie!' and the victim complies, only one statutory violation, one robbery, has been committed." In the instant case, petitioner, instead of saying, "Give me your watch, your wallet, and your tie!", said "Give me the keys. Give me everything you have" (T 90-91). Ms. Thompson did so. This is one robbery. Petitioner applied a single continuous use of force to obtain the keys, money, and truck. By contrast, had petitioner taken Ms. Thompson's money, walked away, and then returned to take by force her keys and truck, there would be two offenses, robbery and carjacking. See Howard v. State, 732 So.2d 863 (Fla. 1st DCA 1998) (armed robbery and armed carjacking involved two discrete offenses where defendant took victim's car at gunpoint then later, while in a different location, took victim's personal effects).

What the Fourth District overlooked is the fact that the gravamen of robbery is the *force* used to take something, not the thing taken. Taylor v. State, 138 Fla. 762, 190 So. 262 (1939). For example, robbing someone of a ball point pen is just as serious an offense as robbing someone of a Rolex watch. Thus, to sustain more than one conviction for robbery there should be more than one application of force, i.e., there should be "successive and distinct forceful takings." Brown, supra. See e.g. Sessler v. State, 740 So.2d 587 (Fla. 5th DCA 1999)(robbery of money and theft

of gun from store clerk were not two separate and distinct acts; defendant could not have been separately convicted of robbery of cash and robbery of gun); Fraley v. State, 641 So.2d 128 (Fla. 3d DCA 1994) (vacating one of defendant's two convictions for armed robbery where defendant took money from register and clerk's personal firearm; "Because the two acts of taking 'were part of one comprehensive transaction to confiscate the sole victim's property,' only one of those convictions can stand.").

In Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999), the victim parked her car in the lot of a store and then went into the store to do some shopping. After she had finished her shopping, she returned to her car, pushing a cart. She opened the front passenger door and placed her purchases and her purse on the seat. As she was returning the cart, several young males, including the defendant Ward, approached her. One of them pointed a gun at her and told her to give them her keys and money; the defendant told her they would shoot if she did not comply. The defendant then took the keys from the victim and gave them to his accomplice, then all three males got in the car and drove off.

In Ward, as in the present case, the robbery charge was for the taking of the victim's personal items and the carjacking charge was for the taking of the car. In both cases, the entire incident took less than a minute and was indisputably a single incident. In Ward, the court found that under the facts, there was only one "forceful taking," all the victim's property was taken as a part of

the same criminal transaction or episode, without any temporal or geographic break, and that double jeopardy thus precluded convictions for both offenses. Since both offenses were armed and thus were first degree felonies punishable by life, either conviction could be set aside; the court chose to set aside the carjacking conviction.

The facts of the instant case are nearly identical to the facts in Ward and petitioner urges this court to quash the decision of the Fourth District. Therefore, the second degree felony robbery conviction and sentence should be vacated. Because petitioner was sentenced pursuant to the guidelines and setting aside his robbery conviction will affect his guidelines scoresheet computation,[3] petitioner's remaining sentences should be reversed and remanded for resentencing. See Ward, supra ("[B]ecause appellant was sentenced pursuant to the guidelines and the computations will be affected by this decision, we vacate appellant's remaining sentences and direct the trial court on remand to resentence appellant").

[3] Setting aside the robbery conviction changes petitioner's maximum prison months from 96 months to 73.5 months (R 21). Petitioner was sentenced to 78.5 months (R 21).

POINT II

PETITIONER'S CRIME FELL WITHIN THE "WINDOW" PERIOD DURING WHICH THE 1995 GUIDELINES WERE IN VIOLATION OF THE "SINGLE SUBJECT" RULE OF THE FLORIDA CONSTITUTION

Petitioner's offense date is March 2, 1997, and he was sentenced pursuant to the 1995 guidelines (R 20). Petitioner's level 7 primary offense scored 56 points and his level 6 additional offense at conviction scored 18 points (R 20). Prior to the adoption of the 1995 amendments to the 1994 sentencing guidelines, a level 7 primary offense scored 42 points and a level 6 additional offense scored 7.2 points. *See* § 6, Ch. 95-184, *Laws of Fla.* (1995); § 921.0014(1), *Fla. Stat.* (1993). Scored under the valid 1994 sentencing guidelines, defendant's scoresheet totals 24.8 fewer points,[4] recommending a sentence of 52 state prison months and permitting a sentence of between 39 and 65 months. The sentence defendant is presently serving, 78.5 months, exceeds that permitted by the 1994 guidelines by 13.5 months.

On February 17, 2000, this court found unconstitutional in violation of the single subject rule the 1995 amendments to the 1994 sentencing guidelines. Heggs v. State, 25 Fla. L. Weekly S137 (Fla. Feb. 17, 2000). This court reversed the sentence imposed upon Mr. Heggs and remanded the cause for resentencing in accordance with the valid laws in effect on the dates his crimes

[4] Primary offense scored at 42 (instead of 56), and additional offense at conviction scored at 7.2 (instead of 18).

were committed. Id. at 140.

The Fourth District Court of Appeal has ruled that the decision in Heggs applies to crimes committed between October 1, 1995, and September 30, 1996. Salters v. State, 731 So. 2d 826 (Fla. 4th DCA 1999) rev. granted, No. 95,663 (Fla. Dec. 3, 1999). The Second and Third Districts have ruled that Heggs applies to crimes committed between October 1, 1995, and May 24, 1997. Heggs v. State, 718 So.2d 263 (Fla. 2d DCA 1998); Diaz v. State, 25 Fla. L. Weekly D518 (Fla. 3d DCA March 1, 2000). Petitioner's offense date of March 2, 1997, falls outside the window period established by the Fourth District but within the period established by the Second and Third Districts. Petitioner urges this Court to adopt the position of the Second and Third Districts, which would place petitioner's case within the window.

As stated by the Second District in Heggs, the reenactment of the statute in the biennial adoption of the statutes determines when the window closes. The reenactment has the effect of adopting as the official statutory law of the state those portions of statues that are carried forward from the preceding adopted statutes. State v. Johnson, 616 So. 2d 1, 2 (Fla. 1993). Once reenacted as a portion of the Florida Statutes, a chapter law is no longer subject to challenge on the grounds that it violates the single subject rule. Id.

Since petitioner's offense date is well within the correct

window period, this court should reverse his sentence and remand for resentencing with a correctly calculated guideline scoresheet.

CONCLUSION

Petitioner respectfully requests this Court to set aside petitioner's conviction for robbery and remand for resentencing.

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street\6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Paul E. Petillo
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to James Carney, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 1st day of May, 2000.

Attorney for Michael Consiglio