IN THE SUPREME COURT OF FLORIDA

GARY THOMAS WRIGHT,

Petitioner,

v. S.Ct. Case No. SC00-2163

STATE OF FLORIDA,

Respondent.

___________________________/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

POINT I - This Court should exercise its discretion to deny review of the district court's opinion. Because Wright was sentenced as if his convictions were for second degree felonies, the issue is moot. A ruling on the merits would have no practical effect on the case and would amount to nothing more than an advisory opinion.

If this Court reaches the merits, it should answer the certified question in the affirmative and approve the decision below. The legislature has expressly declared that the statute at issue is a substantive reclassification statute, rather than a sentence enhancement statute. A defendant who commits a crime with a masked accomplice should be convicted as a principal to the reclassified offense. This is consistent with the strong policy of holding felons responsible for the acts of their accomplices when those acts are in furtherance of their common scheme.

POINT II - This Court should decline to address the double jeopardy issue in Point II, as it is beyond the scope of the certified question. On the merits, Wright's dual convictions for attempted carjacking and robbery arose from discrete criminal acts. Even under a Blockburger separate elements test, the two offenses pass muster, as each possesses an element the other does not.

ARGUMENT

POINT I

THIS COURT SHOULD DENY REVIEW AS THE ISSUE IS MOOT. ON THE MERITS, AN ACCOMPLICE TO A MASKED OFFENSE IS GUILTY OF THE RECLASSIFIED OFFENSE.

Petitioner Gary Thomas Wright seeks review of Wright v. State, 767 So. 2d 576 (Fla. 5th DCA 2000), which certified the following question as one of great public importance:

> IS THE ACCOMPLICE TO MASKED OFFENSES GUILTY OF THE ENHANCED OFFENSES?

Wright, 767 So. 2d at 578. The certified question furnishes this Court with a basis for exercising its discretionary jurisdiction, if it so chooses. Art. V, § 3(b)(4), Fla. Const. However, this Court should deny review because the issue in this case is moot.

Wright was charged by information with one count each of attempted carjacking and robbery. (R.20-21).[1] Both offenses are second degree felonies. § 812.133(2)(b) & § 777.04(4)(c), Fla. Stat. (1997); § 812.13(2)(c), Fla. Stat. (1997). However, both counts of the information alleged the use of a hood, mask, or other device to conceal the perpetrators' identity. (R.20-21). Pursuant to Section 775.0845, Florida Statutes (1997), which was cited in

[1] "R" refers to the record-on-appeal. "Tr" refers to the trial transcript. "ST" refers to the sentencing transcript.

the information, (R.20-21), a second degree felony is reclassified to a first degree felony when the offender uses a mask or other device to conceal his or her identity. § 775.0845(2)(b), Fla. Stat. (1997).

The evidence at trial showed that Wright's accomplices concealed their identities with bandannas, but that Wright, who remained in the getaway car, did not. Wright, 767 So. 2d at 576. The jury found Wright guilty "as charged in the information" on both counts. (R.60-61). Wright was adjudicated guilty and his written judgment refers to the reclassification statute and reflects conviction for two first degree felonies. (R.62).

The case proceeded to sentencing, where the criminal punishment code scoresheet reflected that Wright was being sentenced for two first degree felonies. (R.70). However, the prosecutor conceded that Wright was only convicted of second degree felonies because there was no special verdict that he used a mask. (ST 2). Accordingly, the scoresheet was corrected by hand to reflect two second degree felonies, rather than two first degree felonies. (R.70-71).

On appeal, Wright argued that his written judgment contained a scrivener's error, reflecting that he had been convicted of first degree felonies. (IB 8). The State conceded that there was a scrivener's error in the judgment and that Wright was entitled to a correct judgment. (AB 8). However, the district court found

that Wright was properly convicted of first degree felonies.

In fairness to the district court, the issue was not preserved for appeal and the grounds advanced for reversal were inaccurate. First, the State's concession in the trial court was on an erroneous ground. A special jury finding is not required where the defendant is found guilty as charged in the information and the information properly alleges the factor giving rise to reclassification. See State v. Hargrove, 694 So. 2d 729, 731 (Fla. 1997); see also Massard v. State, 501 So.2d 1289 (Fla. 4th DCA 1986)(jury verdict of guilty as charged sustains mandatory minimum where information recited the use of a blunt instrument). Wright's argument in the district court that the offense could not be reclassified where he did not personally wear a mask was properly rejected for the reasons stated in the opinion below and discussed later in this point-on-appeal.

A case is moot when it presents no actual controversy or when the issues have ceased to exist. Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992). To apply another definition, a case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. Murphy v. Hunt, 455 U.S. 478, 481 (1982); WFTV, Inc. v. Robbins, 625 So. 2d 941, 943 (Fla. 4th DCA 1993). "It is the function of a judicial tribunal to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare

principles or rules of law which cannot affect the matter in issue." Montgomery v. Department of Health and Rehabilitative Services, 468 So. 2d 1014, 1016-1017 (Fla. 1st DCA 1985). The mootness doctrine precludes an attempt to obtain an opinion from the Court where there is no real controversy. Lieber v. Lieber, 40 So. 2d 111 (Fla. 1949). A moot case will generally be dismissed. Godwin, 593 So. 2d at 212. On the other hand, mootness does not deprive the Court of jurisdiction, where the issue is of great public importance or is likely to recur. Meola v. Department of Corrections, 732 So. 2d 1029, 1031 n.2 (Fla. 1998).

The reason this case is moot is that Wright's sentence did not take into account any reclassification. On his scoresheet, his offenses were classified as second degree felonies. (R.70-71). Even if he prevails in this Court, he will at most be entitled to correction of a scrivener's error in his judgment. However, this will have no practical effect on the case, as his sentence will remain the same. In essence, if this Court addresses the merits, it will be issuing an advisory opinion. While the certified question presents an intriguing issue, this is not the case in which to address it. Accordingly, this Court should exercise its discretion to deny review.

However, if this Court grants review, it should approve the district court's opinion. The determination of whether to reclassify an offense would seem to be a mixed question of law and

fact. This gives rise to a two-step standard of review:

> The standard of review of the findings of fact is whether competent, substantial evidence supports the findings. Findings of historical fact should be reviewed only for "clear error", with "due weight to be accorded to inferences drawn from those facts" by the lower tribunal... We review the trial court's application of the law to the facts de novo.

Hines v. State, 737 So. 2d 1182, 1184 (Fla. 1st DCA 1999)(citations omitted).

Because, as will be discussed below, there is a vital distinction between sentencing enhancement and degree reclassification, the State proposes reformulating the certified question as follows:

> IS AN ACCOMPLICE WHOSE INVOLVEMENT IN A MASKED OFFENSE IS SUFFICIENT TO SUSTAIN CONVICTION UNDER A PRINCIPAL THEORY, GUILTY OF THE RECLASSIFIED OFFENSE EVEN THOUGH HE OR SHE DOES NOT PERSONALLY WEAR A MASK?

The certified question arises from application of Section 775.0845, Florida Statutes (1997), which provides that the degree of offense shall be reclassified to the next higher level if the offender wore "a hood, mask, or other device that concealed his or her identity" while committing the offense. The evidence adduced at trial established that Wright participated in the offenses of robbery and attempted carjacking with two accomplices. The accomplices wore masks, but Wright did not. Wright was convicted, under a principal theory, of reclassified offenses pursuant to Section 775.0845.

Wright argues that an offense may only be reclassified

pursuant to Section 775.0845 if the defendant him- or herself wore the mask. Cabal v. State, 678 So. 2d 315 (Fla. 1996), which interpreted the section as a penalty enhancement statute, is unavailing. As Wright candidly and commendably acknowledges, Section 775.0845 was amended in 1997 to make it clear that the legislative intent was to reclassify the offense, not to enhance the penalty. Ch. 97-39, Laws of Fla. This legislative change was a direct response to Cabal, as the preamble to the chapter law makes clear. Ch. 97-39.

The distinction between sentencing enhancement and degree reclassification is a key one. A person cannot logically be a principal to a sentencing enhancer, since sentencing factors are personal to the defendant. See Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984)(one could be convicted as a principal to armed robbery where an accomplice was armed, but could not receive a minimum mandatory sentence based on possession of a firearm unless personally armed); Hicks v. State, 583 So. 2d 1106 (Fla. 2d DCA 1991)(while vicarious possession of firearm is sufficient to sustain appellant's convictions under the principal theory, it is not sufficient to impose a mandatory minimum period of confinement under the statute); Freeny v. State, 621 So. 2d 505 (Fla. 5th DCA 1993)(although possession of a firearm by a co-defendant is sufficient to convict a defendant of armed robbery pursuant to the principal theory, it is not a sufficient basis to warrant the

imposition of the mandatory minimum sentence).

However, where possession of a weapon causes the offense to be classified as a higher degree of the underlying crime, it is well settled that a defendant may be convicted as a principal to the higher degree of the offense. See Hough, 448 So. 2d at 629; Lewis v. State, 625 So. 2d 102 (Fla. 1st DCA 1993)(appellant properly convicted as principal to armed offenses of robbery with a firearm, aggravated battery, and burglary of a structure with a firearm, where accomplice, not appellant, carried firearm; constructive or vicarious possession of firearm sufficient to sustain conviction); Jackson v. State, 662 So. 2d 1369, 1372 (Fla. 1st DCA 1995)(one may be convicted of armed robbery with a deadly weapon if the weapon is carried by an accomplice during the robbery, notwithstanding lack of knowledge that the accomplice has the weapon); Jones v. State, 648 So. 2d 1210 (Fla. 4th DCA 1995)(if any one participant in a robbery carried a firearm during the commission of the crime, all of the participants are guilty as principals to armed robbery); State v. Williams, 637 So. 2d 45 (Fla. 2d DCA 1994) (defendant was a principal to sexual battery with a deadly weapon where co-defendant, not defendant, held the gun); M.K.T. v. State, 685 So. 2d 995, 996 (Fla. 5th DCA 1997)(defendant guilty of armed trespass for participating in offenses with armed accomplices, even though defendant unarmed); Stripling v. State, 645 So. 2d 589 (Fla. 3d DCA 1994)(defendant whose involvement in crime satisfied principals

statute could be found guilty of armed robbery, regardless of whether he personally possessed firearm); see also Terry v. State, 668 So. 2d 954 (Fla. 1996)(defendant properly convicted as principal to aggravated assault, where he supplied accomplice with gun and accomplice held one victim at gunpoint to facilitate defendant committing robbery and murder on other victim); Lovette v. State, 636 So. 2d 1304, 1307 (Fla. 1994)(defendant who participated with accomplice in robbery of pizza restaurant was guilty as principal to accomplice's armed robbery of an employee where it furthered the underlying robbery of the restaurant). If a defendant who never possessed a firearm can be found guilty of these armed offenses under a principal theory, it follows that a defendant who never wore a mask can be found guilty of attempted carjacking and robbery while wearing a mask under a principal theory.

The case law on principals establishes an unquestionably strong policy of holding principals liable for the acts of their accomplices. Because felons are generally responsible for the actions of their co-felons, one who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme, regardless of whether the defendant physically participates in that crime. Lovette, 636 So. 2d 1306. This is so even though the defendant does not physically participate in the act, Id.; Alfieri v. State, 722 So. 2d 856 (Fla.

4th DCA 1998), rev. denied, 732 So. 2d 325 (Fla. 1999), or know in advance it will be committed, Diaz v. State, 600 So. 2d 529, 530 (Fla. 3d DCA), rev. denied, 613 So. 2d 3 (Fla. 1992); Dell v. State, 661 So. 2d 1305 (Fla. 3d DCA 1995); Perez v. State, 711 So. 2d 1215, 1217 (Fla. 3d DCA), rev. denied, 728 So. 2d 204 (Fla. 1998) & cert. denied, 526 U.S. 1120 (1999). The key is whether the crime is in furtherance of the common scheme. Hampton v. State, 336 So. 2d 378, 380 (Fla. 1st DCA), cert. denied, 339 So. 2d 1169 (Fla. 1976); see also Bryant v. State, 412 So. 2d 347, 350 (Fla. 1982)(lethal act must be in furtherance of the common design or unlawful act the cofelons set out to accomplish); Massey v. State, 755 So. 2d 761 (Fla. 4th DCA 2000)("Here, Massey admits that he participated in the robbery; therefore, the question before this court is whether the extra criminal acts committed by Donaldson were in furtherance of that crime."). This is a factual question to be determined on a case-by-case basis. Hampton, 336 So. 2d at 380.

Support for applying the law of principals to an offense reclassified by use of a mask can be found in some of the independent act case law. Felons are routinely held responsible for a murder convicted by their accomplice where the murder furthers the underlying crime by lessening the risk of detection or facilitating the perpetrators' flight. See Lovette, 636 So. 2d at 1307 (trial court properly denied independent act instruction even

though defendant did not personally shoot the victims, where he was a willing participant in the robbery and the murders furthered the robbery by lessening the chance of immediate detection of the robbery and apprehension of the robbers); Vasquez v. State, 763 So. 2d 1161, 1164 (Fla. 4th DCA)(same), cause dismissed, 762 So. 2d 919 (Fla. 2000); Perez, 711 So. 2d at 1217 (court properly denied independent act instruction where shooting of bystander was in furtherance of armed robbery, in which defendant was a willing participant, in that it enabled the perpetrators to successfully flee the scene). Like the murders described in these cases, the use of a mask facilitates commission of the offense. It lessens the chance of detection and intimidates the victim. Surely, if one can be a principal to a murder committed by an accomplice to facilitate a jointly undertaken offense, then one can also be guilty of the reclassified version of a jointly undertaken offense where the act giving rise to reclassification was done to facilitate that offense.

The case upon which Wright primarily relies is State v. Rodriguez, 602 So. 2d 1270, 1272 (Fla. 1992). Rodriguez interpreted Section 775.087(1), Florida Statutes (1983), which permitted the reclassification of the substantive offense if the "defendant" used a firearm. The Court held that the terms of the statute did not allow for vicarious enhancement of the defendant's conviction where the accomplice used the firearm, but not the

defendant. Rodriguez, 602 So. 2d at 1271-1272.

Rodriguez is distinguishable in two ways. First, the statute at issue in Rodriguez, by its own terms, only permitted reclassification if the "defendant" used the firearm. This is a point emphasized in the Rodriguez opinion, which italicized the word "defendant" when it quoted the statute. 602 So. 2d at 1271. By contrast, the statute at issue in this case permits reclassification if the "offender" wears a mask. § 775.0845. An "offender" is defined simply as "[a] person who has committed a crime." Black's Law Dictionary 1108 (7th ed. 1999). The term offender is broader than the term defendant. Whereas "defendant" is limited to the individual being prosecuted and sentenced, "offender" would encompass accomplices, regardless of whether they were the subject of the prosecution. Thus, Section 775.0845 is more susceptible to the interpretation that is applies to accomplices than is the statute that was considered in Rodriguez. See Wright, 767 So. 2d at 577-578.

Second, Rodriguez was decided before the legislature amended Section 775.0845 in Chapter 97-39. Throughout Rodriguez, the Court refers to Section 775.087(1), the firearm reclassification statute, as a sentencing enhancement statute. The preamble to Chapter 97-39 makes it expressly clear that Section 775.0845 is a substantive reclassification statute, not a sentencing enhancement statute:

> WHEREAS, the Legislature further finds that section 775.0845, Florida Statutes, should be amended to provide

> additional clarification to the courts that the legislative intent behind the statute is not to enhance a penalty but to reclassify an offense the next higher degree . . .

Ch. 97-39, Laws of Fla. Thus, it appears that the legislature intends Section 775.0845 to create a new substantive offense, rather than a sentencing enhancement. As argued above, one can be a principal to a substantive offense, but not to a sentencing enhancer. Accordingly, this Court should answer the certified question in the affirmative and approve the decision below.

POINT II

THIS COURT SHOULD DECLINE TO CONSIDER WRIGHT'S SECOND POINT. IF THE COURT DOES ADDRESS POINT II, IT SHOULD HOLD THAT DUAL CONVICTIONS FOR ROBBERY AND ATTEMPTED CARJACKING DO NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES.

Wright next contends that his convictions for both robbery and attempted carjacking violate the prohibition against double jeopardy. This issue is beyond the scope of the certified question. The State acknowledges that once this Court accepts a case for review, it may review any issue that has been properly preserved and presented, even where the issue is beyond the scope of the district court's certification. See Tillman v. State, 471 So. 2d 32, 34 (Fla. 1985); Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982); Hall v. State, 752 So. 2d 575, 577 n.2 (Fla. 2000). However, this Court routinely declines to review issues beyond the

scope of the certified question. See e.g. McMullen v. State, 714 So. 2d 368, 373 (Fla. 1998); Goodwin v. State, 634 So. 2d 157 (Fla. 1994); Raben-Pastal v. City of Coconut Creek, 573 So. 2d 298, 303 n.6 (Fla. 1990), cert. denied, 502 U.S. 811 (1991). Even if this Court grants review based on the certified question, it should decline to address the double jeopardy issue, which received scant mention in the district court's opinion. See Wright, 767 So. 2d at 576.

If this Court addresses this issue, it should approve the decision of the district court, which affirmed the dual convictions on the ground that the robbery was completed before the attempted carjacking. Id. A judgment of conviction comes to the appellate court with a presumption of correctness. Terry v. State, 668 So. 2d 954, 964 (Fla. 1996). In moving for JOA, a defendant admits not only the facts stated and evidence adduced but also every conclusion favorable to the State that a jury might reasonably infer from the evidence. Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). The trial court should not grant the motion unless the evidence is such that no view which the jury may lawfully take of it favorable to the state can be sustained under the law. Id. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal. Id. Where the verdict is supported by competent, substantial evidence, it will not be overturned on appeal. Woods v. State, 733 So. 2d 980,

985 (Fla. 1999).

The evidence adduced at trial established that Wright's accomplices pushed the victim against his car and took his cellular phone and bag. (Tr. Vol. I, 108-109). The victim told his assailants, "You don't want to do this." (Tr. Vol. I, 109). The duo responded by demanding the victim's car keys. (Tr. Vol. I, 109). The victim refused, pushed the men, and ran away. (Tr. Vol. I, 109-110).

Under these circumstances, two criminal acts occurred and dual convictions were proper. See Howard v. State, 723 So. 2d 863 (Fla. 1st DCA 1998); Smart v. State, 652 So. 2d 448 (Fla. 3d DCA), rev. denied, 660 So. 2d 714 (Fla. 1995); Cruller v. State, 745 So. 2d 512 (Fla. 3d DCA 1999), rev. granted, 762 So. 2d 916 (Fla. 2000); Consiglio v. State 743 So. 2d 1221 (Fla. 4th DCA 1999), rev. granted, 761 So. 2d 327 (Fla. 2000); Brown v. State, 743 So. 2d 1213 (Fla. 4th DCA 1999); Mason v. State, 665 So. 2d 328 (Fla. 5th DCA 1995); Simboli v. State, 728 So. 2d 792 (Fla. 5th DCA), rev. denied, 741 So. 2d 1137 (Fla. 1999). The dispositive question is whether there were "'successive and distinct forceful takings with a separate and independent intent for each transaction.'" Consiglio, 743 So. 2d 1221 (quoting Brown v. State, 430 So. 2d 446, 447 (Fla. 1983)). In this case, there were two distinct offenses and dual convictions are therefore proper. This is consistent with the express legislative intent that each criminal offense committed

in the course of one criminal episode or transaction warrants a separate conviction. § 775.021(4)(b), Fla. Stat. (2000); see also Howard, 723 So. 2d at 864; United States v. Hawkins, 794 F.2d 589 (11th Cir. 1986) (separate acts, no matter how close in time, constitute separate criminal offenses); State v. Perez, 718 So. 2d 912, 915-916 (Fla. 5th DCA 1998) (a defendant who commits more than one criminal act during a criminal episode can be convicted of more than one crime), rev. denied, 727 So. 2d 909 (Fla. 1999).

Under this analysis, a comparison of the statutory elements is unnecessary. However, even if such a comparison were undertaken, it would support the dual convictions. Legislative intent is the polestar that guides a double jeopardy analysis. State v. Anderson, 695 So. 2d 309, 311 (Fla. 1997). The constitutionality of multiple convictions and sentences for offenses arising from the same act depends on whether the legislature "intended to authorize separate punishments for the two crimes." M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996)(quoting Albernaz v. United States, 450 U.S. 333, 344 (1981)). Legislative intent to authorize separate punishments can be determined through application of the Blockburger separate elements test. Id.; Blockburger v. United States, 284 U.S. 299 (1932). The Blockburger test inquires whether each offense contains an element not contained in the other. M.P., 682 So. 2d at 81. Where each offense requires proof of an element the other does not, the offenses are considered separate and there

is no double jeopardy problem. See State v. Craft, 685 So. 2d 1292, 1294 (Fla. 1996). For purposes of this analysis, the fact that the offenses arise from the same conduct makes no difference. M.P., 682 So. 2d at 82.

Wright was convicted of robbery and attempted carjacking. (R.62). Each offense contains an element the other does not. Robbery requires a completed taking, whereas an attempted offense is by definition left incomplete.[2] § 812.13(1), Fla. Stat. (1997); § 777.04(1), Fla. Stat. (1997). Attempted carjacking requires that the object of the attempted taking be a motor vehicle, an element not included in robbery. § 812.133(1), Fla. Stat. (1997); § 812.13(1), Fla. Stat. (1997). Accordingly, the offenses pass the Blockburger separate elements test and dual convictions are proper.

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[2] This Court is currently reviewing Cruller to determine if there is a double jeopardy violation in dual convictions for robbery and carjacking. See Cruller v. State, 762 So. 2d 916 (Fla. 2000) (granting review). That case involves a completed carjacking and is therefore distinguishable from this case. It appears that the Consiglio case also addresses this same issue. Case no. SC99-125.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Honorable Court approve the district court's decision in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been furnished by inter-office delivery to Nancy Ryan, Esq., and Dee Ball, Esq., Asst. Public Defenders, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 29th day of January, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this document is 12-point Courier New, a font that is not proportionally spaced.

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