IN THE SUPREME COURT OF FLORIDA

CASE NO. 1999-49

JAMES CRULLER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON MERITS

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

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INTRODUCTION

This is the initial brief on the merits of petitioner/defendant James Cruller on certified conflict jurisdiction from the Third District Court of Appeal.

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(T) - Transcript of Proceedings

(A) - Appendix with Third District's decision

STATEMENT OF THE CASE AND FACTS

The petitioner/defendant was charged by information on September 18, 1996, with the armed robbery of Manuel Garcia by taking his wallet and money in violation of §812.13(2)(a), Florida Statutes (1995), and the armed carjacking of Manuel Garcia by taking his car in violation of §812.133(2)(a). (R: 1-2)

Jury trial began on November 18, 1997. The state presented the testimony of Manuel Garcia who stated that on August 26, 1996, he pulled into his driveway at his house in Miami; it was evening and dark outside. (T: 191-193) Three men pulled up behind him in another car as he got out of his car to open his gate. (T: 192-195) Two men got out of their car, one quickly pointed a gun at him and asked him for his keys, the other told him to hand over his wallet. (T: 193) Garcia immediately handed the first guy his keys, but before he could hand over his wallet, the second man had

already reached into Garcia's pocket and took out the wallet. (T: 193) Both men then immediately got into Garcia's car, one in the driver's seat and the other in the passenger's seat, and drove away with their own car driven by the third person following. (T: 191-195) Garcia was not able to identify the men and was unable to identify the defendant in court as one of the robbers. (T: 196, 200)

The incident was witnessed by an undercover officer, Officer Payen, who was driving by at the same moment in his undercover car. (T: 205) Officer Payen testified he saw Garcia standing next to his car with his hands on top of the roof of the car, looking back and forth. (T: 205) Officer Payen saw another male standing behind Garcia taking a wallet from Garcia's pocket. (T: 206-207) The officer did not see anything else, never saw a gun and never saw the second male. (T: 206-207) Officer Payen identified the defendant in court as the person who reached into Garcia's pocket and took the wallet. (T: 202-207) The officer testified the entire incident happened very quickly. (T: 218-219) The police chased the stolen car until it crashed and the defendant bailed out of the passenger side. (T: 202-211, 245) A perimeter was set up and the K9 dog eventually located him under a porch. (T: 236)

The state rested and the defendant moved for judgment of acquittal, which was denied. (T: 344-345) The defense rested and renewed the motion for judgment of acquittal, which was again denied. (T: 345) At the conclusion of the trial, the jury

found the defendant guilty of the lesser offense of robbery without a firearm in count 1 and the lesser offense of carjacking without a firearm in count 2. (R: 30; T: 425) The judge adjudicated him guilty on November 20, 1997. (T: 428)

At the sentencing hearing on January 20, 1998, the judge found the defendant met the criteria for habitual violent offender and sentenced him as an HVO to 30 years in prison for the strong arm robbery in count 1 and to life in prison for the unarmed carjacking in count 2. (R: 34-39, 84-85, 95-99)

The defendant appealed his conviction and sentence to the Third District Court of Appeal, arguing the trial court erred in convicting and sentencing him for the dual offenses of robbery in count I and carjacking in count 2 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 conviction and sentence 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). (A: 1) The Third District acknowledged, however, 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. (A: 1) The Third District's decision states:

> Defendant and an accomplice robbed the victim in this case after following him home. While his accomplice

> pointed a gun at the victim's head and demanded his car keys, defendant took the victim's wallet out of his pocket. Both assailants then drove off in the stolen car. As in Smart v. State, 652 So.2d 448 (Fla. 3d DCA 1995), we find that under these circumstances the defendant was properly convicted for both of the separate offenses of robbery and carjacking. Nevertheless, because our decision conflicts with Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999), we certify our conflict with the majority's decision in that case. (A: 1)

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

SUMMARY OF ARGUMENT

The Third District's decision holding the defendant was properly convicted and sentenced for both of the separate offenses of robbery and carjacking is incorrect and should be quashed. The record is clear there was only one forceful taking of the one victim's wallet and keys at one time, in the same place in just a few seconds; it was indisputably one episode and one criminal transaction. Consequently, the separate convictions and sentences of robbery in count 1 and carjacking in count 2 are in violation of double jeopardy under the United States and Florida Constitutions and his conviction and sentence for robbery must be reversed.

ARGUMENT

THE DEFENDANT'S DUAL CONVICTIONS FOR ROBBERY IN COUNT 1 AND CARJACKING IN COUNT 2 FOR OFFENSES THAT OCCURRED DURING A SINGLE CRIMINAL EPISODE ARE A VIOLATION OF DOUBLE JEOPARDY UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS AND CONSEQUENTLY, THE DECISION OF THE THIRD DISTRICT MUST BE QUASHED AND THE DEFENDANT'S CONVICTION AND SENTENCE FOR ROBBERY MUST BE REVERSED.

The petitioner/defendant was charged with armed robbery and armed carjacking and was convicted of robbery without a firearm and carjacking without a firearm. (R: 1, 30; T: 425) The judge adjudicated him guilty and sentenced him on both charges. (R: 34-39, 84-85, 95-99; T: 428) The issue before this Court is whether a defendant may be separately convicted and sentenced for the robbery of personal effects and the carjacking of the car when both offenses arise out of a single criminal transaction or episode. The defendant submits the double jeopardy provisions of both the United States and Florida Constitutions preclude convictions for both offenses and that his conviction for robbery should be reversed.

The information charged the defendant with the robbery of Manuel Garcia and taking his wallet in count 1 in violation of §812.13, Florida Statutes (1995), and with the carjacking of Manuel Garcia and taking his car in count 2 in violation of §812.133.

(R: 1) As can be seen in the applicable statutes below, robbery and carjacking are nearly identical offenses, except that carjacking only involves the taking of a car, a "motor vehicle," whereas robbery involves the taking of "money or other property."

The robbery statute, §812.13, Florida Statutes (1995), states in pertinent part as follows:

> **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 in pertinent part:

> **812.133 Carjacking. --**
> (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.

Thus, 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 of 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, in the absence of an express statement of legislative intent to punish them separately, 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), Florida Statutes (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 at 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 that 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. Ball v. United States, 105 S.Ct. 1668 (1985); M.P. v. State, 682 So.2d 79 (Fla. 1996).

Here, there is only one criminal episode. In Brown v. State, 430 So.2d 446, 447 (Fla. 1983), this Court stated that "[w]hat is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction." Here, there is a single forceful taking without any significant temporal or geographic break. The taking of the same victim's wallet and car happened immediately at the same time and place in only a few seconds and was indisputably a single episode. The defendant and his companion walked up to Garcia, took his keys and wallet and immediately took his car and drove away. There was thus one continuous transaction with one victim at one time during which they took his property. It was one robbery.

This case is virtually identical to Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999). In Ward, 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 into the car and drove off. These facts are nearly

identical to the facts in the present case, where the defendant and his accomplice went up to Garcia, pointed a gun at him, demanded his keys and his wallet, took his keys and his wallet, got into his 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 victim's car. In both cases, the entire incident took less than a minute and was indisputably a single incident. In Ward, the First District observed that the state conceded that all the elements of carjacking are subsumed by the offense of robbery. The court stated "there is nothing in either statute expressly authorizing separate convictions and sentences when both offenses arise out of a single criminal transaction or episode" and that accordingly, "a conviction for only one of the offenses is permitted unless each offense arose out of a separate criminal transaction or episode." The court then 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.[1] Since both offenses were armed and thus were first degree felonies

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[1]See also Sirmons v. State, 634 So.2d 153 (Fla. 1994) (defendant could not be convicted separately for grand theft of car and robbery with a weapon where there was a single taking of the car at knife point from single victim; both offenses are merely degree variants of the core offense of theft); Nordelo v. State, 603 So.2d 36 (Fla. 3d DCA 1992) (where defendant took money from cash register,

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 identical to the facts in Ward and the defendant urges this Court to quash the decision of the Third District. Since the dual offenses here were unarmed, the carjacking is a first degree felony, §812.133(2)(b), and the robbery a second degree felony, §812.13(2)(c). Therefore, the second degree felony robbery conviction and sentence should be vacated.

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then beat victim, then took victim's wallet, takings were one continuing criminal episode of one victim and hence one transaction; defendant could only be convicted of one count of robbery); Fraley v. State, 641 So.2d 128 (Fla. 3d DCA 1994) (defendant could not be convicted for two counts of armed robbery for taking money from the cash register, then taking clerk's personal firearm, where there was only one victim and acts were part of single comprehensive transaction); Hamilton v. State, 487 So.2d 407 (Fla. 3d DCA 1986) (where defendant held up victim at gunpoint and stole victim's cash and car all in a single transaction, only one robbery was committed; grand theft conviction reversed because it merges, for double jeopardy purposes, with robbery).

Compare Simboli v. State, 728 So.2d 792, 24 FLW D578 (Fla. 5th DCA 1999) (separate convictions of robbery and carjacking not violate double jeopardy where defendant first stole money then forced taxi driver out of the car and drove the car away); Howard v. State, 723 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); 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).

CONCLUSION

Based upon the foregoing, the defendant requests that this Court quash the decision of the Third District and reverse the defendant's conviction and sentence for the robbery in count 1.

Respectfully submitted,

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CERTIFICATE OF FONT

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this _____ day of January, 2000.

By:_____
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