ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-936

DARRELL WAYNE BUTLER,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is the initial brief on the merits of petitioner/defendant Darrell Wayne Butler 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 October 19, 1998, with the carjacking of Milagros Sanchez and taking her car in violation of §812.133(2)(b), Florida Statutes (1997), the strong arm robbery of Milagros Sanchez and taking her purse and venetian blinds in violation of §812.13(2)(c), and the felony battery of Milagros Sanchez in violation of §784.041. (R: 1-3) The defendant pled not guilty.

Jury trial began on April 5, 1999. (T: 1) The state presented the testimony of Milagros Sanchez who stated that on September 24, 1998, she left work and drove her Toyota Camry to a Home Depot to buy hurricane supplies. (T: 259) She parked in the middle of the parking lot and went inside to buy some venetian blinds, some tape

for the windows and some nails. (T: 260) She paid for the items and carried them outside with her purse slung over her shoulder and her keys in her right hand. (T: 260-261) She testified the last thing she remembered was walking close to her car, then something happened and she lost consciousness until she woke up later in the fire-rescue ambulance. (T: 261-262) She admitted she did not know what happened to her. (T: 263) She went to the hospital with two broken facial bones and a cut that required stitches. (T: 269)

Ms. Sanchez further testified that her car was stolen from the Home Depot parking lot; she got it back three days later, along with her car keys. (T: 263) The venetian blinds, tape and nails that she bought at Home Depot were found in the car, although she had no idea how they got there, but her purse was missing. (T: 263-264, 267) She admitted she did not know who robbed her. (T: 271)

The next witness was Isabella Capilla, an unrelated lady who lived in Miami Springs; she testified that one morning she woke up and found a man she did not know walking around her car parked in her driveway. (T: 280) She also noticed a car she did not recognize parked behind her car. (T: 280) She told the man to leave or she would call the police; he did not say anything and did not leave and she called the police. (T: 281) The police came and handcuffed the man, who turned out to be the defendant. (T: 281)

Officer Wimberly and Officer Tarver from the Metro Dade Police Department testified they responded to Capilla's house and observed the defendant standing on the sidewalk next to a Toyota Camry that had been reported stolen. (T: 285, 289, 294, 296) They asked him to put his hands up, but he did not respond to any of their verbal commands. (T: 286, 295-296) They handcuffed him and put him in the back of the patrol car. (T: 286, 296) The officers searched the Toyota Camry and found documents and items belonging to the defendant as well as venetian blinds; they did not find a purse, but the keys were in the ignition. (T: 287-290, 297-300)

Detective Morales from the Metro Dade Police Department testified he took over the investigation shortly after the Home Depot carjacking, but that nothing was found in the parking lot; there were no eye witnesses, no physical evidence and Sanchez could not identify anybody. (T: 306, 315) The detective interviewed Sanchez and she told him that "she was approaching and entering her vehicle," that "she was approaching her vehicle and going to get into her vehicle when she doesn't remember anything else." (T: 326-327) A few days later her stolen Toyota was found in Miami Lakes and the defendant was arrested. (T: 307) Detective Morales testified he interviewed the defendant and read him his rights; the defendant waived them and admitted he came up behind Sanchez in the Home Depot parking lot and "hit her as she was entering her vehicle." (T: 313-314)

The state and the defense rested and the defendant moved for judgment of acquittal, which was denied. (T: 369-372, 375, 385) In particular, the defendant objected to the double jeopardy charging of both carjacking and robbery and referred the court to the case Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999), which held that under similar circumstances, the robbery and the carjacking were part of the same criminal episode or transaction and that separate convictions and sentences were unlawful. (T: 335, 370) The judge agreed, but announced that he would send both cases to the jury with the understanding that if the defendant were convicted of both offenses, the court would only convict and sentence him on the first degree felony carjacking.. (T: 336-338, 370-372, 447)

At the conclusion of the trial, the jury returned verdicts of guilty as charged to carjacking, robbery and felony battery. (R: 22-24; T: 445)

At the sentencing hearing on May 20, 1999, the judge held, based on the Third District's decision in Smart v. State, 652 So.2d 448 (Fla. 3d DCA 1995), that it was not double jeopardy to convict and sentence the defendant for both carjacking and robbery. (R: 75-76, 81-82) The judge adjudicated the defendant guilty and sentenced him as a violent career criminal to life in prison on the carjacking and to 40 years on the robbery. (R: 25-38, 83-84) On the felony battery, the court sentenced him as a habitual offender to 10 years in prison. (R: 25-38, 83-84) All the sentences were to

run concurrent. (R: 38, 83-84)

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 and carjacking where the offenses took place during a single criminal episode and the dual convictions were in violation of double jeopardy.

On March 29, 2000, 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 Cruller v. State, 745 So.2d 512 (Fla. 3d DCA 1999), rev. granted, (Fla.S.Ct., Case No: 1999-49), and other cases. (A: 1) The Third District disagreed that these offenses occurred during a single criminal episode and that both convictions violated double jeopardy, but 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 in relevant part:

> We write further, solely to address the defendant's argument that the trial court erred in convicting and sentencing the defendant for the dual offenses of carjacking and robbery. The defendant contends that the offenses occurred during a single criminal episode and thus both convictions violate double jeopardy citing to Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999). We disagree.
>
> This Court, as well as other courts, has consistently

> held that double jeopardy does not bar convictions and sentences for both robbery and carjacking. See Cruller v. State, 745 So.2d 512 (Fla. 3d DCA 1999); Consiglio v. State, 743 So.2d 1221 (Fla. 4th DCA 1999); Brown v. State, 743 So.2d 1213 (Fla. 4th DCA 1999); Simboli v. State, 728 So.2d 792 (Fla. 5th DCA), rev. denied, 741 So.2d 1137 (Fla. 1999); Smart v. State, 652 So.2d 448 (Fla. 3d DCA), rev. denied, 660 So.2d 714 (Fla. 1995); Waters v. State, 542 So.2d 1371 (Fla. 3d DCA 1989). Accordingly, the defendant was properly convicted.
>
> As we did in Cruller, we acknowledge that this decision conflicts with Ward v. State, 730 So.2d at 728, and thus certify our conflict with the First District's decision in that case. (A: 1)

The defendant has filed a notice of discretionary review in this Court on the certified conflict and this Court postponed its decision on jurisdiction, but ordered briefs on the merits.

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 keys, purse, venetian blinds and car 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 2 and carjacking in count 1 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 CARJACKING IN COUNT 1 AND ROBBERY 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 and convicted of carjacking and robbery; the judge adjudicated him guilty of both offenses and sentenced him to life in prison on the carjacking and to 40 years on the robbery. (R: 25-38, 83-84; T: 445) 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 Milagros Sanchez and taking her purse and/or venetian blinds in count 2 in violation of §812.13(2)(c),

Florida Statutes (1997), and with the carjacking of Milagros Sanchez and taking her car in count 1 in violation of §812.133(2)(b). (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 keys, purse, venetian blinds and car happened immediately at the same time and place in only a few seconds and was indisputably a single episode. The record shows that Sanchez parked her car in the parking lot to go shopping; she came out of the store and was approaching her car to get in it carrying a bag with venetian blinds, tape and nails and with her keys in her right hand and her purse slung over her shoulder. (T: 260-261) The defendant walked up to Sanchez as she was entering her car, hit her, then took her keys, purse and venetian blinds and immediately took the car and drove away. (T: 260-263, 326-327, 313-314) There was thus one continuous transaction with one victim at one time in one place in a few seconds. It was one robbery of several items, including a car, at the same time.

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 went up to Sanchez, hit her from behind as she was approaching her car, took her keys, purse and venetian blinds, got into her 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

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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, 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); Waters v. State, 542 So.2d 1371 (Fla. 3d DCA 1989) (robbery and grand theft arise out of two separate acts where defendant drove off with victim's car after victim abandoned car and escaped from defendant's presence).

felonies 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 in count 2 should be vacated.[2]

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[2] Petitioner has filed a notice of related cases along with this brief referring this Court to the related cases of Cruller v. State, 745 So.2d 512 (Fla. 3d DCA 1999), rev. granted, (Fla.S.Ct. Case No: 1999-49), and Consiglio v. State, 743 So.2d 1221 (Fla. 4th DCA 1999), rev. granted, (Fla.S.Ct. Case No: SC99-125).

CONCLUSION

Based upon the foregoing, the petitioner/defendant requests that this Court quash the decision of the Third District and reverse his conviction and sentence for the robbery in count 2.

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 26th day of May, 2000.

By: Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

Darrell Wayne BUTLER, Appellant,
v.
The STATE of Florida, Appellee.

No. 3D99-1605.

District Court of Appeal of Florida,
Third District.

March 29, 2000.

An Appeal from the Circuit Court for Miami-Dade County, Marc Schumacher, Judge.

Bennett H. Brummer, Public Defender, and Marti Rothenberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Regine Monestime, Assistant Attorney General, for appellee.

Before LEVY, GERSTEN, and SHEVIN, JJ.

***786** PER CURIAM.

Darrell Wayne Butler ("defendant") appeals his conviction and sentence for carjacking, robbery and felony battery. We affirm the conviction and sentence in all respects.

We write further, solely to address the defendant's argument that the trial court erred in convicting and sentencing the defendant for the dual offenses of carjacking and robbery. The defendant contends that the offenses occurred during a single criminal episode and thus both convictions violate double jeopardy citing to Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999). We disagree.

This Court, as well as other courts, has consistently held that double jeopardy does not bar convictions and sentences for both robbery and carjacking. See Cruller v. State, 745 So.2d 512 (Fla. 3d DCA 1999); Consiglio v. State 743 So.2d 1221 (Fla. 4th DCA 1999); Brown v. State, 743 So.2d 1213 (Fla. 4th DCA 1999); Simboli v. State, 728 So.2d 792 (Fla. 5th DCA), rev. denied, 741 So.2d 1137 (Fla.1999); Smart v. State, 652 So.2d 448 (Fla. 3d DCA), rev. denied, 660 So.2d 714 (Fla.1995); Waters v. State, 542 So.2d 1371 (Fla. 3d DCA 1989). Accordingly, the defendant was properly convicted.

As we did in Cruller, we acknowledge that this decision conflicts with Ward v. State, 730 So.2d at 728, and thus certify our conflict with the First District's decision in that case.

Affirmed; conflict certified.

END OF DOCUMENT

APPENDIX : 1