IN THE SUPREME COURT OF THE STATE OF FLORIDA

PATRICK JOSEPH KELSO,

Petitioner,

vs. CASE NO. SC05-597

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY 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 AND FACTS

Petitioner relies on the statement of the case and facts contained in his initial brief on the merits.

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.

Petitioner initially observes that Respondent's argument that the instant offenses are not the "same" because the statutory offenses of one are not subsumed in the other, Respondent's answer brief at 11-14, is irrelevant, since Petitioner has not contended that the offenses are statutorily the same, but that they are degree variants of the offense of theft, a conclusion with which this Court has expressly agreed. Thus, in Johnson v. State, 597 So. 2d 798, 799 (Fla. 1992) (emphasis added), this Court stated:

> *the value of the goods or the taking of a firearm merely defines the degree of the felony and does not constitute separate crimes.* A separate crime occurs only when then there are separate distinct acts of seizing the property of another.

The effect of this conclusion on the viability of multiple convictions for the degree offenses is equally clear. This Court has consistently held that a defendant may not be convicted of two offenses which are merely degree variants of the same underlying core offense. Sirmons v. State, 634 So. 2d 153 (Fla. 1994) (armed

robbery and grand theft auto). Indeed, two offenses may be degree variants of the same offense if they share a common underlying core offense even if they are not specifically identified as degrees of the same offense within the statutes. State v. Anderson, 695 So. 2d 309 (Fla. 1997). Quite simply:

> subsection 775.021(4)(b)(2) means just what it says: Multiple punishments are barred for those "crimes" which are degrees of the same underlying crime.

Anderson, 695 So. 2d 309.

Respondent argues that 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" in its decision in Johnson v. State, 597 So. 2d 798. Respondent's answer brief at 17-18. Respondent has completely misread this Court's decision in Johnson, as well as the reasoning of the district court of appeal in the case being reviewed, Johnson v. State, 574 So. 2d 242 (Fla. 1st DCA 1991).

While the district court of appeal did originally certify the question restated in footnote 2 of Respondent's answer brief at 18, "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 lawful to

convict and sentence for both crimes?," it is clear from the context of the district court's opinion that its concern was the statute's abrogation of the single transaction rule, not any exclusion from the abrogation which might be part of that statute. In particular, the district court recognized that the most recent (1988) amendment to the statute expressly deleted the "rule of lenity," codified in §775.021(1), Florida Statutes (1985).[1] It was the rule of lenity which this Court had, until then, relied on as providing a continuing basis for reversal of multiple convictions even where the offenses had different elements. *See* Carawan v. State, 515 So. 2d 161 (Fla. 1987). Following the decision in *Carawan*, however, the legislature enacted an additional amendment of §775.021(4), so that the statute now provides that:

> (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 legislature intent.*

(Emphasis added.) In State v. Smith, 547 So. 2d 613 (Fla. 1989), this Court agreed that, based on this provision,

[1] "Since this act occurred after the amendment to the rule of lenity became effective (*see* Section 775.021, Florida Statutes (Supp. 1988), we AFFIRM as to this point." 574 So. 2d at 242.

> It is readily apparent that the legislature does not agree with our interpretation of legislative intent and the rules of construction set forth in *Carawan*.

547 So. 2d at 615. Thus,

> (4) By its terms and by listing only three instances where multiple punishment shall not be imposed, [footnote omitted] subsection 775.021(4) removes the need to *assume* that the legislature does not intend multiple punishments for the same offense, it clearly does not. However, the statutory element test *shall* be used for determining whether offenses are the same or separate. Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity.

547 So. 2d at 616 (emphasis original). Although this Court agreed that the amended §775.021 could not be retroactively applied to offenses committed before its effective date, it concluded that *Carawan* had been overridden for offenses occurring after that date. 547 So. 2d at 617.

Cognizant of this history, this Court specifically *declined* to consider the question presented to it by the First District Court of Appeal in Johnson v. State, 574 So. 2d 242. Instead this Court rephrased the question, completely omitting any reference to the statute, the interpretation of which is central to the resolution of the instant case:

> MAY A DEFENDANT BE 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.

Johnson v. State, 597 So. 2d at 799. The State's reliance on the original certified question, which did not include the precise issue herein raised and which was, in any event, never answered by this Court, is therefore misguided. Moreover, since this specific issue has never been directly addressed by this Court, the decisions of the various district courts of appeal cited by Petitioner in support of his position cannot be considered "contrary to Supreme Court precedent." Respondent's answer brief at 18. There are, instead, completely consistent with both the statute as amended in 1988 and with this Court's decisions in Sirmons v. State, 634 So. 2d 153, and State v. Anderson, 695 So. 2d 309.

Finally, contrary to the State's position, Respondent's answer brief at 17, no separate acts of taking were proven in the instant case. In order to resolve whether there are distinct and independent criminal acts or whether there is one continuous criminal act with a single criminal intent, courts should look to whether there was a separation of time, place, or circumstances between the alleged separate crimes. *See* Mixson v. State, 857 So. 2d 362, 365 (Fla. 1st DCA 2003). Such separation has been found, for instance, in where the defendant *left* burglarized premises after

taking property, including car keys, from it and *then* used the keys to steal the car which was parked outside. Hayes v. State, 803 So. 2d at 704: "the robbery of various items from inside the residence was sufficiently separate in time, place, and circumstance from Hayes' theft of the motor vehicle outside the victim's residence to constitute distinct and independent criminal acts," *id.*, since "The auto theft occurs not upon the taking of the keys but on the subsequent taking of the car." Hayes v. State, 748 So. 2d 1042, 1044-45 (Fla. 3d DCA 1999) *approved* 803 So. 2d 695.

But in the instant case, all the "stolen" property was gathered at a single time and place – from *inside* the victim's home. The theft of that property consequently constituted no more than a single criminal episode, regardless of how many separate items were moved. The classic case in this area, of course, is Hearn v. State, 55 So. 2d 559 (Fla. 1951), where eleven cattle were rounded up and taken from the same open range within a period of a few minutes. This Court held that only one theft was committed, even though the cattle belonged to different owners. "[T]he clear weight of authority if to the effect that the stealing of several articles at the same time and place as one continuous act or transaction is a single offense...." 55 So. 2d at 560.

The State posits that, since the victim's property was taken from different places and piled up by the sliding glass door, there must have been a separate intent and act to take each item. Respondent's answer brief at 17. But accepting this argument would result in permitting prosecution for any number of separate thefts, based solely on the total number of individual items taken during a burglary: picking up any individual object is, according to this analysis, a separate act with a separate intent.[2] It is exactly this result which the legislature has foreseen and forbidden by precluding conviction for offenses, like theft, which are mere degree variants of each other.

Consequently, Petitioner's convictions of both grand theft of property worth more than $5000 and of a firearm, each of which is a degree variant of the crime of theft, is precluded by the express terms of § 812.021(4) and the constitutional prohibition against double jeopardy. Appellant's conviction for one of those offenses must therefore be vacated and set aside.

[2] For instance, if someone stole ten shirts, each worth $30, the State could charge him with either ten counts of petit theft. But it could not charge him with one count of grand theft, since each "taking" is, according to the State's logic, a separate crime, not part of the same theft.

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 JULY, 2005.

_____
Of Counsel

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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Assistant Public Defender