IN THE SUPREME COURT OF THE STATE OF FLORIDA

PATRICK JOSEPH KELSO,

Petitioner,

vs. CASE NO. SC05-597

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the Fourth District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and appellee in The Fourth District Court of Appeal. In this brief the parties will be referred to as they appear before the Court.

The following symbols will be used:

"R"	Record proper, contained in Volume 1 of the record on appeal
"T"	Transcript of proceedings in the lower tribunal, contained in Volumes 2-4 of the record on appeal, followed by the appropriate volume and page numbers

STATEMENT OF THE CASE

Petitioner was charged by information with burglary of an occupied dwelling while armed (Count I), grand theft of firearms (Count II) and more than $20,000 cash (Count III) from Eric Olson, and possession of a firearm by a convicted felon (Count IV) (R 7-8, 34-35). Count IV was severed for trial (R 61, T2/2) and ultimately nolle prossed by the State (R 74), which also abandoned its prosecution of the allegation in Count I that the dwelling was occupied (T2/150, 152, 3/327, 328).

At the conclusion of Petitioner's trial, the jury returned its verdicts finding Petitioner guilty of armed burglary of a dwelling with a firearm which was *not* in Petitioner's actual possession (R 65), and of Counts II and III as charged (R 66).

On June 25, 2003, Petitioner was adjudged guilty of burglary of an occupied dwelling while armed and two counts of grand theft (R 76) and sentenced to serve life in prison as a prison releasee reoffender on Count I (R 78-79), with concurrent five-year prison sentences on Counts II and III (R 80-81). His lowest permissible sentence pursuant to the Criminal Punishment Code was only 61.15 months in prison (R 85).

On appeal from the convictions and sentences, Petitioner argued, *inter alia*, that his convictions for the two grand theft charges violated the prohibition against

double jeopardy. Rejecting the holdings to that effect by the Fifth District Court of Appeal in Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2001) and Scarola v. State, 889 So. 2d 108 (Fla. 5th DCA 2004), and by the First District Court of Appeal in Thompson v. State, 888 So.2d 89 (Fla. 2d DCA 2004), the Fourth District Court of Appeal held that this Court's decision in State v. Getz, 435 So. 2d 789 (Fla. 1983) precluded Petitioner from receiving relief. His appeal was accordingly rejected in a decision dated March 9, 2005. The Court certified that its decision was in direct and express conflict with the decisions of the other two district courts of appeal.

On April 1, 2005, Petitioner noticed his intent to seek this Court's review of his case. On April 12, 2005, this Court entered its order postponing jurisdiction in this cause and setting a briefing schedule. This initial brief on the merits follows.

STATEMENT OF THE FACTS

On July 22, 2002, Malcolm Randolph saw a car he did not recognize parked across from his home on a dead-end street (T2/185). Because this was unusual in his neighborhood of only five houses (T2/182), he called 911 (T2/185).

A few minutes later, between noon (T3/213) and 1:00 p.m. (T2/193), Tiffany and William Hughes drove up to the home they rented, together with Eric and Jocelyn Olsen, on the same street (T2/192, 3/238). They noted the red Honda parked on the street as they drove up to their garage (T2/193, 213). Tiffany went into the house through the garage entry (T2/194) and noticed a white male wearing a bluish green shirt with his gloved hand on the screen door (T3/202). She did not notice any tattoos (T3/209).

Tiffany called out to her husband, and he went to the back of the house while Tiffany waited in the driveway (T3/207, 214). William Hughes saw someone trying to leave through the back gate (T3/217). He yelled, and the man looked back at him for about two seconds (T3/218). The man left, and although Hughes ran around to the front of his house, he did not see the intruder again (T3/219).

At the suppression hearing and again at trial, Hughes testified that, after about thirty minutes, the police took him to the Stuart Yacht Club, about a mile or

mile and a half away (T2/124, 3/221). There he viewed a shirtless suspect wearing jeans who had been detained while walking down St. Lucie Boulevard, sweating and breathing hard (T2/135). Hughes said the suspect looked like the man Hughes had seen in his yard, "But he didn't have any hair" (T2/124). Hughes told police this was not the person he had seen earlier (T2/125, 3/222).

Fifteen minutes later, the police showed Hughes another suspect at Sandscript Park, about a quarter of a mile away (T2/125). This man was handcuffed in the back of a police car, wearing a green shirt with orange stripes and no gloves (T2/126, 3/262). Hughes positively identified this man, Petitioner, as the intruder (T2/126, 128, 3/223, 260), although he had not mentioned seeing any tattoos like the ones on Petitioner's arms when he viewed the person at his house (T2/142, 3/225).

Petitioner had been discovered near a wooded area (T3/274). Police found $3000 in Petitioner's pocket (T3/298), as well as a film canister containing jewelry (T3/282). Another $8000 was found inside Petitioner's shoe (T3/298). $10,000 was recovered from an area around Petitioner's other shoe (T3/300, 316), which he had kicked off before being apprehended (T3/295). A work glove was retrieved from Petitioner's rear pocket (T3/263, 282, 299), but he did not have any car keys

(T3/268, 323),[1] nor were any weapons recovered from Petitioner or the vicinity of his arrest (T3/284, 302).

At the Hughes home, their bedroom was in disarray (T2/205, 3/259, 309), although the room used by the Olsens was relatively neat (T3/259, 308). CDs, computer games and videos belonging to the couple and kept in their bedroom had been piled by the back door (T3/206, 229). Six firearms belonging to Eric Olsen had been moved from a closet in the Olsen's bedroom to the same location (T3/238-239, 240-242, 270). One of these guns may have been an antique (T3/248), but the rest were operable (T3/249-250). A seventh gun, a .22 caliber pistol, which Olsen had kept in a dresser drawer, was missing and never recovered (T3/242, 315). Police returned to Olsen $21,000 which had been taken from the house (T3/305, 317-318) and two rings which had also been missing (T3/304).

[1]The keys to the red Honda were recovered (T3/322), apparently from the first man picked up by the police but not identified by William Hughes (T3/).

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case directly and expressly conflicts with Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2001) on the identical point of law: whether multiple convictions for the degree offense of theft are permissible when all the takings were committed during the course of a single burglary. Contrary to the decision of the Fourth District Court of Appeal in the instant case, the multiple theft convictions are prohibited in such circumstances, since the legislature has expressly *excluded* offenses which are "degrees of the same offense as provided by statute" from those crimes for which multiple convictions and sentences may be returned even if they are all committed in a single criminal episode or transaction.

ARGUMENT

POINT

BECAUSE THEFT OF A FIREARM AND THEFT OF PROPERTY ARE DEGREES OF THE SAME OFFENSE OF THEFT, CONVICTIONS FOR BOTH CRIMES ARISING FROM A SINGLE CRIMINAL EPISODE ARE NOT AUTHORIZED BY THE LEGISLATURE AND THUS ARE BARRED BY THE DOUBLE JEOPARDY CLAUSE.

§ 812.014, Florida Statutes, defines the offense of theft:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to use the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

The statute then goes on to define the different degrees of the basic theft offense, including:

> (2)(b) 1. If the property stolen is valued at $20,000 or more, but less than $100,000...
> the offender commits grand theft in the second degree, punishable as a felony of the second degree....
>
> (c) It is grand theft of the third degree and a felony of the third degree ... if the property stolen is:
>
> 1. Valued at $300 or more, but less than $5,000.
> 2. Valued at 5,000 or more, but less than $10,000.
> 3. Valued at $10,000 or more, but less than $20,000.
> 4. A will, codicil, or other testamentary instrument.

> 5. A firearm.
> 6. A motor vehicle, except as provided in paragraph (2)(a).
> 7. Any commercially farmed animal....
> 8. Any fire extinguisher.
> 9. Any amount of citrus fruit consisting of 20,000 or more individual pieces of fruit.
> 10. Taken from a designated construction site iden-tified by the posting of a sign as provided for in s. 810.09(2)(d).
> 11. Any stop sign.
> 12. Anhydrous ammonia.
>
> (d) It is grand theft of the third degree and a felony of the third degree ... if the property stolen is valued at $100 or more, but less than $300, and is taken from a dwelling as defined in s. 810.011(2) or from the unenclosed curtilage of a dwelling pursuant to s. 810.09(1).

The question presented by the instant case is: to what extent are multiple convictions for theft authorized where all the property is taken during a single criminal incident. In other words, where an offense is defined and then classified in degrees, what is the effect on the State's ability to obtain multiple convictions of the same offense, but in different degrees, where all the property is taken at the same time from the same victim at the same place?

The Fifth Amendment of the United States Constitution and Article I, § 9 of the Florida Constitution guarantee an accused th right against being placed twice in jeopardy. Moreover, the fact that multiple charges are jointly tried in a single proceeding makes no difference to the application of the Double Jeopardy Clause:

> We do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

Ex Parte Lang, 85 U.S. 163, 21 L.Ed. 872, 878, 18 Wall. 163, 173, 1874).

Legislative intent is the guide by which questions determining the constitutionality of multiple convictions and sentences for offenses arising from the same criminal transaction are judged. Gordon v. State, 780 So. 2d 17, 19 (Fla. 2001); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 1436, 63 L.Ed. 2d 715 (1980). Thus, the legislature is free under the Double Jeopardy Clause to define crimes and fix punishments, but thereafter a court may not impose more than one punishment for the same offense. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). If the legislature does not fix the punishment for crime clearly and without ambiguity, then the rule of lenity applies and the ambiguity is to be resolved against turning a single transaction into multiple offenses. But where the legislative intent to punish is clear, the rule of lenity does not apply. Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958).

This legislative intent can be "explicitly stated in a statute ... or ... discerned through the *Blockburger* test of statutory construction." M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996). The citation to *Blockburger* references Blockburger v. United

States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which provided that, in the absence of an express statement of legislative intent otherwise, offenses are "separate" for double jeopardy purposes where each offense requires proof of an element that the other does not.

In Florida, the legality of multiple convictions was originally governed by the "single transaction rule" which provided that a defendant charged with several offenses arising out of a single criminal episode could only be convicted of the most serious one. Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (Fla. 1942). But the legislature then codified its intent to utilize the *Blockburger* test to determine whether multiple convictions and sentences are authorized. § 775.021(4), Florida Statutes (1979) stated:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more separate criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses....

This act was "intended to authorize multiple convictions and separate sentences when two or more separate criminal offenses are violated as part of a single criminal transaction.... The statute has abrogated the single transaction rule" in favor of the *Blockburger* test to determine when multiple convictions are permitted. Borges v. State, 415 So. 2d 1265, 1266 (Fla. 1982).

In State v. Getz, 435 So. 2d 789 (Fla. 1983), this Court examined the then-existing version of § 775.021(4) in addressing the propriety of the defendant's convictions for both grand theft of a firearm and petit theft of other property when both takings occurred during a burglary. Recognizing that legislative intent was the controlling factor in that case as in all others involving questions of double jeopardy, this Court in Getz found that the statute reflected an intent to punish the defendant for each separate theft committed, even if all the crimes were accomplished during the course of a single criminal episode.

> 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 (emphasis added). Thus, even though the various degrees of theft are all defined in one criminal statute, this Court believed that the intent of the legislature, as enacted in the then-existing law, required it to authorize the multiple convictions.

In Grappin v. State, 450 So. 2d 480 (Fla. 1984), this Court held, based on the same rationale, that the defendant could be convicted of five separate counts of stealing a firearm, even though all the thefts occurred during a single burglary. precluded the relief sought by Appellant. Because the legislature made theft of "a" firearm an offense, this Court reasoned that it intended for each theft of a gun to

constitute a separate offense which could be separately punished. This result was required

> because the legislature unambiguously intended that the taking of each firearm be treated as a theft. Multiple thefts of firearms which occur in a single episode are to be considered separate crimes under the statute.

The Fourth District Court of Appeal in the instant case relied on the holdings of Getz and Grappin to justify its affirmance of Petitioner's convictions for theft of property worth more than $20,000 and theft of a firearm, even though both takings occurred during a single residential burglary.

Since those cases were decided however, the Florida legislature has amended § 775.021(4), effective July 1, 1988. Ch. 88-131 §7, Laws of Florida. The statute now retains the language previously employed to define separate offenses in § 775.021(4)(a), Florida Statutes:

> 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.

However, the Florida legislature, after initially stating its intent that a person be convicted of and sentenced for every separate crime he commits in "one criminal transaction or episode," specifically defines three critical *exceptions* to that general principle for:

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

§ 775.021(4)(b), Florida Statutes (emphasis added).

Obviously, theft is a crime which is divided into degrees based on the nature and value of the property stolen. Consequently, the specific and unambiguous statutory directive contained in § 775.021(4)(b) provides that each theft which is no more than a degree variant of the general crime of theft is the "same" crime for purposes of determining whether multiple convictions and sentences are permitted. Thus, only a single conviction for theft is authorized where property is taken during a single criminal episode.

This was the result reached in Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2003), where the defendant was convicted of two counts of theft based on charges that he committed theft of property worth more than $300 and theft of a firearm during the course of a single burglary of a residence. In light of the express terms

used by the legislature to define its intent in such situations, Wilson held that multiple convictions for theft were not permitted.

> Section 812.014 establishes various degrees of seriousness for thefts of different kinds and values of property. It is clearly an example of a statutory degree crime, and not a separate offense statute for each possible degree delineated in the statute. *See Sirmons v. State*, 634 So. 2d 153 (Fla. 1994); *Johnson v. State*, 597 So. 2d 798 (Fla. 1992). Thus we agree with Wilson that only one grand theft offense can stand for each burglary.

See also Scarola v. State, 889 So. 2d 108 (Fla. 5th DCA 2004) (en banc) (holding that double jeopardy violation present when defendant was convicted of theft of property worth more than $300 and theft of a firearm, all stolen during a single burglary, could be raised and corrected on direct appeal from unconditional no contest plea, even absent objection below); *cf.* Taylor v. State, 801 So. 2d 173, fn. 1 at 175 (Fla. 5th DCA 2001).

Wilson's straightforward statutory analysis has been followed by the Second District Court of Appeal in Thompson v. State, 888 So. 2d 89 (Fla. 2d DCA 2004) (reversing dual convictions for theft of property worth more than $300 and theft of firearm). The First District Court of Appeal has likewise applied the same analysis to preclude multiple convictions for theft for different types of property stolen during a single burglary. Mixson v. State, 857 So. 2d 362 (Fla. 1st DCA 2003).

The decisions of those three district courts of appeal are entirely justified in their legal conclusions. It is well established that construction and interpretation of a statute are unnecessary when it is unambiguous. Baker v. State, 636 So. 2d 1342 (Fla. 1994). "It is settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language." Overstreet v. State, 629 So. 2d 125 (Fla. 1993). Even where the legislature itself may have really meant something not expressed in the words of the act, a court will not deem itself authorized to depart from the plain meaning of the statute. Lamont v. State, 610 So. 2d 435 (Fla. 1992). It is neither the function not the prerogative of courts to speculate on constructions which are more or less reasonable when the plain words of the statute convey an unequivocal meaning. Statutes must be strictly construed according to their letter: words and meanings beyond the literal language may not be entertained. Blount v. State, 581 So. 2d 604 (Fla. 2d DCA 1991). In light of the statutory revision which expressly now forbids the result the State desires, the Fourth District Court of Appeal's reliance below on this Court's decisions in Getz and Grappin is untenable.

In the present case, it is uncontested that all the takings occurred during the course of a single burglary. Further, the takings were charged as theft: in fact, the information charging Petitioner in the instant case cites only the general theft

statute, § 812.014, not any particular subdivision (R 7). *See* Wilson v. State, 776 So. 2d at 351 ("the state charged Wilson with the generic section 812.014(2)(c), not 812.014(2)(c)5."). Appellant was, in fact as in law, charged with commission of but a single crime.

Finally, as in Thompson v. State, 888 So. 2d at 90, there was insufficient evidence of the events that occurred during the burglary to permit a conclusion that the taking of the firearm was separated by time, place or circumstances from the taking of the other items. *See also* Mixson v. State, 857 So. 2d at 365 ("the State is unable to demonstrate the requisite separation of time, place, and circumstances between the taking of the truck and the taking of the tools"). In the present case, there was no evidence as to how the items in the house were taken. Their temporal and spacial separation was not, therefore, established.

Accordingly, as acknowledged by the Fourth District Court of Appeal, its decision is in direct and express conflict with the decision of Wilson v. State, 776 So. 2d 347, and the other cases cited. That conflict affects the legality of multiple convictions and sentences in cases where property defined in different sections of § 812.014, Florida Statutes, are all taken during a single criminal episode. In the First, Second, and Fifth Districts, only one conviction for theft is permitted. In the Fourth District, on the other hand, multiple convictions and sentences are allowed,

despite the express exclusion in § 775.021(4)(b) of degree offenses like theft from such treatment. This disparity will continue in the absence of resolution of the conflict by this Court. Petitioner therefore requests that this Court accept jurisdiction for discretionary review of this cause and correct the erroneous decision of the Fourth District Court of Appeal in this case.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Petitioner requests that this Court reverse the decision of the Fourth District Court of Appeal below and remand this cause to require that Petitioner's conviction for theft of a firearm be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Jeanine M. Germanowicz, Assistant Attorney General, 1515 N. Flagler Drive, ninth floor, West Palm Beach, Florida 33401 by courier this ___ day of MAY, 2005.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

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