IN THE SUPREME COURT OF FLORIDA

GARY THOMAS WRIGHT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC00-2163
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

STATEMENT OF CASE AND FACTS

The State charged Gary Thomas Wright (petitioner) with attempted car jacking with a mask (Count I) and robbery with a mask (Count II) arising from events that occurred on March 17, 1999. R. 20-21. The matter was tried to a jury in September 1999.

At trial Frank Glover testified that he rode around the Orlando area with petitioner and Antonio Kent looking for a likely car jacking victim.[1] Eventually petitioner followed a white car into the parking lot of an apartment complex. Glover and Kent, who were wearing masks, got out of the vehicle. TR. 309. After

[1]Glover was seventeen years old at the time of trial. He pled guilty to robbery, and the trial court sentenced him to incarceration for 15 months. TR. 308, 315-16.

Kent took a cellular telephone and bag from the driver of the white car, he and Glover ran into the woods. They were arrested later that night. TR. 309-11, 313-14, 331, 341-43.

Jon Presler, the driver of the white car, saw two men in masks or hoods exit a pink Sunfire automobile and approach him as he exited his own car late on the evening of March 16-17. The men took his cell phone and athletic bag. When Presler refused to give up his keys, the two men ran. TR. 103-11. As Presler drove to a nearby convenience store where he had earlier noticed police cars, he saw the Sunfire parked at a gas station and got the tag number. TR. 111-14. Later that night Presler tentatively identified petitioner as the driver of the Sunfire. He did not identify petitioner at trial. TR. 115-16.

Leilani Ridens was with Glover, Kent, and petitioner on the night of March 16. She was smoking cocaine in the back seat for much of the evening while the men traded driving duties. At one point petitioner followed her into a gas station bathroom and told her she should "make sure [she] didn't know anything about" something the men were planning to do later that evening. She later heard petitioner, Glover, and Kent discuss likely car jacking victims. Eventually they followed a white car into an apartment complex, and Glover and Kent exited the vehicle. Both were wearing masks. Petitioner then drove to a nearby gas station

and waited briefly for Glover and Kent. When petitioner decided that something must have gone wrong, he asked Ridens to drive to Titusville. The police stopped them shortly afterward. Ridens testified she understood, based upon conversations in the car, that petitioner "most definitely" expected something in exchange for participating in the evening's activities. TR.229-30, 234-41, 249-66, 270.

Deputy Fernando Zeppieri of the Orange County Sheriff's Office testified that Preslar approached him at a 7-11, reported the robbery, and described the Sunfire. Zeppieri stopped the Sunfire approximately ten minutes later. In a written statement petitioner admitted that he dropped off Glover and Kent and that they discussed a plan to steal a car. Zeppieri also testified that petitioner made oral statements, which were not included in Zeppieri's report, implicating himself as an active participant in the car jacking. TR. 149-53, 162, 195-203.

At the conclusion of the State's case petitioner moved for a judgment of acquittal on the ground that double jeopardy barred convictions on both charges. TR. 349-53. The trial court denied the motion. TR. 352-53. Petitioner did not present any evidence.

The jury found petitioner guilty as charged in the information.[2] R. 60-61, TR. 419-20. The judgment reflects two second degree felonies enhanced to first degree felonies by the use of a mask. The trial court sentenced petitioner to incarceration for 15 years on each count, concurrent, to be served day for day. R. 8, 12-13, 73-75, 78-79. Appellant timely appealed. R. 82.

Petitioner argued on appeal that (1) the trial court erred by entering judgment on both the robbery charge and the attempted car jacking charge, (2) the order of judgment incorrectly states that he was convicted of two first degree felonies, and (3) the prison releasee reoffender act violates the constitutional requirements of separation of powers and due process.[3] The district court addressed only whether section 775.0845, Florida Statutes, enhances the offenses and certified the following question: Is the accomplice to masked offenses guilty of enhanced offenses? Wright v. State, 767 So. 2d 576 (Fla. 5th DCA 2000). Petitioner timely sought review by this court.

SUMMARY OF ARGUMENT

[2] The verdict contains no finding that petitioner wore a mask, and the State conceded at trial and on appeal that petitioner did not wear a mask during the commission of the offenses. R. 2, TR. 283, AB 8.

[3]The constitutionality of the prison releasee reoffender act was pending before this court when the briefs were filed below.

The language of Section 775.084, Florida Statutes (1999) is susceptible to only one meaning: petitioner's convictions can only be reclassified if, while committing the offenses, he was wearing a hood, mask, or other device that concealed his identity. The statute contains no language indicating a legislative intent to impose vicarious liability. Even if the statute were susceptible to more than one meaning, this court must construe it in favor of petitioner.

Where all of the victim's property was taken without a temporal break dual convictions for robbery with a mask and attempted carjacking cannot stand.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY HOLDING THAT PETITIONER CAN BE VICARIOUSLY CONVICTED UNDER SECTION 775.0845, FLORIDA STATUTES (1999) WHERE PETITIONER DID NOT WEAR A MASK DURING THE COMMISSION OF THE OFFENSES.

Standard of Review

Aspects or components of a decision resolving legal questions are subject to de novo review. State v. R.R., 697 So. 2d 181 (Fla. 3d DCA 1997); Wilson v. State, 673 So. 2d 505 (Fla. 1st DCA), rev. denied, 682 So. 2d 1101 (Fla. 1996).

Merits

Section 775.0845, Florida Statutes (1999) provides

> The felony or misdemeanor degree of any criminal offense, . . . shall be reclassified to the next higher degree as provided in this section if, while committing the offense, the offender was wearing a hood, mask, or other device that concealed his or her identity.

In Cabal v. State, 678 So. 2d 315, 318 (Fla. 1996), this court construed an earlier version of section 775.0845 that imposed an enhanced penalty for wearing a mask; however, in 1997 the legislature amended the statute to clarify its intent to reclassify the offense to the next higher degree rather than to enhance the penalty. See, McDonald v. State, 714 So. 2d 643 (Fla. 3d DCA 1998).

In its opinion in this case the district court noted that section 775.0845 is a statute of general application and that when applied to a particular offense it creates a new substantive crime, **if the jury determines that a mask was used**. Thus the statute adds another element to the taking of property with force and creates a new offense of robbery with a mask. Under the well-established rules of statutory construction relied upon in Cabal, this court must strictly construe section 775.0845.

Petitioner contends that section 775.0845 is susceptible to only one meaning: his convictions can only be reclassified if, while committing the offense, he was wearing a hood, mask, or other device that concealed his identity. The record on appeal is clear: the jury did not find that petitioner wore a mask; in fact, at trial and on appeal the State concedes that petitioner did not wear a mask. Even if this court were to find that section 775.0845 is ambiguous, then it must be construed in favor of the accused. See, Cabal, supra.

By analogy petitioner relies upon State v. Rodriguez, 602 So. 2d 1270, 1172 (Fla. 1992) where this court held that section 775.087(1), Florida Statutes, which enhances the penalty for using a firearm during the commission of an offense, requires that the defendant must have actual possession of the firearm and expressly rejected the State's argument that possession could be vicarious or

constructive. The district court distinguished Rodriguez on the ground that section 775.087(1) uses the word defendant while section 775.0845 uses the word offender; however, a defendant is the accused in a criminal case, and an offender is a person implicated in the commission of a crime. Black's Law Dictonary, 5th ed. The distinction drawn by the district court is one without meaning in the context of criminal law.

Where the record clearly indicates that petitioner did not wear a hood, mask, or other device that concealed his identity while committing the offenses, this court must reverse the reclassification of the offenses and remand for further proceedings.

POINT II

THE TRIAL COURT ERRED BY ENTERING JUDGMENT ON BOTH THE ROBBERY CHARGE AND THE ATTEMPTED CARJACKING CHARGE.

Jon Presler testified that Glover and Kent took his cellular telephone and athletic bag and then demanded the keys to his car. When he refused to give up his keys, Glover and Kent ran. The State charged petitioner with attempted carjacking with a mask (Count I) and robbery with a mask (Count II). At the conclusion of the State's case, petitioner moved for a judgment of acquittal on double jeopardy grounds.

Standard of Review

A motion for judgment of acquittal admits the facts in evidence and every reasonable inference favorable to the State. Lynch v. State, 293 So. 2d 44 (Fla. 1974).

Merits

Double jeopardy bars separate convictions and sentences of two offenses arising out of a single criminal episode absent an express statement of legislative intent to punish the two offenses separately. See, M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996). The elements of carjacking with a firearm are subsumed by the offense of armed robbery with a firearm. See, §§ 812.1333(2)(a), 812.13(2)(a),

Fla. Stat. (1999), and Ward v. State, 730 So. 2d 728 (Fla. 1st DCA 1999); see also, J.M. v. State, 709 So. 2d 157 (Fla. 5th DCA 1998) (dual convictions for robbery and theft of vehicle reversed where taking of keys was followed by car being driven off); cf. Taylor v. State, 751 So. 2d 659 (Fla. 5th DCA 1999) (dual convictions proper where there was a temporal and spatial break between acts).

Since all of Presler's property was taken without a temporal break from the attempted carjacking, the dual convictions cannot stand. J.M., supra; Butler v. State, 711 So. 2d 1183 (Fla. 1st DCA 1998), *approved*, 735 So. 2d 481 (Fla. 1999); Fraley v. State, 641 So. 2d 128 (Fla. 3rd DCA 1994); Nordelo v. State, 603 So. 2d 365 (Fla. 3rd DCA 1992); Hamilton v. State, 487 So. 2d 407 (Fla. 3rd DCA 1986); Morgan v. State, 407 So. 2d 962 (Fla. 4th DCA 1982).

CONCLUSION

Based upon the authorities cited and the arguments presented this court should reverse the decision of the Fifth District Court of Appeal and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Gary Wright, DC #184299, Hamilton Correctional Institution, 11419 S.W. County Rd., #249, Jasper, FL 32052, this 4th day of December, 2000.

NANCY RYAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

NANCY RYAN
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