IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 05-597
4th DCA CASE NO. 4D03-2924

PATRICK JOSEPH KELSO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. Respondent was the appellee and Petitioner the appellant in the District Court of Appeal of the State of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol AR" will be used to denote the record on appeal. Similarly, reference to the trial transcripts will be by the symbol "T."

STATEMENT OF THE CASE AND FACTS

Petitioner, Patrick Joseph Kelso, was charged by information with burglary of an occupied dwelling while armed (Count 1); third degree grand theft of a firearm (Count 2); second degree grand theft of property and U.S. Currency in the value of twenty thousand or more dollars (Count 3); and possession of a firearm by a convicted felon (Count 4). (R 34-35) All counts were alleged to have occurred on July 22, 2002. (R 34-35) At trial, the State dropped the allegation, made in Count 1, that the dwelling was occupied. (R 62, T 150, 328) Petitioner was tried as charged on Counts 2 and 3. Count 4 was severed for trial purposes. (R 71, T 2)

Two of the four victims, William and Tiffany Hughes, testified at a suppression hearing and again at trial that, on the afternoon of July 22, 2002, they arrived home and interrupted a burglary in progress. As Tiffany explained, she noticed that the door to the house was uncharacteristically propped open before she entered the house. (T 119-120, 138) Upon entering, Tiffany Hughes saw a man, wearing gloves and a greenish short-sleeved shirt, standing there and holding the screen door to the pool. (T 139) The t-shirt Petitioner wore when he was caught by police on the day of the burglary was consistent with the shirt that the burglar was wearing. (T 141)

When she saw the man, Tiffany hollered, “Somebody’s here - somebody’s here.” (T 119-120, 138) In response to Tiffany’s alarm, William Hughes went around the back of the house, looked through the pool area, and saw someone trying to get

through a gate. (T 121) As soon as Hughes saw him, he hollered at the person and the person looked back at Hughes. (T 123)

William Hughes described the person as wearing a green and yellow and orange shirt and baggy pants, and having real short, spiked, and bleached or badly dyed blond hair. (T 122, 128) The person was wearing gloves on both hands. (T 123)

After the man fled, the Hughes called the police; consequently, William Hughes was taken to identify a possible suspect about thirty minutes later and a half-mile away. (T 123-124) This first suspect appeared to have a narrow face like the person Hughes had seen except that he did not have any hair and he did not have a shirt on. (T 124, 129) Hughes immediately told the police that the suspect looked enough like the man he saw that he could be his brother but it was not him. (T 125, 127)

Hughes was called again fifteen minutes later to identify another suspect a quarter of a mile from his home. (T 125) This second suspect, Petitioner, was wearing a green and yellow or orange shirt. (T 126) Hughes immediately identified Petitioner as the person he saw in his yard; he repeated the identification in court. (T 126-129)

The Hughes lived with another couple, the Olsons, and both couples' belongings had been ransacked and many of their possessions had been moved to stacks next to an outside door, including six firearms. (T 205-06, 226, 238-39, 269-270, 307-08) A seventh firearm had disappeared entirely and was still missing as of the trial. (T 242) In addition, twenty-one thousand dollars in cash and two rings

belonging to Jocelyn Olson were taken from the house; they were later found on Petitioner. (T 304-305)

The police established a perimeter around the scene of the crime and Detective Root saw Petitioner pop his head out of some bushes at the edge of the perimeter. (T 274-278). Petitioner looked at Root, then dropped back down into the bushes. (T 276-278)

Root chased Petitioner. (T 276-278) During the chase, Petitioner deliberately kicked off a shoe and something flew out of the shoe. (T 295) Petitioner kept going and another detective was forced to physically tackle Petitioner in order to stop him. (T 279, 285) At this time, the other shoe came off. (T 297)

The police searched Petitioner, Petitioner's shoes, and the area through which Petitioner had run. (T 282, 298, 300) On Petitioner, they found a pouch holding two rings belonging to Jocelyn Olson, a gardening or work glove, and three thousand dollars in cash. (T 282, 298, 299) They also found eight thousand dollars in cash in one of the shoes and about ten thousand dollars in cash scattered around the other shoe. (T 298, 300, 316)

Petitioner was found guilty of burglary of a dwelling while armed (Count 1); grand theft of a firearm (Count 2); and theft of property greater than twenty thousand dollars (Count 3). (R 65-66, 71, 76, T 411) Following the guilty verdict on Counts 1, 2, and 3, the State entered a nolle prosequi on Count 4. (R 74, T 434)

Petitioner was designated a Prison Releasee Reoffender and was sentenced to life in prison on Count 1, and to five years in prison on Counts 2 and 3, all to run concurrently. (R 74, 78-82, T 433)

He appealed his convictions to the District Court of Appeal, Fourth District, arguing, in pertinent part, that his right not to be subjected to double jeopardy had been violated when he was convicted of both Counts 2 and 3, grand theft of a firearm, and theft of property greater than twenty thousand dollars because both thefts occurred during the same burglary. (R 87) The Fourth District, citing to this Court's decision in State v. Getz, 435 So. 2d 789 (Fla. 1983), noted the special nature of firearms, which were to be treated by legislative intent as distinct from other property that could be stolen during a single burglary. Kelso v. State, 898 So. 2d 1023 (Fla. 4th DCA 2005). The appellate court affirmed the convictions, ruling they did not violate double jeopardy based on Getz. However, the appellate court certified conflict with Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2001), Scarola v. State, 889 So. 2d 108 (Fla. 5th DCA 2004), and Thompson v. State, 888 So. 2d 89 (Fla. 2d DCA 2004), as contrary to the Getz decision.

Petitioner sought the discretionary review of this Court and the instant proceeding ensued.

SUMMARY OF THE ARGUMENT

As this Court recognized in State v. Getz, 435 So. 2d 789 (Fla. 1983), and re-affirmed in Johnson v. State, 597 So. 2d 798 (Fla. 1992), due to the special nature of firearms, there is no double jeopardy in convicting a defendant of theft of a firearm as well as theft of other property during the same criminal episode. Therefore, this Court should uphold the decision of the Court of Appeal, Fourth District in Kelso v. State, 898 So. 2d 1023 (Fla. 4th DCA 2005), affirming Petitioner's convictions and sentences on Counts 2 and 3.

ARGUMENT

DOUBLE JEOPARDY IS NOT IMPLICATED IN PETITIONER'S CONVICTIONS FOR GRAND THEFT OF A FIREARM AND FOR GRAND THEFT OF PROPERTY.

Petitioner contended below that a violation of his right to remain free from double jeopardy occurred when he was convicted of both grand theft of a firearm and theft of property of a value of more than twenty thousand dollars for items taken during the same burglary. However, as the District Court of Appeal, Fourth District, recognized, there was no double jeopardy violation here. Kelso v. State, 898 So. 2d 1023 (Fla. 4th DCA 2005).

Section 775.021(4), Florida Statutes (2002), provides that one should be convicted and sentenced for each of one or more separate criminal offenses committed in the course of one criminal transaction and 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. § 775.021(4), Fla. Stat. (2002)(emphasis added). The statute also provides three exceptions to this rule of construction:

> 1. Offenses which require identical elements of proof.
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§ 775.021(4)(b), Fla. Stat (2002).

This Court, in State v. McCloud, 577 So. 2d 939 (Fla. 1991), held that, in determining whether the statutory elements of one offense are subsumed by another, it is inappropriate to examine the evidence in a case since Section 775.021(4) requires the analysis be made "without regard to the accusatory pleading or the proof adduced at trial." The Court further held that where each crime may be committed without necessarily committing the other, the elements of one crime are not subsumed within the other. Obviously, Section 775.021(4) and the Supreme Court's decisions in McCloud and Davis v. State, 581 So. 2d 893 (Fla. 1991), approving Davis v. State, 560 So. 2d 1231 (Fla. 5th DCA 1990), expressly prohibit the trial court from reviewing the facts of a case to determine whether acts committed in a single criminal transaction can constitute one or more separate criminal offenses.

Here, without giving any regard to the facts of this case, it is obvious that the offenses of third degree grand theft of a firearm and second degree grand theft of property with a value of twenty or more thousand dollars do not have identical elements of proof. The former requires proof that a firearm was taken while the latter requires proof that property in the value of twenty or more thousand dollars was taken. § 812.014, Fla. Stat. (2002). Each crime requires proof of at least one element not required by the other.

This analysis also demonstrates that the statutory elements of one offense are not subsumed by the other offense. Each crime can be committed without committing the other. Thus, neither offense is itself a lesser offense of the other, nor are they degrees of the same offense.

The case of Billiot v. State, 711 So. 2d 1277 (Fla. 1st DCA 1998), supports this analysis. In Billiot, the First District rejected the appellant's argument that his two convictions for first degree burglary and aggravated battery violated the prohibition against double jeopardy. The court found that although simple battery might be a lesser included offense of burglary with a battery, aggravated battery was not because it required the use of a deadly weapon and it required that the victim be 65 years or older. The court concluded that "[n]o violation of double jeopardy principles occurs when two offenses at issue contain distinctly separate elements, even though they share a common element." Billiot, 711 So. 2d at 1277. Here, as the State previously pointed out, the two offenses now at issue also contain distinctly separate elements.

Nor is the same property the subject of both convictions. One of the convictions was based on the taking of more than twenty thousand dollars in cash and the other was based on the taking of a firearm.

Petitioner attempts to argue that he was subjected to double jeopardy because both offenses are degree variants of the same core offense: theft. The State submits that, as the Fourth District recognized below, this is not the case.

Three of the cases Petitioner relies primarily on are Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2001), Scarola v. State, 889 So. 2d 108 (Fla. 5th DCA 2004), and Thompson v. State, 888 So. 2d 89 (Fla. 2d DCA 2004). In Wilson, the Fifth District reversed multiple convictions for theft of firearms and of other personal property arising during a single burglary and held that double jeopardy barred more than one conviction for theft. Similarly, in Scarola and Thompson, multiple convictions for theft of a firearm and theft of other personal property were reversed based on double jeopardy principles. These cases appear directly on point; however, the appellate courts that issued the opinions did not properly recognize the precedential opinions of this Court, most particularly State v. Getz, 435 So. 2d 789 (Fla. 1983), Therefore, they are unsound and must be quashed.

In Getz, the defendant was charged, under Section 812.014, with theft of a firearm and with theft of other property worth less than one hundred dollars (a calculator and some coins). Both offenses arose out of a single burglary. This Court ruled that even though the theft of the firearm and the theft of the calculator and coins occurred at the same time, the defendant could be convicted of and sentenced for both offenses without violating double jeopardy because the offenses constituted separate offenses arising under different subsections of Section 812.014.

The Court stated:

> It is our view that as the theft statute is written, the

> legislature intended to make theft of a firearm under subsection (2)(b)3 and theft of property worth less than one hundred dollars under subsection (2)(c) separate and distinct offenses, even where the thefts occur in a single criminal episode. It is clear from a reading of section 812.014 that the legislature intended to treat the theft of different types of property as separate criminal offenses and to establish distinct punishments for the separate offenses. We note if a firearm is stolen, its value is not an element of the offense and it is grand theft even if the firearm is worth less than one hundred dollars.
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> * * *
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> The fact that the offenses for which respondent was convicted and sentenced are defined in the same statute is irrelevant because it is the intent of the legislature which controls in this situation.

Getz, 435 So. 2d at 791. Clearly, this Court recognized that the statute as written shows that stolen firearms are distinct from other stolen property and must be treated accordingly.

And, in Grappin v. State, 450 So. 2d 480 (Fla. 1984), the Supreme Court again recognized the special nature of firearms as distinct from other property that could be stolen. In Grappin, the Court ruled that the defendant could be charged with five separate acts of second degree grand larceny for stealing five firearms during a single burglary. The Court held that it was clear that the legislature intended to make each firearm a separate unit of prosecution.1

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1 Grappin was cited with approval in this Court's relatively recent opinion in Bautisa v. State, 863 So. 2d 1180 (Fla. 2003).

As a matter of social policy, this distinction is justified given the physical danger to society inherent in firearms which is generally not inherent in other items of personal property such as the cash and jewelry which were stolen in the instant case. That the legislature has recognized that firearms, as weapons of destruction whose sole purpose is to maim or kill, are worthy of distinction and intends to so distinguish them is evident in the fact that penalties for other offenses are routinely increased based on the mere use or possession of a firearm during the offense. See, e.g., s. 921.0024, Fla. Stat. (additional points are scored on Criminal Punishment Code scoresheet for possession of firearm during the commission of a felony).

It is true that, in Johnson v. State, 597 So. 2d 798 (Fla. 1992), this Court found double jeopardy principles to be violated in a case where the defendant was separately convicted and sentenced for grand theft of cash and grand theft of a firearm accomplished by means of snatching a purse that contained both cash and a firearm when the defendant did not know the nature of the purse's contents. However, this Court stated that although their view appeared to be contrary to Getz, in Getz, there was a separate intent and act to take each item, while in Johnson, there was only one intent and one act of taking the handbag. "Had the gun been picked up separately from the taking of the handbag, Getz would allow separate convictions. However, neither Getz nor Grappin v State, 450 So. 2d 480 (Fla. 1984)(where five firearms were knowingly taken) should apply where an enclosed bag and its contents are the

subject of the theft in one swift action." Johnson, 597 So. 2d at 798.

There was no suggestion in this case that the firearm and the other property taken were taken as the result of "one swift action;" to the contrary, the evidence was that the entire house was ransacked, and that property was taken from different places and piled up by the sliding glass door. It is apparent from the manner of the burglary that there was a separate intent and act to take each item. Therefore, Getz governs the instant case.

Incidentally, the State would note that Johnson, a 1992 opinion, was issued by this Court well after the amendment of Section 775.021(4), Florida Statutes, in 1988. Moreover, this Court must have considered the impact of the amendment of Section 775.021, since the Court specifically addressed a certified question regarding the amendment of the statute.2 Consequently, it is clear that the amendment of Section 775.021(4) did not alter this Court's reasoning that the knowing theft of a firearm merited a separate conviction.

As Getz has never been overruled, it appears that three of the four cases Petitioner specifically relies on, Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2001); Scarola v. State, 889 So. 2d 108 (Fla. 5th DCA 2004), and Thompson v. State, 888 So. 2d 89 (Fla. 2d DCA 2004), are actually contrary to Supreme Court precedent.

2 The certified question read: "When a double jeopardy violation is alleged based on the crimes of grand theft of property (between $300 and $20,000 and of a firearm in a single act, and the crimes occurred after the effective date of Section 775.021, Florida Statutes (Supp. 1988), is it unlawful to convict and sentence for both crimes?" Getz, 597 So.

The fourth case, Mixon v. State, 857 So. 2d 362 (Fla. 1st DCA 2003), is as the Fourth District, recognized, distinguishable because, while it involved the theft of more than one item of personal property, there was no theft of a firearm involved. Moreover, if the lack of a firearm theft did not distinguish Mixon, it would then be contrary to Getz.

The State submits that, pursuant to the Getz case, this Court should uphold the Fourth District's decision in the instant cause and should quash the decisions of the Fifth and Second Districts in Wilson, Scarola, and Thompson. Consequently, Petitioner's separate convictions and sentences for grand theft of a firearm and for theft of property worth more than twenty thousand dollars should be affirmed because they do not violate double jeopardy principles.

2d at 798-99.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to AFFIRM the decision of the district court below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: TATJANA OSTAPOFF, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, on July 7, 2005.

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not proportionately spaced.

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