

IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-936

DARRELL WAYNE BUTLER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, DARRELL WAYNE BUTLER, was the DEFENDANT below and the Respondent, THE STATE OF FLORIDA, was the PROSECUTION below. In this brief, the parties will be referred to as they stood in the proceedings below. The symbols "R" and "T" will refer to the record on appeal and the transcripts of the proceedings, respectively.

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.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's facts as a generally accurate account of the proceedings below. Any additional facts which the Respondent seeks to bring to the attention of the Court are contained in the argument portion of the brief.

POINT ON APPEAL

THE TRIAL COURT PROPERLY CONVICTED
THE DEFENDANT OF BOTH ROBBERY AND
CARJACKING

SUMMARY OF ARGUMENT

The acceptance of discretionary jurisdiction by this Court is appropriate to resolve the conflict certified by the instant case decision of the Third District Court of Appeal and prior decisions rendered by the First District Court of Appeal.

The trial court properly convicted Defendant of both robbery and carjacking where the Defendant committed two wholly distinct and separate crimes by first striking the victim and stealing her property(robbery) and then entering the victim's car and driving away with it(carjacking). Courts in Florida have found, in analogous situations to the instant case, that double jeopardy does not bar the dual convictions of robbery and carjacking.

ARGUMENT

THE TRIAL COURT PROPERLY CONVICTED THE DEFENDANT OF BOTH ROBBERY AND CARJACKING

The acceptance of discretionary jurisdiction by this Court is appropriate to resolve the conflict certified by the instant case decision of the Third District Court of Appeal and prior decisions rendered by the First District Court of Appeal.

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.

Specifically, in this case, the victim testified that while she was approaching her car in the Home Depot parking lot, she lost consciousness and woke up in an ambulance. (T. 262). The purse and other items she had on her person were missing when she awoke and her car was stolen. (T. 262-63). She later discovered that she was knocked unconscious by a blow to her face. (T. 268). The facts as presented to the jury were sufficient to reasonably conclude that two separate and distinct crimes took place at two separate and distinct times. The first crime, the robbery, took place and was completed when the Defendant took her purse and items from her person by striking her on the face. The second crime, the carjacking, took place and was completed when the Defendant drove off in the victim's car. The case of *Smart v. State*, 652 So. 2d 448 (Fla. 3d DCA), *rev. denied*, 660 So. 2d 714 (Fla. 1995), provides direction in this regard:

Smart accosted the victim at an A.T.M. and, at gunpoint, robbed him of his jewelry and wallet. After an accomplice struck the victim, the defendant drove off with his car. We hold, contrary to the appellant's sole contention, that, under these circumstances, he was properly convicted and sentenced for both armed robbery of the personal effects under section 812.13(2)(a), (b), Florida Statutes (1993), and the armed carjacking of a different item, the vehicle, which is forbidden by a different statute, section 812.133(2)(a), Florida

Statutes (1993). See § 775.021, Fla.Stat. (1993). Compare *Sirmons v. State*, 634 So.2d 153 (Fla.1994) (double jeopardy precludes separate convictions and sentences for armed robbery and theft of same vehicle); *Fraley v. State*, 641 So.2d 128 (Fla. 3d DCA 1994) (double jeopardy precludes convictions and sentences for multiple counts of armed robbery when acts of taking were part of one comprehensive transaction to confiscate the sole victim's property); *Nordelo v. State*, 603 So.2d 36, 38 (Fla. 3d DCA 1992) (same).

Similarly, in *Simboli v. State*, 728 So. 2d 792 (Fla. 5th DCA 1999), the Fifth District upheld the dual convictions of robbery and car jacking:

Appellant was a passenger in a taxicab. According to the driver's testimony, when they reached appellant's requested destination, appellant demanded the driver's money and threatened to stab him if he didn't comply. After the driver turned over his cash, appellant then had the driver empty his pockets to see if he held any money back, and then forced the driver out of the cab and drove away with it. The state correctly argues that under these facts, two crimes were committed, not just one as contended by appellant. See *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). See also *Smart, supra* (robbery of victim's wallet and jewelry and then his car constitutes two separate crimes under separate statutes); *Howard v. State*, 723 So. 2d 863 (Fla. 1st DCA 1998), *cause dismissed*, (Fla. Jun. 1, 1999) (Case no. 95,863).

As in *Simboli* and *Smart*, the Defendant in this case completed a robbery when he struck the victim and stole her property. Furthermore, after the Defendant successfully removed the victim's property, the Defendant then got into the victim's car, and drove away. Clearly, as in the above referenced cases, there was a robbery committed, and a separate, later carjacking. See *Howard*, 723 So.2d at 863 (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 also analogous to the Fourth District's case of *Consiglio v. State*, 24 Fla. L. Weekly D2575 (Fla. 4th DCA November 17, 1999):

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.

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*, and *Mason, supra*.

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.

CONCLUSION

Based upon the arguments and authorities cited herein, the appellee respectfully requests this Court to affirm the trial court's judgment 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 Appellee was mailed this ___ day of June 2000, to Marti Rothenberg, Assistant Public Defender, 1320 N.W. 14 Street, Miami, FL 33125.

REGINE MONESTIME
Assistant Attorney General