IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-929

MICHAEL BLEVINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****
ON PETITION FOR DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL
****

BRIEF OF RESPONDENT ON MERITS

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CASE NO. SC00-929

MICHAEL BLEVINS v. STATE OF FLORIDA

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida, Appellee herein, certifies that the following additional persons and entities have or may have an interest in the outcome of this case.

1. The Honorable C. Pfeiffer Trowbridge, Circuit Court Judge, Nineteenth Judicial Circuit

2. Georgette Leenher, Neil Leenher, and Robert Murray (Victims)

3. The Honorable Robert A. Butterworth, Attorney General

4. Celia A. Terenzio, Assistant Attorney General, Bureau Chief (Counsel for the State of Florida, Respondent)

5. Steven R. Parrish, Assistant Attorney General (Counsel for the State of Florida, Respondent)

6. The Honorable Michael Satz, State Attorney Nineteenth Judicial Circuit

7. The Honorable Richard L. Jorandby, Public Defender Fifthteenth Judicial Circuit (Counsel for Petitioner/Appellant)

8. Anthony Calvello, Assistant Public Defender (Counsel for Petitioner/Appellant)

9. Michael Blevins, (Petitioner/Appellant/Defendant)

CERTIFICATE OF TYPE SIZE AND STYLE

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 the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and Appellant before the Fourth District Court of Appeal, and will be referred to herein as "Petitioner" or "Defendant" or "Appellant". Respondent, the State of Florida, was the prosecution in the trial court and the Appellee on appeal, and will be referred to herein as "Respondent" or the "State".

The following symbols will be used:

"R" = Record on Appeal

"T" = Transcript of Trial ans Sentencing

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Statement of the Facts for purposes of this appeal subject to the additions and clarifications set forth in the argument portion of this brief, which are necessary to resolve the legal isues presented by this appeal.

SUMMARY OF THE ARGUMENT

Petitioner's convictions of both burglary with a battery and aggravated battery do not violate double jeopardy, being consistent with the Legislative intent codified in §775.021(4), Fla. Stats. (1997). Likewise, Petitioner's convictions for robbery and grand theft do not violate double jeopardy.

Even if Petitioner shows fundamental sentencing error and falls within the Heggs window for challenging the 1995 amendments to the sentencing guidelines, no relief is warranted for his guidelines departure sentence where the same sentence could have been adjudged under the sentencing statutes in effect prior to the 1995 amendments to the sentencing guidelines.

ARGUMENT

POINT 1

PETITIONER'S CONVICTIONS OF BOTH BURGLARY WITH A BATTERY AND AGGRAVATED BATTERY DO NOT VIOLATE DOUBLE JEOPARDY.

Petitioner alleges that his convictions for both burglary with a battery and aggravated battery must be set aside as a double jeopardy violation. His theory is that the aggravated battery conviction was used by the State to enhance his burglary conviction. A review of the Florida Statutes and the case law show that Petitioner is mistaken.

Florida has essentially adopted, with enumerated exceptions, the United States Supreme Court's Blockburger elements test for determining whether multiple convictions arising out of a single criminal transaction or episode may stand. See Blockburger v. United States, 284 U.S. 399, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger test has been codified in Florida at §775.021(4). M.P. v. State, 682 So.2d 79, 81 (Fla. 1995). The test states:

> (a) 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 the 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.

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offense which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§775.021(4), Fla. Stats. (1995)

"Legislative intent is the polestar that guides our analysis in double jeopardy issues." Donaldson v. State, 722 So.2d 177, 183 (Fla. 1998)(quoting State v. Anderson, 695 So.2d 309, 311 (Fla. 1997)). The Legislature explicitly spelled out it's intent in §775.021(4)(a). This Court has ruled that §775.021(4)(a) should be "strictly applied without judicial gloss." State v. Smith, 547 So.2d 613, 616 (Fla. 1989). The statutory element test shall be used for determining whether offenses are the same or separate, and there will be no occasion to apply the rule of lenity because offenses will either contain unique statutory elements or they will not. Id.

Aggravated battery, §784.045(1)(a), Fla. Stats. (1995), requires as an element that Petitioner cause great bodily harm, permanent disability, or permanent disfigurement; or, use a deadly

weapon. This element is nowhere to be found in burglary with a battery, §810.02, Fla. Stats. (1995), which only requires a simple assault or battery.

There are numerous cases holding that simple battery is a lesser included offense of burglary with a battery because the elements of simple battery are subsumed in the first degree burglary charge. See, e.g., Bronson v. State, 654 So.2d 584 (Fla. 2d DCA 1995); Watson v. State, 646 So.2d 288 (fla. 2d DCA 1994); Bradley v. State, 540 So.2d 185 (Fla. 5th DCA 1989); Spradley v. State, 537 So.2d 1058 (Fla. 1st DCA 1989). Although the elements of simple battery are subsumed in first degree burglary, the elements of aggravated battery are not. Billiot v. State, 711 So.2d 1277, 1279 (Fla. 1st DCA 1998). Aggravated battery, as opposed to simple battery, does not constitute a lesser included offense the statutory elements of which are subsumed by the greater offense of burglary with a battery. Billiot at 1280. They are not lesser offenses of each other, nor are they degrees of the same offense. The exceptions to §775.021(4)(b) do not apply in this case; the Legislative intent is clear that both crimes should be charged and punished.

Further, burglary with a battery requires as an element that Petitioner enter and remain in a dwelling, structure, or a conveyance with the intent to commit an offense therein. This element is nowhere to be found in aggravated battery. Obviously,

each crime requires an essential element of proof that the other does not. Both burglary with a battery and aggravated battery can be committed without committing the other. The requirements of §775.021(4)(a) have been met; aggravated battery and burglary with a battery are separate crimes to be punished separately even if arising out of the same episode or transaction.

Petitioner rejects Billiot and relies upon the reasoning in Crawford v. State, 662 So.2d 113 (Fla. 5th DCA 1995), to reach a contrary conclusion. In Crawford, the only proof of a battery was the defendant hitting the victim with a hammer as he lay sleeping on the couch. This act formed the basis for the first degree burglary charge as well as the aggravated battery charge. The 5th DCA erroneously states the battery element of a first degree burglary crime can be viewed either as an enhancement factor of that crime, necessarily included in it, or as a species of a degree of the same crime of burglary.

Crawford's misinterpretation of the nature of common elements between crimes in a double jeopardy context, predates this Court's decision in M.P. v. State, 682 So.2d 79 (Fla. 1996), where the charges in question were carrying a concealed weapon and possession of a firearm by a minor. The fact the charges have the common element of possession of a firearm does not override the Legislative intent of §775.021(4).

> Although the offenses at issue here share the common element of possession of a firearm,

> carrying a concealed weapon requires the additional element of concealment and possession of a firearm by a minor requires that the person who possesses the weapon be under eighteen years of age. Thus, these are not the same offenses for purposes of double jeopardy.
>
> We also note that it makes no difference that the offenses at issue stemmed from the same conduct by M.P. The Supreme Court specifically overruled the *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), "same-conduct" test as being "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." *United States v. Dixon*, 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556 (1993).

M.P. 682 So.2d at 82.

Even were this Court to adopt Crawford's rationale and reject the plain language and Legislative intent of §774.021(4), as well as overturn Blevins, Billiot and M.P., there still would be no double jeopardy in the instant case. One cannot even argue that the aggravated battery was used as the battery element of the burglary with a battery. The State specifically pointed out the separate proof of these crimes to the jury in its argument. The beating that was the subject of the attempted murder charge (found by the jury to be aggravated battery), was not the assault and battery supporting the first degree burglary charge.

> Now in the course of the burglary did he commit a battery? And putting aside the horrific beating Mrs. Leenher took because that's the attempted murder. The battery that's charged along with the burglary here. Remember, when she was lying on the ground she

> was hit twice with the lamp and once with the iron and she still hadn't died. He did what? He grabbed her by the wrists and yanked her up and drug her in the bedroom and he threw her on the bed. He touched her. He left a bruise and the doctor said that it was a bruise and that's a battery. He is guilty of that offense.

(T 277).

This Court should affirm Petitioner's convictions and sentence for both burglary with a battery and aggravated assault. The Legislative intent represented by §775.021(4) is clear, and none of the statute's exceptions apply. Crawford should be rejected in favor of Blevins and Billiot.

POINT 2

PETITIONER'S CONVICTION FOR ROBBERY AND GRAND THEFT DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

Petitioner asserts that his convictions for robbery under Count III and grand theft under Count IV violate double jeopardy, because the grand theft conviction was subsumed under the robbery conviction pursuant to §775.021(4)(b)1.-3., Fla. Stats. (1997). Thus, he requests the grand theft conviction be vacated.

It is well settled that whether a continuous transaction results in the commission of but a single offense or separate offenses is not dependent on the number of unlawful motives in the mind of the accused, but is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed. Bins v. United States, 331 F.2d 390, 393 (11th Cir.) cert. denied, 379 U.S. 880, 85 S.Ct. 149, 13 L.Ed2d 871 (1964). A single transaction can form the basis for separate offenses under different statutes. United States v. Ward, 696 F.2d 1315 (11th Cir.), appeal after remand, United States v. Prows, 728 F.2d 1398 (11th Cir. 1984).

Florida law clearly provides for separate and distinct prosecutions in cases in which one act or series of acts constitutes separate criminal offenses. §775.021, Fla. Stat. (1997). There is an exception where the two offenses are merely aggravated forms of the same underlying offense. See Sirmons v.

State, 634 So.2d 153 (Fla. 1994). Thus, for example, in State v. Jones, 678 So.2d 1336, 1338 (Fla. 5th DCA 1996), the Fifth District Court of Appeals made it clear that while the crime of aggravated stalking "requires repeated acts, such acts could conceivably constitute separate and distinct factual events which would support multiple prosecutions and convictions." Likewise, in State v. Getz, 435 So.2d 789 (Fla. 1983) this Court held that grand theft of a firearm and petit theft of a calculator and coins from the same property at the same time do constitute separate offenses, and a defendant so charged may be separately convicted and sentenced. And in the case of Santos v. State, 644 So.2d 171 (Fla. 4th DCA 1994), the court held that convictions for two counts of robbery were appropriate when codefendants entered a shoe store and obtained money from a safe and two necklaces from the neck of an employee.

Moreover, Petitioner's reliance on Sirmons is misplaced because the facts in the instant case are completely unlike Sirmons. There, Sirmons was accused of taking a single item -- an automobile -- but was convicted of grand theft of an automobile and robbery. Id. at 254. Thus, the thing taken by force in the robbery was the same thing which served as a basis for the auto-theft charge; a factual situation akin to charging a defendant with robbery of a cash-filled wallet and grand larceny of that same wallet. Likewise, this Court in Johnson v. State, 597 So.2d 798

(Fla. 1992), found that snatching a purse which turns out to contain money and a gun is only one offense, because the defendant could not have known the nature of the purse's contents. It was a single taking - of a purse - that was the object of the defendant's intent, just as the car was in Sirmons.

In the case at bar, the information charged Petitioner in Count III with robbery, in other words, taking "certain property, to wit: Necklace and/or bracelet and/or Ring, from the person or custody of Georgette Leenher, with the intent to permanently or temporarily deprive the said person or owner of the property, and in the course of the taking there was the use of force, violence, assault, or putting in fear." (R 7). In Count IV, the information charged Petitioner with grand theft, or in other words, "unlawfully and knowingly obtaining or using the property of another, to wit: Jewelry, the property of Georgette Leenher and/or Neil Leenher as owner or custodian, of the value of $300 or more, but less than $5,000, with the intent to permanently or temporarily deprive the true owner of a right to the property or a benefit therefrom or to appropriate the property to the use of the taker or to the use of any person not entitled thereto." (R 7).

It is significant to note that the two charges are based on the taking of different items and two different victims. Count III is premised upon the taking of Georgette Leenher's bracelet, ring and necklace. (R 7), Count III does not include Neil Leenher as a

victim, nor does Count III include any property owned by Neil Leenher. (R 7). Moreover, Georgette's property in Count III is limited to her necklace, ring, and bracelet which she was wearing. Count IV is based upon the taking of property from both Georgette and Neil Leenher. Additionally, in Count IV, the information charges that jewelry was taken. Count IV is not premised upon the taking of the same items listed in Count III. Under the information, two clearly different crimes are charged. This distinguishes the instant case from Sirmons and other cases cited by Petitioner[1], because Sirmons involved a charge for grand theft of an auto and robbery with a weapon of the same auto and the same victim.

Also, whether an item is taken as part of one theft or robbery, or two, necessarily depends upon chronological and spatial relationships. Castleberry v. State, 402 So.2d 1231, 1232 (Fla. 5th DCA 1981). In the instant case, the evidence shows Petitioner broke into the Leenher home through a screen and opened kitchen window. (T 31). After hearing a noise, Georgette Leenher stepped out of the closed bathroom door to investigate. (T 31-2). Upon immediately finding herself face-to-face with petitioner,

[1] J.M. v. State, 709 So.2d 157 (Fla. 5th DCA 1998); Castleberry v. State, 402 So.2d 1231 (Fla. 5th DCA 1981). See Simboli v. State, 728 So.2d 792 (Fla. 5th DCA 1999), where the Fifth District Court of Appeal also distinguished J.M. on the basis that the facts in Simboli did not concern the taking of the same property for the two offenses.

petitioner grabbed a ceramic lamp, turned it upside down and hit Georgette Leenher twice in the head. (T 35). Although she did not remember getting hit with the iron, the evidence shows petitioner then hit Georgette Leenher in the head with the iron. (T 36, 98). Petitioner grabbed her by the arm and dragged her into the bedroom, where he threatened to cut off her fingers if she did not remove her rings, and then he grabbed her necklace and bracelet from off her body. (T 39-40). After which, Petitioner then took all the jewelry from her jewelry box, including a gold Seiko watch and another watch. (T 40-2). Petitioner also stole several items belonging to Georgette's husband, Neil Leenher, at this point. (T 40).

The State submits that there was a clear temporal break between the robbery of Georgette Leenher's ring, necklace and bracelet from her person, and the subsequent theft of the jewelry from the jewelry box and drawers. There was ample evidence from which the jury could find that two independent acts of robbery and grand theft took place, resulting in two different crimes. This is especially true where the information charges an additional victim in Count IV and the taking of different and distinct property in Counts III and IV.

The defendant in Mason v. State, 665 So.2d 328, 329 (Fla. 5th DCA 1995), asserted that armed robbery -- the taking of money – - and carjacking should be combined into one robbery because

carjacking was a form of robbery and both robberies merged together under the facts of the case. However, the 5th DCA held that there were two separate crimes committed - the taking of the money and the taking of the car. The court noted that, "if appellant had carjacked and there was money in the car then he could have been charged with only one robbery, or the carjacking. But here the two occurred independent of each other and at different times." Id. See also Simboli v. State, 728 So.2d 729 (Fla. 5th DCA 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 the driver's money, defendant told driver to empty his pockets, forced the driver out of taxicab, and drove away in taxicab).

Here, Petitioner committed two separate crimes, the robbing of Georgette Leenher's necklace, bracelet and rings, by force or putting in fear and the grand theft of the other jewelry which belonged to both Georgette and Neil Leenher. As there are no double jeopardy principles violated in this case, this Court must affirm petitioner's convictions and sentences.

POINT 3

PETITIONER'S 1995 SENTENCE FALLS WITHIN THE HEGGS CHALLENGE WINDOW, BUT NO RELIEF IS WARRANTED, EVEN GIVEN STANDING, WHERE SENTENCE ADJUDGED COULD HAVE LAWFULLY BEEN GIVEN UNDER 1994 SENTENCING STATUTES.

Discretionary jurisdiction should not be granted on this issue, as it was not raised before the 4th DCA on direct appeal. Even if the issue constitutes fundamental error (See Heggs v. State, 25 Fla.L.Weekly S137, S138 (Fla. February 17, 2000)[2], that merely saves it from not being considered at the DCA level because it was not properly preserved at the trial level. Here, there is no ground to invoke this Court's discretionary jurisdiction on an issue not ruled upon below. All discretionary review is premised upon a review of a district court of appeal's decision. Where Petitioner has failed to raise the issue in the DCA, there is no decision for this Court to review.

Therefore, this Court should not exercise discretionary jurisdiction on this issue. Should the Court disagree with Appellee's analysis, the merits of the issue are argued below.

Petitioner asserts that he has standing to challenge the 1995

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[2] Heggs adopted the reasoning that since Petitioner's sentence would be much longer under the 1995 guidelines than pursuant to the 1994 guidelines, a fundamental due process liberty interest was implicated - ergo, fundamental error. As pointed out in argument infra., there was no increase in sentence between a departure sentence under the 1995 sentencing statutes versus the 1994 sentencing statutes where an individual receives an upward departure on a felony punishable by life.

sentencing guidelines. His offenses were committed on January 22, 1996, which is within the challenge window this Court has delineated. (See Salters v. State, 25 Fla.L.Weekly S365 (Fla., May 11, 2000); Trapp v. State, 25 Fla.L.Weekly S429 (Fla., June 1, 2000)).

However, in the instant case, Petitioner is not owed any sentencing relief despite his standing to challenge the 1995 sentencing guidelines, because he has not been adversely affected by the 1995 amendments. This Court issued its revised opinion in Heggs v. State, 25 Fla.L.Weekly S359 (Fla., May 4, 2000), where the Court held:

> Stated another way, in the sentencing guidelines context, we determine that if a person's sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines (without a departure), then that person shall not be entitled to relief under our decision here. See, e.g., Freeman v. State, 616 So.2d 155, 156 (Fla. 1st DCA 1993)(affirming denial of the defendant's motion to correct sentence, even in light of this Court's decision in State v. Johnson, 616 So.2d 1 (Fla. 1993), because the defendant failed to allege that "he could not have been habitualized without the amendments effected by chapter 89-280"); cf. State v. Mackey, 719 So.2d 284, 284-85 (Fla. 1998),(affirming fifteen-year sentence that departed from 1991 guidelines - even though the trial court should have calculated the sentence using the 1994 guidelines - because the fifteen-year sentence would have been within the 1994 guidelines range).

Although this Court noted the above Heggs rule applied to

guidelines sentences given "without departure," Respondent believes this same rationale is applicable for departure sentences, nonetheless. A defendant is not entitled to relief from a 1995 sentence he could have received under the statutes in existence prior to the 1995 amendments, because he has not been prejudiced or adversely affected.

Petitioner was sentenced to life for burglary of a dwelling with a battery (a felony punishable by life); a guideline upward departure. The trial court stated:

> I find that there are good grounds to exceed the guidelines, because the offense was one of violence and was committed in a manner that was especially heinous, atrocious and cruel.
>
> Secondly, the victim was especially vulnerable due to age, physical and mental capability.
>
> And, three, the victim suffered extraordinary physical or emotional trauma or permanent physical injury and was treated with particular cruelty.

(T 328-29). The trial court found these aggravating factors, which are cited in §921.016(3)(b), (j) and (l), Fla. Stats. (1995). The trial judge reduced his reasons for departure to writing on February 19, 1999, the same day as the sentencing hearing (R 107).[3]

[3] Petitioner appealed the reasons for the upward departure, but the 4th DCA rejected his arguments and summarily affirmed on this issue. Blevins V. State, 25 Fla. L.Weekly D921, D922 (Fla. 4th DCA, April 12, 2000). Petitioner did not appeal this issue to this Court.

The aggravating factors cited by the trial court under the 1995 sentencing statute, are also found verbatim at §921.016(3)(b), (j) and (l), Fla. Stats. (1993). Had Petitioner been sentenced under the guidelines that existed prior to the 1995 amendments, he still would have received a life sentence from the trial court for the same reasons. Therefore, irregardless of standing to challenge the 1995 sentencing guidelines, petitioner has not been adversely affected and his sentence should be affirmed. Petitioner's sentence should be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, this Court should uphold Petitioner's convictions and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Respondent on Merits" has been furnished by U.S. Mail, to: ANTHONY CALVELLO, Public Defender, 15th Judicial Circuit of

Florida, Criminal Justice Building/6th Floor, 421 3rd Street, West Palm Beach, Florida 33401 on July ____, 2000.

_____
CELIA TERENZIO
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