IN THE SUPREME COURT OF THE STATE OF FLORIDA

HORACE McKINNEY,

Petitioner,

v.

Case No. SC10-140
5th DCA No. 5D08-1862

STATE OF FLORIDA,

Respondent.

______________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

The district court of appeal properly affirmed McKinney's convictions for both grand theft and robbery with a firearm, both of which arose out of a single taking of cash and a cell phone at gun-point. Applying the analysis mandated by this Court's decision in Valdes v. State, 3 So. 3d 1067 (Fla. 2009), the Fifth District properly concluded that McKinney's convictions for both offenses were no longer prohibited by statute. As the exceptions of section 775.021(4)(b) are inapplicable in this case, the Fifth District's decision should be affirmed. The decision of the Fourth District in Shazer v. State, 3 So. 3d 453 (Fla. 4th DCA 2009), holding that the defendant's dual convictions for robbery with a deadly weapon and grand theft violated double jeopardy, should be disapproved.

ARGUMENT

PETITIONER'S CONVICTIONS FOR GRAND THEFT AND ROBBERY WITH A FIREARM DO NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES.

The issue before this Court involves a question of double jeopardy. Specifically, this Court must resolve the question of whether, in light of the decision in Valdes v. State, 3 So. 3d 1067 (Fla. 2009), Petitioner's dual convictions for robbery with a firearm and grand theft, arising from a single taking of cash and a cell phone at gun-point, violate double jeopardy. The Fifth District Court of Appeal in McKinney v. State, 24 So. 3d 682 (Fla. 5th DCA 2009), concluded that no double jeopardy violation occurred from the dual convictions and certified conflict with Shazar v. State, 3 So. 3d 453 (Fla. 4th DCA 2009), which reached the opposite conclusion. This Court has jurisdiction. See Art. V, § 3(b)(4), Fla. Const.

A double jeopardy claim based upon undisputed facts presents a pure question of law and is reviewed *de novo*. Pizzo v. State, 945 So. 2d 1203, 1206 (Fla. 2006).

McKinney argues that robbery and theft are simply aggravated forms of the same underlying offense. Thus, he contends, section 775.021(4)(b)2 precludes his convictions for both of these offenses as they constitute "offenses which are degrees of the same offense as provided by statute." Respondent asserts that, based

upon double jeopardy law, and in particular this Court's opinion in Valdes, Petitioner's argument lacks merit.

There is no constitutional prohibition against multiple punishments for different offenses arising out of the same criminal transaction as long as the Legislature intends to authorize separate punishments. Valdes v. State, 3 So. 2d at 1069 (citing Hayes v. State, 803 So. 2d 695, 699 (Fla. 2001)); Borges v. State, 415 So. 2d 1265, 1267 (Fla. 1982)("The Double Jeopardy Clause 'presents no substantive limitation on the legislature's power to prescribe multiple punishments,' but rather, 'seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense.' ")(quoting State v. Hegstrom, 401 So. 2d 1343, 1345 (Fla. 1981)). In this case, there is no clear statement of legislative intent to authorize or to prohibit separate punishments for violations of sections 812.014 and 812.13. Because there is no clear legislative intent, the next inquiry becomes whether separate punishments for the two offenses violate the Blockburger[1] test, as codified in Florida Statute section 775.021(4).

The Legislature did specifically state that it was its intent to convict and sentence defendants for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity to determine

[1] Blockburger v. United States, 284 U.S. 299 (1932).

legislative intent. See 775.021(4)(b), Fla. Stat. (2007). Offenses are considered separate if they pass the two-pronged test of section 775.021(4)(a), Florida Statutes. First, each offense must "require[ ] proof of an element that the other does not." § 775.021(4)(a).[2] Second, even if the charges contain different elements, to be considered separate offenses none of the exceptions to the legislature's intent, contained in section 775.021(4)(b), can apply.

An analysis of the robbery and grand theft statutes demonstrates that each contains at least one element that the other does not, to-wit: robbery requires force, whereas grand theft requires proof of the value of the property taken. §§ 812.13 & 812.014, Fla. Stat. While Petitioner suggests that this Court should ignore the element of grand theft regarding the value amount, to do so would directly contradict the elemental analysis mandated under the law. The fact that there is a value element in grand theft sets the offense apart from the crimes of robbery or of

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[2] Section 775.021(4)(a) provides:

> Whoever, in the course of one criminal transaction of episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be separately for each criminal offense.... 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.

petit theft. Insko v. State, 969 So. 2d 992, 1000 (Fla. 2007). See also Fla. Std. Jury Instr. (Crim.) 15.1.

Moreover, to adopt McKinney's reasoning, this Court would have to apply the "same conduct/subsumed within" analysis which was rejected in United States v. Dixon, 509 U.S. 688 (1993), recognizing that a "same conduct" test is inconsistent with Blockburger. Likewise, McKinney's approach is akin to the "primary evil" test specifically rejected in Valdes.

Having satisfied the first portion of the double jeopardy analysis by demonstrating each of the two charged offenses each contains an element the other charge does not, separate convictions for these two offenses are authorized unless the offenses fit within one of the three exceptions set forth in section 775.021(4)(b). Section 775.021(4)(b) provides:

> (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 legislative intent. Exceptions to rule of construction are:
>
> 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.

Section 775.021(4)(b)1, which concerns offenses that "require identical elements of proof," does not apply here. As stated above, both grand theft and robbery each contain an element of proof not required by the other. Hence, although both crimes occurred based on the same act, the offenses themselves do not require identical elements of proof. Subsection (4)(b)3 applies only in circumstances where one offense is a necessarily included lesser offense of the other. State v. Florida, 894 So. 2d 941, 947 (Fla. 2005), overruled in part by Valdes v. State, 3 So. 3d 1067 (Fla. 2009). Necessarily included lesser offenses are those crimes which are always committed, as a matter of course, when a greater crime is committed. See State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986) (stating a necessarily included lesser offense "is, as the name implies, a lesser offense that is always included in the major offense"). Grand theft is not a necessarily lesser included offense of robbery. See Fla. Std. Jury Instr. (Crim.) 15.1.

In Valdes, this Court re-examined double jeopardy, specifically addressing the application of section 775.021(4)(b)2, and found that jurisprudence required the adoption of the approach set forth in Justice Cantero's special concurrence in State v. Paul, 934 So. 2d 1167 (Fla. 2006). In so doing, this Court held section

775.021(4)(b)2 prohibits "separate punishments for crimes arising from the same criminal transaction only when the *statute* itself provides for an offense with multiple degrees." Valdes, 3 So. 3d at 1068. Utilizing this new standard, the Fifth District Court found that McKinney's dual convictions for robbery and grand theft did not violate double jeopardy as robbery is not a degree of theft, nor is theft a degree of robbery. McKinney, 24 So. 3d at 684. Respondent avers that the Fifth District Court properly applied Valdes.

Thus, the focus in this case, as it was in Sirmons v. State, 634 So. 2d 153 (Fla. 1994), is subsection (4)(b)(2) - whether the offenses are degrees of the same offense as provided by statute. Based upon the analysis set forth in Valdes, that answer, as applied to the two convictions at issue in this case, is "no."

In Valdes, this Court concluded, in accord with Justice Cantero in his special concurrence in Paul:

> ... the plain meaning of the language of subsection (4)(b)(2), providing an exception for dual conviction for '[o]ffenses which are degrees of the same offense as provided by statute,' is that '[t]he Legislature intends to disallow separate punishments for crimes arising from the same criminal transaction only when the *statute* itself provides for an offense with multiple degrees.'

Valdes, 3 So. 2d at 1076 (quoting Paul, 934 So. 2d at 1176 (Cantero, J., specially concurring))(emphasis in the original).

Without conducting a legal analysis, the Fourth District Court of Appeal, in Shazer v. State, 3 So. 3d 453 (Fla. 4th DCA 2009), concluded dual convictions for robbery with a deadly weapon and grand theft violated double jeopardy. In so finding, the court cited to Ingram v. State, 928 So. 2d 1262 (Fla. 4th DCA 2006). Ingram, however, relies upon Sirmons, which is no longer valid in light of this Court's more recent opinion in Valdes.

Under the now-applicable Valdes test, the two offenses at issue, robbery and grand theft, do not satisfy the second statutory exception of 775.021(4)(b)2 because the two offenses are found in separate statutory provisions, neither offense is an aggravated form of the other, and they are not degree variants of the same offense. The opinion of the Fifth District Court should be approved and the Fourth District Court's opinion in Shazer should be disapproved.

CONCLUSION

Based upon the authorities and argument presented herein, Respondent respectfully requests this Honorable Court affirm the decision of McKinney v. State, 24 So. 3d 682 (Fla. 5th DCA 2009), in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished by delivery to Assistant Public Defender Rebecca M. Becker, counsel for Petitioner, whose office is located at 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, this 12th day of April, 2010.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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APPENDIX

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