IN THE SUPREME COURT OF FLORIDA

CASE NO. 1999-49

JAMES CRULLER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

****

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

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RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Appellant, James Cruller, was the Defendant below, and the State of Florida was the prosecution. In this brief, the parties will be referred to as they stood in the proceedings below. All references to the record on appeal will be designated by "R." followed by the appropriate page number[1]. All references to the transcript of proceedings will be designated by "Vol." followed by the appropriate volume number and a colon to indicate the appropriate page number. All references to the attached Appendix will be referred to by "App." followed by the appropriate letter.

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.

[1] All references to the transcript of the Motion to Suppress at page after page 102 of the Record on Appeal, will be designated by (R.Mot.), followed by a colon with the appropriate page number as the page numbers provided for the Record on Appeal were not continued into the transcript of the Motion to Suppress.

STATEMENT OF THE CASE AND FACTS

The Defendant was charges by Information with robbery using a deadly weapon or firearm and armed robbery (carjacking) based on an incident which occurred on August 28, 1996. (R.: 1-2). The Defendant entered a plea of not guilty, and prior to trial, filed various Motions to Suppress. (R.: 10-18). The trial court denied the Motions, which ruling were challenged and affirmed on direct appeal (App. A), and the case proceeded to trial. After a jury was selected and sworn, and opening statements were made, the State called the victim to testify. (Vol. I: 31-190).

The victim, Manuel Garcia testified that and on August 28, 1996 his wallet and car were taken. (Vol. I: 191). The victim stated that as he was getting to his house it was dark, and another car blocked him from the rear. (Vol. I: 192). The victim testified the car did not move and he did not know the people inside the car. (Vol. I: 193). After the victim exited his car two individuals from the other car came over and one was pointing a revolver at him. (Vol. I: 193). The perpetrator holding the gun asked the victim for his keys and the victim handed them to him. (Vol. I: 193). The other perpetrator told the victim to give him his wallet, and without giving the victim time to comply, took it out of the victim's pocket himself. (Vol. I: 193). The victim stated he was very afraid and that he was afraid they were going to

shoot. (Vol. I: 194).

After the perpetrators took the victim's keys and wallet, they got into the victim's car and proceeded to put the car into reverse. (Vol. I: 195). The victim stated that the car they arrived in, which had been blocking his car, immediately left the area. (Vol. I: 195). Then, the perpetrators left the area in the victim's car. (Vol. I: 195). The victim then went inside and called the police. (Vol. I: 195). The victim stated he was not able to identify the perpetrators, but he did get his wallet back the same evening. (Vol. I: 195). The State then showed the victim pictures which the victim identified as photos of his car. (Vol. I: 197). The victim also identified a picture of his house which he said looked the same but for the fact it was dark when the incident occurred. (Vol. I: 197). Next, the victim identified a photo of his wallet and pictures of its contents including his driver's license, insurance card, and visa card. (Vol. I: 198). During cross-examination, the victim stated he could not identify the Defendant as one of the perpetrators because there were two (2) of them and one was pointing a gun at him and it was dark. (Vol. II: 201).

The next witness called by the State was Officer Peyen. (Vol. II: 201). He stated that on the evening in question, he was working undercover, in plain clothes. (Vol. II: 202). He stated that he observed a robbery in progress while he and his partner

were riding in an undercover car. (Vol. II: 205). The officer stated he observed a car pull up into a driveway and saw an older white male standing with a nervous look on his face. (Vol. II: 205). He also saw a black male wearing a white tank top and long white shorts standing behind the white male, going through his pockets. (Vol. II: 205). After going through the white male's pockets, the officer stated he saw the black male retrieving a wallet from the older Latin or white male. (Vol. II: 206). The officer identified the Defendant as the person he saw taking the wallet and identified the Defendant in court.

At this point the officer made a quick U-turn, and radioed other officers, requesting backup because he was in plain clothes and his car was not equipped with sirens and lights needed to make a stop. (Vol. II: 208). He stated he saw the victim's vehicle, with the Defendant in the passenger seat, leaving the area. (Vol. II: 209). He testified they followed the vehicle until marked units came and attempted to pull the car over. (Vol. II: 209). The officer further testified he never lost sight of the car until he stopped pursuing when the marked units arrived. (Vol. II: 210). Later, the officer heard on the radio the car had crashed and when he arrived at the scene of the crash he saw the same car he had previously pursued. (Vol. II 211). The officer also made a visual identification of the person the police had apprehended and identified him as the person who robbed the victim. (Vol. II:

212).

The next witness called by the State was Officer Fernandez who responded to the scene where the Defendant was apprehended by a police dog in the backyard of a house. (Vol. II: 236). The officer identified the Defendant in court, as the person he apprehended and handcuffed. (Vol. II: 236). He further testified, the Defendant stated, "it wasn't my idea, it was the other guy's." (Vol. II: 236-237). After cross-examination, the State called Detective Nogues[2], who testified he became involved in the pursuit of the Defendant. (Vol. II: 244).

Detective Nogues testified he observed the car the Defendant was traveling in, hit a wall, and saw two individuals get out of the car, with the Defendant exiting the passenger side. (Vol. II: 245). At this point the two suspects ran and the he chased them. (Vol. II: 246). Later, after the Defendant was apprehended, the officer identified him as the person who "bailed out" of the car that crashed. (Vol. II: 247). When he identified the Defendant in the back of a van the Defendant yelled, "you fucking cracker, you got nothing on me." (Vol. II: 249).

The witness then stated the Defendant spontaneously stated, "fuck you, you can't get me for armed carjacking, I only took the wallet." (Vol. II: 249). Finally, the Detective stated at this

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[2] The record reflects that the court reporter spelled Detective Nogues's name incorrectly as "Novis".

point he closed the door to the van, and went to the victim's car to examine the interior. (Vol. II: 250-251). After looking in the passenger area, the Detective noticed a brown wallet in the front seat. (Vol. II: 251). After further investigation, he returned it to the victim. (Vol. II: 251). The remainder of the officer's testimony was consistent with his testimony during the Motion to Suppress. (Vol. II: 250-264).

The next witness called was the latent print examiner, Marie Nelson, who the Defense stipulated was an expert. (Vol. II: 264, 268). Nelson testified she took the Defendant's fingerprints prior to trial. (Vol. II: 276). The witness testified she used his fingerprints to make a comparison to prints taken in the investigation of the Defendant's case. (Vol. II: 277). After comparing the Defendant's prints taken in court to prints taken in the Defendant's case, the witness determined that some of the prints matched. (Vol. II: 283). The next witness called by the State was Detective Luquis, who testified consistently with his testimony at the Motion to Suppress. (Vol. II: 294-317).

The next witness called by the State was technician Jeffreys who testified he works as a crime scene technician. (Vol. II: 328). He stated he was called out on a case on August 28, 1996 to process the victim's vehicle. (Vol. II: 329). After being shown one of the State's exhibits, the witness identified it as fingerprints he lifted from the victim's vehicle. (Vol. II: 330).

The prints were lifted from the exterior surface of the right front passenger's door. (Vol. II: 331). The witness further testified he took pictures of evidence collected from the crime scene including a wallet and the contents of the wallet. (Vol. II: 336).

After the above testimony, the State rested. (Vol. II: 344). The Defense then reserved their Motion for Judgement of Acquittal and rested. (Vol. II: 344). The trial court denied the Motion for Judgement of Acquittal at the close of the State's case and at the close of the Defendant's case. (Vol. II: 345). Thereafter, counsel for the State and Defense made closing arguments. (Vol. II: 346). After instructions and deliberations, the jury returned a verdict of guilty of robbery without a firearm and guilty carjacking without a firearm. (Vol. II: 425).

On February 2, 1998, the Defendant was sentenced as a violent habitual felony offender on Count I, robbery, to thirty (30) years is prison. (R.: 32-39). With regard to Count II, carjacking, the Defendant was sentenced as a violent habitual felony offender to life in prison. (Vol. II: 32-39).

The Defendant thereafter appealed his conviction and sentence to the Third District Court of Appeal, arguing among other things that the trial court erred in convicting and sentencing him for the dual offenses of robbery in count I and carjacking in count II where the offenses took place during a single criminal episode and the dual convictions were in violation of double jeopardy.

On November 24, 1999, the Third District affirmed the convictions and sentences and held the Defendant was properly convicted for both of the separate offenses of robbery and carjacking as per Smart v. State, 652 So.2d 448 (Fla. 3d DCA 1995). (App. A). The Third District acknowledged that its decision conflicted with the First District's decision in Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999), and certified conflict. (App. A).

The Defendant thereafter filed a notice of discretionary review in this Court on the certified conflict.

SUMMARY OF THE ARGUMENT

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

The State would argue the convictions and sentences for robbery and carjacking were not based on one (1) crime, but instead on two (2) individual crimes for which different elements were necessary in order to convict. Furthermore, the record reflects that the State provided ample evidence to support each element of each count for which the Defendant was convicted. As such, the prohibition against double jeopardy was not violated and the Defendant's convictions and sentences should be affirmed.

ARGUMENT

SINCE THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL CERTIFIED THAT ITS DECISION WAS IN DIRECT CONFLICT WITH THE PRIOR DECISION RENDERED BY THE FIRST 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 First 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.

The Defendant argues that his convictions and sentences for both robbery and carjacking violate double jeopardy. §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.

The State would argue that while Section 775.021(4)(a), Florida Statutes (1995), precludes multiple convictions when one offense contains all the elements necessary to another and when the convictions are based upon one underlying act, Section 775.021(4)(b) provides that "each criminal offense committed in the course of one criminal episode or transaction" warrants a *separate conviction*. (Emphasis added.) As such, because in the instant case there were separate criminal offenses committed in the course of one episode, each offense committed by the Defendant warrants a separate conviction.

Furthermore, where the victim was robbed of his car keys and wallet and then the Defendant and his accomplice drove away in the victim's car, the Defendant was properly convicted of both robbery and carjacking. Smart v. State, 652 So.2d 448 (Fla. 3d DCA 1995)(Double jeopardy did not bar convictions and sentences for both armed robbery of personal effects and armed carjacking in connection with incident in which defendant robbed the victim at gunpoint of his jewelry and wallet and then drove off with victim's car); Simboli v. State, 24 Fla. L. Weekly D578 (Fla. 5th DCA 1999); See dissent in Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999).

In Simboli v. State, as in the instant case, the defendant was convicted of robbery and carjacking, and thereafter sentenced to

life if prison as a habitual offender. Id. In, addition as in the case at hand, the defendant in Simboli, challenged his convictions and sentences arguing they violate the United States constitutional prohibition against double jeopardy. Id. Similarly, the defendant in Simboli used a weapon[3] to complete a robbery against the victim by taking his money. Id. Then, as in the instant case, after completing the robbery, the defendant drove away in the victim's car. Id.

The district court determined, convicting the defendant of separate crimes of robbery and carjacking did not violate double jeopardy principles where defendant threatened the victim and completed a robbery and then, after completing the robbery, drove away in the victim's car. Id. Under these circumstances, the court held two crimes were committed, not just one as contended by the appellant. Id.; See also 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).

As in Simboli, the Defendant in this case completed a robbery while his accomplice held a gun on the victim. Id. Furthermore, after the Defendant successfully removed the victim's wallet and car keys, the Defendant and his accomplice then got into the

[3] Although the defendant in Simboli used a deadly weapon (a knife) to complete his crimes, as in this case, he was only convicted of robbery without a weapon and carjacking without a weapon. Simboli v. State, 24 Fla. L. Weekly D578 (Fla. 5th DCA February 26, 1999).

victim's car, and drove away. Id. Clearly, as in the above referenced cases, there was a robbery committed, and then afterward there was a carjacking. Smart v. State, 652 So.2d 448 (Fla. 3d DCA 1995); Mason v. State, 665 So.2d 328 (Fla. 5th DCA 1995); Howard v. State, 723 So.2d 863 (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 took victim's personal effects).

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. 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).

Finally, the the concurring and dissenting opinion, filed by Judge Lawrence of the First District Court should be considered. Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999). In Ward, as noted by the Defendant, the victim was robbed of her belongings while she unpacked her groceries in a parking lot, and then her car was stolen from her. Id. Judge Lawrence reasoned, that while the

jury could have found from the evidence that the victim was robbed of her purse, checkbook, and money and at the same time she was robbed of her keys, the carjacking offense was not complete until the car was taken by the defendant and his accomplices. Id. Judge Lawrence reasoned, that taking the victim's keys alone, was not sufficient to constitute a carjacking and because the armed robbery of the victim's purse, checkbook and money occurred before the carjacking, separate offenses were committed. Id. In addition, Judge Lawrence wrote, "I am persuaded by our sister court's decision in Smart v State, 652 So.2d 448 (Fla. 3d DCA 1995), affirming dual convictions for armed robbery and armed carjacking. Id[4].

Based upon the foregoing, the State would argue the Defendant's convictions and sentences do not violate double jeopardy as there were separate crimes, and the lower court's adjudications and sentences should be affirmed.

[4] Initially, Judge Lawrence pointed out he concurred with regard to upholding the defendant's robbery conviction but dissented with regard to the reversal of the defendant's carjacking conviction because he was "unable to reconcile that action" with the First Districts decision in Howard, supra. Id.

CONCLUSION

Based upon the foregoing reasons and authorities, the decision of the Third District Court of Appeal affirming the judgment of conviction and 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 Marti Rothenberg, Asst. Public Defender, Counsel for Petitioner, 1320 N.W. 14th Street, Miami, FL 33125, on this 20th day of January, 2000.

_____
M. REBECCA SPRINGER
Asst. Attorney General