IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FREDDRICK HINES,

Respondent.

CASE NO. SC08-1204

PETITIONER'S REPLY BRIEF

BILL McCOLLUM
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0045489

THOMAS D. WINOKUR
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 906336

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Parties (such as the State and Respondent, FREDDRICK HINES), emphasis, and the record on appeal will be designated as in the Initial Brief, and "IB" will designate Petitioner’s Initial Brief, "AB," will designate Respondent’s Answer Brief, each followed by any appropriate page number in parentheses.

ARGUMENT

ISSUE

IS REVERSAL OF A PRIOR CRIMINAL CONVICTION REQUIRED BECAUSE AN ISSUE OF ULTIMATE FACT NECESSARY TO THE OUTCOME OF THE TRIAL OF THE PRIOR CASE IS DETERMINED DIFFERENTLY IN A SUBSEQUENT PROSECUTION?

The State will address three matters Respondent raised in his brief.

1. The applicability of State v. Perkins, 349 So.2d 161 (Fla. 1977) to Hines I and Hines II[1]

Respondent notes that the State "has not made any argument that Perkins does not control the other two cases of the Hines triad," and that "the State agrees that the evidence related to the gun was inadmissible because of Perkins" in those cases (AB 8). These statements do not accurately represent the State's position on the matter.

When this Court accepted this case for review, the State considered challenging the ruling originally made in Hines I that the trial court erred in permitting the State to introduce the disputed evidence at trial. The State ultimately chose not to raise this challenge before this Court, primarily because the that issue was decided in Hines I rather than Hines III, and

[1]As in the initial brief, the State will identify the three DCA decisions in the case as "Hines I" (Hines v. State, 982 So.2d 22 (Fla. 1st DCA 2008)); "Hines II" (Hines v. State, 982 So.2d 1276 (Fla. 1st DCA 2008)); and Hines III (Hines v. State, 983 So.2d 721 (Fla. 1st DCA 2008). Hines III is the decision under review.

Hines I is not before this Court. While the Hines III court ultimately concluded that the disputed evidence was inadmissible, the import of the opinion, and the question it chose to certify to this Court, involved the fact that the acquittal occurred subsequent to trial. The State concluded that it was inappropriate to challenge a ruling that was in fact made in an earlier opinion. However, this conclusion should not, as Respondent suggests, be read as an endorsement of the opinion in Hines I.[2]

The State still disagrees with the opinion in Hines I. Under the applicable rule, the court must "examine the record of a prior proceeding [in which the defendant was acquitted], taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, 397 U.S. 436, 444 (1970). If so, then the prior acquittal has no preclusive effect. In other words, "the first prosecution must result in a jury verdict that necessarily determines some fact in favor of the defendant which fact is contrary and inconsistent with some fact the prosecution must necessarily prove in order to prevail in the second prosecution." Jaffe v. Sanders, 463 So.2d 318, 320 (Fla. 5th DCA 1984). See also State v. Wade, 435 So.2d

[2]The State did concede in Hines II that Hines I controlled and required reversal. Hines II. This was merely a recognition that a *prior* appeal had already decided the issue, rather than a concession that the issue was meritorious.

898 (Fla. 1st DCA 1983); State v. Short, 513 So.2d 679, 681 (Fla. 2d DCA 1987)("when a verdict of not guilty is rendered, the fact sought to be foreclosed must necessarily have been determined in the defendant's favor; it is not sufficient that the fact might have been determined in the first trial"); Hilaire v. State, 799 So.2d 403, 405 (Fla. 4th DCA 2001)(to exclude evidence under the principle of collateral estoppel and Perkins, the issue "must have been actually litigated in the prior proceeding, and the issue must necessarily have been decided in the prior proceeding").

Applying these standards, an examination of the record of Case No. 02-1045, taking into account the evidence and other relevant matter, clearly shows that the jury could have grounded its verdict on a matter other than that which Respondent sought to foreclose from consideration in the robbery trials.

The trial in Case No. 02-1045 was bifurcated to permit the jury to consider the grand theft of an automobile and possession of short-barreled shotgun charges without being informed that Respondent was a convicted felon, an element of the possession of firearm by convicted felon (PFCF) charge. The jury found Respondent guilty as charged on the former counts (XXXIII 309-310). Apparently, the jury specifically found that Respondent was in constructive, rather than actual, possession of the shotgun (XXXIII 312). After the verdict was rendered, the court informed the jury that they must also decide whether Respondent was guilty of the PFCF charge (XXXIII 310-11). The court

informed the jury that, because their earlier verdict found that Respondent only constructively possessed the shotgun, that they should only consider whether Respondent possessed the revolver for the PFCF charge. Id.

This instruction to the jury was a misstatement of law. The fact that the jury found that Respondent constructively possessed the shotgun had no bearing on whether he could be found guilty of PFCF for possessing it. See James v. State, 868 So.2d 1242, 1245 (Fla. 4th DCA 2004)("Possession of a firearm by a convicted felon can be proven either by an actual or a constructive possession theory"). The court erroneously limited the PFCF charge to possession of the revolver only, based on its apparent belief that PFCF required a finding of *actual* possession of the firearm.

Defense counsel reinforced this misstatement of law, explicitly arguing to the jury that they must decide "whether or not [Respondent] was ever in actual possession of a firearm." Id. Counsel noted that the revolver was found in the grill and that no witness testified that he saw Respondent with the revolver, and asked the jury "to come back and find that [Respondent] was not in actual possession of any firearm" (XXXIII 313).

The prosecutor did not correct the error, urging the jury to "return guilty verdict as to actual possession, at least with the .357 magnum." Id.

While the court's formal jury instructions indicated that PFCF could be proven with constructive possession (XXXIII 315-16), the jury appeared to be focused on actual possession, as

they asked to see the shorts that Respondent was allegedly wearing before the revolver was discovered in the grill, suggesting that they wanted to determine whether the revolver would fit in the pocket (XXXII 140, XXXIII 318). All argument from both parties focused on actual possession. As it was clear that the evidence was insufficient to show that Respondent was in actual possession of the revolver, under these circumstances it came as no surprise that the jury found Respondent not guilty of the PFCF count.

As stated, in order to exclude evidence related to the revolver in the grill, the jury in the earlier trial must **necessarily** have found that Respondent did not have access to the weapon, the fact for which admission of this evidence was offered to prove. A complete review of the prior trial demonstrates that the jury quite likely acquitted Respondent only because it found that the evidence did not sufficiently prove that he was in "actual possession" of the revolver, inasmuch as the State presented no witnesses in that trial testifying that they saw Respondent with the revolver. However, a finding that Respondent was in actual possession of the revolver on March 3, 2002, which was the specific fact that the jury rejected in the prior trial, was not necessary to establish that Respondent had access to the firearm.

For these reasons, the State respectfully disagrees with the First District's ruling in Hines I. Respondent's suggestion that the State "agrees" with Hines I is mistaken. The State does not

raise this matter in the reply brief in order for this Court to consider this as an issue under review; rather, the State mentions it only to rebut Respondent's suggestion that the State "agrees" that Perkins required exclusion of the evidence in Hines I and Hines II, which is an important part of Respondent's argument here.

It is for this reason that the State disagrees that simple "justice" dictates affirmance of the First District's opinion. While the State argues that Hines I does not control because the acquittal in this case occurred after the instant robbery trial, the State disagrees that Hines I was correctly decided, and contends that Respondent simply benefitted from judicial errors in the other trial, errors perpetuated by his counsel and not corrected by the prosecutor.

2. The order of the trials

Respondent dismisses the State's position as an attempt to take unfair advantage of a "timing anomaly," by creating an arbitrary distinction between acquittals occurring prior to the case in question, and acquittals occurring after the case in question. Respondent suggests that there is no principled reason to exclude the disputed evidence in all of his robbery trials; if it is inadmissible for one, it should be inadmissible for all.

While this argument has surface appeal, one need only scratch that to discover flaws. The first was amply addressed in the initial brief: the entire notion of "preclusive effect" is based on a prior judicial finding. Collateral estoppel, *res*

judicata, law of the case, and *stare decisis* are all well-established legal concepts based on the preclusive effect of *prior* rulings. The State's argument seeks to take advantage of a "timing anomaly" no more than any of these other principles of law.

Second, this is not merely a matter of "order of trial" as Respondent characterizes it. Respondent fails to consider that the acquittal for which the defendant may seek retroactive exclusion of evidence in an earlier trial may occur in another jurisdiction, or may simply be a completely unrelated prosecution. Respondent ignores the myriad of other contexts in which this issue could arise in which the "order of trial" is irrelevant to the matter.

Third, Respondent presumes too much when he suggests that the State intentionally chose the peculiar order of trial in this case. One glance at the record on appeal reveals that the trial preparation for Respondent's various cases was extraordinarily protracted, involving numerous judges, overlapping motions, et cetera. It is just as likely that the trials in Hines I and Hines II were delayed until after the possession of firearm/grand theft trial due to Respondent's own delays as to the State's trial strategy.

However, these matters relate to the unusual circumstances of this particular case, rather than to a rule of evidentiary law to be applied generally. Respondent could have been convicted of all six robbery charges, and years later, been acquitted on the

possession of firearm/grand theft trial charges. Under Respondent's reasoning, all six robbery convictions would be subject to reversal years afterward, for use of evidence that was admissible at the time of trial. That is the effect of the First District's ruling, and is the result the State opposes, irrespective of the particular facts of this case.

3. The relationship between Burr and Perkins

Respondent claims that Burr v. State, 576 So.2d 278, 280 (Fla. 1991) (Burr IV) is nothing more than this Court's routine application of Perkins, so that the State is mistaken in arguing that Burr IV constituted a confusion of the remand issues from the United States Supreme Court. By Respondent's reckoning, this Court was merely presented in Burr IV with the question whether Perkins required exclusion of the disputed evidence, and this Court held that it did. As Respondent sees it, all of the prior opinions in Burr are irrelevant to this clear and plain ruling.

The State disagrees. Respondent ignores the fact that this Court was presented with precisely the same question in the earlier Burr appeal, Burr v. State, 518 So.2d 903 (Fla. 1987) (Burr II). This Court held in Burr II that the subsequent acquittal of the collateral crime which had been admitted in Burr's murder trial did not require a new trial, because "[t]his Court will not render evidence retroactively inadmissible." Burr II, 518 So.2d at 905. It was until the United State Supreme Court remanded the case back to this Court, first to reconsider it in light of Johnson v. Mississippi, 486 U.S. 578 (1988), and

again reconsider it in light of Dowling v. United States, 493 U.S. 342 (1990), that this Court reversed its position in Burr II regarding the retroactive exclusion of evidence.

This series of events raises the following question: if Burr IV was nothing more than a routine application of Perkins (a 1977 case), what happened between Burr II (1987) and Burr IV (1991) to impel this Court to reverse its decision?

The answer is obvious: Burr III (Burr v. State, 550 So.2d 444 (Fla. 1989)) came between Burr II and Burr IV. Burr III had considered the effect of Johnson v. Mississippi, which reversed a death sentence based on the subsequent acquittal of a crime which the State had used as aggravating factor in a death sentence. Thus, it was Burr III's consideration of Johnson that had led this Court to conclude that "[e]vidence of the collateral act for which Burr received an acquittal is inadmissible under *Johnson*." Burr III, 550 So.2d at 446. Burr III had nothing to do with Perkins.

In Burr IV, this Court concluded that it erred in holding that Johnson rendered this evidence "inadmissible," but then held that Perkins did require its exclusion (although it also concluded that the admission of the disputed evidence, at least for the guilt phase, was harmless). This Court held that Dowling v. United States, 493 U.S. 342 (1990), did not alter this conclusion, because Perkins was a matter of state law.

Again, what this Court in Burr IV failed to explain is why Perkins required the retroactive exclusion of evidence in 1991,

but not in 1987 when it decided Burr II. The State submits that this Court in Burr IV overlooked the retroactivity aspect of Johnson that led to the remand from the United States Supreme Court in the first place, and then mistakenly applied Perkins without regard to this aspect. The State can imagine no other reason why the Burr IV Court reversed Burr II on the authority of Perkins, a case that predated Burr II by ten years.

Thus, the State disagrees that Burr was decided "on the bedrock of Perkins" (AB 9), and that the procedural history of Burr is irrelevant. The State respectfully suggests that this Court in Burr did not adequately address the critical distinction between Perkins and Burr, that the acquittal regarding the disputed evidence in Burr occurred subsequent to the case, as opposed to prior to the case, as in Perkins. This distinction is critical under well-established legal principles, and requires this Court to disapprove the First District's decision below.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 983 So.2d 721 should be disapproved, and the judgment entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Steven L. Seliger, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on January 6, 2009.

Respectfully submitted and served,

BILL McCOLLUM
ATTORNEY GENERAL

_____
TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

_____
THOMAS D. WINOKUR
Assistant Attorney General
Florida Bar No. 906336

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L08-1-17836]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Thomas D. Winokur
Attorney for State of Florida

[C:\USERS\CRIMINAL\PLEADING\08117836\HINES-BR.WPD --- 1/9/09,11:08 AM]