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IN THE SUPREME COURT OF FLORIDA

JESSICA ANUCINSKI, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC12-1281

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

An information was filed on December 18, 2009, alleging that Anucinski committed grand theft by knowingly obtaining property of Tiffany & Co. valued at three hundred dollars or more and committed dealing in stolen property by trafficking in property that Anucinski knew was stolen. (R:9) During the plea hearing, when explaining its offer of 18 months in prison, the State provided the following statement:

> Anucinski walked into Tiffany's, stole a $2,500 ring right in the middle of the day and then pedaled her bike down to the pawnshop and pawned it for an amount of $400, which is more than what we normally see in here on a dealing in stolen property or a pawn, $400. So the State believes it's within its right to ask for State Prison based on the nature of the offense. I mean, a $2,500 ring, it's pretty expensive.

(T:10) The pawn shop was called Pine Ridge Pawn and Jewelry and was located on Pine Ridge Road. (T:14) Tiffany's was located in Waterside Shops. (T:15) Anucinski entered a plea of no contest and the court adjudicated her guilt of both crimes. (R:32-33) Anucinski was sentenced to one year in jail followed by six years in prison on the dealing in stolen property and one year in jail followed by four years probation on the grand theft, to be served concurrently. (R:75-76,92-98)

In the briefs before the Second District Court of Appeal, Anucinski argued that statutory double jeopardy from section

812.025 and Hall v. State, 826 So. 2d 268 (2002) applied to her plea on the grand theft and dealing in stolen property. The State argued that preservation and waiver from double jeopardy principles applied to the plea instead. The Second District agreed with Anucinski and, on March 7, 2012, remanded the case back to the trial court for a hearing to determine which crime should be vacated. The State filed a motion for rehearing, which only addressed the court's remedy.[1] The Second District granted the motion for rehearing, finding that the correct remedy was to vacate the lesser offense - the grand theft.

[1] The Second District, and Anucinski, in her brief to this Court, have stated that the State, by only filing a rehearing on remedy, have impliedly conceded that Anucinski's convictions violate double jeopardy. The State has never conceded this point.

SUMMARY OF THE ARGUMENT

The primary issue before this Court, raised in the initial brief and highlighted in the Second District's opinion, is the remedy courts should use when applying statutory double jeopardy, such as that found in section 812.025. Because statutory double jeopardy follows the same principles as constitutional double jeopardy, the same principles of law should apply when analyzing both cases. From the application of the statute to devising a remedy, constitutional double jeopardy provides a framework for statutory double jeopardy analysis. Thus, the appropriate remedy in statutory double jeopardy cases, like constitutional double jeopardy cases, is to vacate the lesser offense.

Yet a secondary issue exists in this case: whether the statute should apply at all to the facts. As raised in the State's answer brief in the appellate court, Anucinski has the burden of proof to show that the facts form one single scheme or course of conduct. The only facts presented were from a generic fact statement at the plea hearing. Anucinski cannot show from the face of the record that Count I and Count II were actually part of one scheme or course of conduct instead of two. Also, by the terms of her plea, Anucinski waived the ability to raise a double jeopardy claim.

ARGUMENT

ISSUE

WHETHER THE APPELLATE COURT ERRED IN VACATING THE LESSER INCLUDED OFFENSE UNDER THE DOUBLE JEOPARDY STATUTE AND WHETHER THE TRIAL COURT ERRED IN CONVICTING THE DEFENDANT OF GRAND THEFT AND TRAFFICKING IN STOLEN PROPERTY AFTER SHE ENTERED A PLEA. (restated by Appellee)

Anucinski claims that she was improperly convicted of grand theft and dealing in stolen property. She further argues that she should receive a new sentencing hearing where she can provide evidence on which crime should be vacated, the grand theft or dealing in stolen property. The state respectfully disagrees. The proper remedy for statutory double jeopardy, like the proper remedy for constitutional double jeopardy, is vacating the lesser of the two offenses. Furthermore, Anucinski has failed to overcome her burden of proving her crimes were actually part of one single scheme or course of conduct. Anucinski entered into a plea and did not object to her convictions. Anucinski cannot overcome the presumption that the information was legal and prove that fundamental error occurred.

A. STATUTORY DOUBLE JEOPARDY

Double jeopardy protection comes from three different sources: constitutional, statutory or common law. 21 Am. Jur. 2d Crim. Law § 275. The constitutional protection against double jeopardy stems from the Fifth Amendment of the United

State Constitution and states that "no person shall be... subject for the same offense to be twice put in jeopardy of life or limb." The analysis and application of constitutional double jeopardy stems from Blockberger v. United States, 284 U.S. 299 (1932).

Jurisdictions have provided additional double jeopardy protection through statutes and through common law. Under statutory and common law double jeopardy, it is not a constitutional provision that prevents conviction but a determination by the legislature or the court that dual convictions should not occur. One common example is a joinder statute which requires the state to bring a charge if it had knowledge of the crime and could have been brought during the first prosecution. See State v. Schroeder, 105 P.3d 1237 (Kan. 2005). Another common example is a successive prosecution statute that prevents a state from prosecuting a defendant for a crime if he has already been prosecuted for the same crime in another jurisdiction. See Booth v. Clary, 635 N.E.2d 279 (N.Y. 1994). When analyzing statutory and common law double jeopardy provisions, courts still apply Blockburger principles. See State v. Aune, 363 N.W.2d 741 (Minn. 1985).

The Florida Legislature has provided supplemental double jeopardy protection through section 812.025. The statute provides,

> Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts.

§ 812.025. Thus, a prosecutor may charge a defendant with theft and dealing in stolen property, but a defendant cannot be guilty of both if the crimes occurred in one scheme or course of conduct. In Hall v. State, 826 So. 2d 268 (Fla. 2002),[2] this Court determined that, although the statute was written in terms of "trier of fact" and "guilty verdict," the statute also applied to pleas.

B. REMEDY

District courts have overwhelming determined that the proper remedy, when a defendant has been incorrectly convicted of theft and dealing in stolen property, was to vacate the lesser of the two offenses. The first case to make such a determination was Ridley v. State, 407 So. 2d 1000, 1002 (Fla.

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[2] The State questions the continuing viability of this decision. The plea process provides defendants and the prosecutor with ultimate flexibility and bargaining power, including the ability to bargain away rights, like double jeopardy rights. See Novaton v. State, 634 So. 2d 607, 609 (Fla. 1994). A defendant can even bargain away his right to appeal if he believes it is in his best interest. See Stahl v. State, 972 So. 2d 1013, 1015 (Fla. 2d DCA 2008) ("[I]t is well established that a defendant can waive his statutory right to a direct appeal contained in a preconviction plea agreement.").

5th DCA 1981). The court decided on such a remedy because it found the dealing/theft statute analogous to constitutional (or Blockburger) double jeopardy. Id.

As in constitutional double jeopardy, vacating the grand theft sentence often does not effect the remaining sentences and saves judicial time and effort. See Poole v. State, 67 So. 3d 431, 432 (Fla. 2d DCA 2011). As in constitutional double jeopardy, judicial economy and effectiveness mandates that the lesser offense be vacated. "[I]n order to save judicial time and effort[,]" the appropriate remedy is to vacate the conviction and sentence for grand theft and affirm the balance of the judgment. Simon v. State, 840 So. 2d 1173 (Fla. 5th DCA 2003). See also Mohansingh v. State, 824 So. 2d 1053, 1054 (Fla. 5th DCA 2002) ("to save judicial time and effort..."). In Blackmon v. State, 58 So. 3d 343, 347 (Fla. 1st DCA), rev. granted, 67 So. 3d 198 (Fla. 2011), the court reversed the lesser offense and stated that such a remedy, "better respects the jury's determination that the state met its burden to prove the greater offense and also avoids the need to speculate what verdict the jury might have returned had it been required to choose between the greater and lesser offenses."

Constitutional double jeopardy is the correct analogy for devising a remedy for statutory double jeopardy cases. Whether a constitutional prohibition or a statutory prohibition on dual

convictions, both end in the same result for a defendant and should have the same remedy. In both situations, the appellate court is faced with the same dilemma: it must decide which of the convictions should stand. Double jeopardy, merger, common law, and section 812.025 all involve prohibitions on dual convictions and, thus, the courts have applied the same remedy to all four doctrines - vacating the lesser offense.

Appropriately so, district Courts have consistently held that the proper remedy is to dismiss the lesser, usually resulting in a sentence for dealing in stolen property. Wilson v. State, 884 So. 2d 74 (Fla. 2d DCA 2004); Drew v. State, 861 So. 2d 110 (Fla. 1st DCA 2003); Bishop v. State, 718 So. 2d 890 (Fla. 2d DCA 1998); T.S.R. v. State, 596 So. 2d 766 (Fla. 5th DCA 1992); Duncan v. State, 503 So. 2d 443 (Fla. 2d DCA 1987); Repetti v. State, 456 So. 2d 1299 (Fla. 2d DCA 1984); Rife v. State, 446 So. 2d 1157 (Fla. 2d DCA 1984). This Court approved such a result in Victory v. State, 422 So. 2d 67, 68 (Fla. 2d DCA 1982), approved by Hall v. State, 826 So. 2d 268 (Fla. 2002), when the Second District vacated the dealing in stolen property charge.

For example, if applying the statutory double jeopardy provision to the facts of this case,[3] Anucinski was sentenced to

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[3] The State does not concede that section 812.025 applies to

one year in prison followed by four years probation on the grand theft charge and one year in prison followed by six years probation on the dealing in stolen property charge, to be served concurrently. Dealing in stolen property is a second degree felony and grand theft is a third degree felony. (R:9) The proper remedy would be for the Second District (or now this Court) to vacate the lesser offense, the grand theft, and remand to the trial court to correct the judgment and sentence order.

Anucinski urges this Court to reverse for an evidentiary hearing before the trial court based on language from Hall. In the conclusion paragraph, after approving Victory, supra, p.8, this Court stated that one of the convictions should be reversed and the defendant should be resentenced. Hall, 826 So. 2d at 272. Anucinski latches onto this language as proof that this Court intended defendants to have an opportunity to have an evidentiary hearing on remand. Yet, Hall says no such thing. In fact, Hall follows Blockburger analysis by looking to legislative intent to determine whether the double jeopardy statute applies to pleas. Id. at 270-71. Likewise, Hall shows no factual support for which offense is a lesser offense or if the offenses are concurrent or consecutive. And continuing with the line of Blockburger analysis, this Court would have to

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Anucinski's case.

remand the case back to the lower court to vacate the lesser of the two offenses and determine how (or if) the lesser sentence effected the other sentences. See, e.g., Repetti v. State, 456 So. 2d 1299 (Fla. 2d DCA 1984) (remanding for new sentencing hearing because the vacated sentence effected the scoreseheet).

Furthermore, if Anucinski wanted to have an evidentiary hearing, she should not have entered a plea. By entering her plea of no contest and being adjudicated guilty of these crimes, Anucinski has agreed that she committed, or at the very least that she would not contest her guilt as to both crimes. Now returning to the trial court to determine which crime she is "more guilty of" would be a waste of judicial resources and defeat the purpose of her plea because she is guilty of both. Anucinski should not now be able to contest that determination. To allow her to have an evidentiary hearing would defeat the goals of judicial efficiency and legal predictability that pleas provide.

C. FUNDAMENTAL ERROR

Issues of double jeopardy, because they require purely legal determinations, are reviewed by appellate courts de novo. State v. Florida, 894 So. 2d 941, 945 (Fla. 2005). Yet an unpreserved issue of double jeopardy must still be reviewed for fundamental error. See State v. Johnson, 483 So. 2d 420, 422 (Fla. 1986).

Fundamental error goes to the foundation of the case, the merits of the cause of action or the heart of the judicial process, resulting in a miscarriage of justice. Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994). Fundamental error should be applied only when justice demands. Nesbitt v. State, 889 So. 2d 801, 803 (Fla. 2004). "A judgment or sentence may be reversed on appeal only when an appellate court determines ***after a review of the complete record*** that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error." § 924.051(2), Fla. Stat. (emphasis added). A defendant asserting fundamental error bears the burden to demonstrate the State could not have obtained the conviction but for the assistance of an error that vitiated the fairness of the proceedings.

D. ONE SCHEME OR COURSE OF CONDUCT

In most cases involving the charges of grand theft and dealing in stolen property, the State must show that the grand theft is terminated before the dealing in stolen property begins to avoid double jeopardy implications. See § 812.025, Fla. Stat. Because Anucinski complains about her plea, the burden shifts from the State to Anucinski. See, e.g., U.S. v. Broce, 488 U.S. 563, 576 (1989) (determining that a defendant must prove that the multiple conspiracies are in fact one single conspiracy). Further emphasizing Anucinski's burden is the lack

of objection in the trial court. Anucinski bears the burden of proving that entering into a plea for the two crimes constitutes fundamental error.

The default rule of law is that a plea will waive double jeopardy. See Novaton v. State, 634 So. 2d 607, 609 (Fla. 1994). If a defendant wishes to remove a conviction after a plea based on double jeopardy, she must prove three things: 1) the plea must be "straight up," 2) the double jeopardy violation must be apparent from the record, and 3) there cannot be an express waiver on the record. Id. Anucinski has waived her right to raise this double jeopardy issue because she cannot show the double jeopardy violation occurred from the record and because her plea form waived her rights to raise a double jeopardy violation.

From the record, Anucinski has not proven that the grand theft and dealing in stolen property were actually one event instead of separate courses of conduct as charged in the information. A very general factual statement was provided by the State, during the plea hearing, as to both counts. The general factual statement did not provide enough details to contradict the information as charged, i.e., that there were separate schemes for each crime. Cf. Kilmartin v. State, 848 So. 2d 1222 (Fla. 1st DCA 2003) (finding that the record provided sufficient factual information to show the plea for

dealing in stolen property and grand theft were part of one scheme or course of conduct). A trial court would have to gather additional factual information, such as time, place and circumstance of offence, to rule on such a double jeopardy claim. Dean v. State, 644 So. 2d 122, 123 (Fla. 2d DCA 1994) (citing Callaway v. State, 642 So. 2d 636, 639 (Fla. 2d DCA 1994)). Such fact gathering can be accomplished under the criminal rules through a motion for postconviction relief. This double jeopardy claim is not appropriate for an attack on direct appeal without preservation in the trial court.

Anucinski had the opportunity to go to trial, present evidence and argue double jeopardy before the trial court; yet, she chose to relinquish that right by entering a plea. See Broce, 488 U.S. at 571. In exchange, Anucinski received a 1 year sentence followed by 6 years probation (4 years probation on the grand theft) on two counts where she could have received up to 20 years in prison.

Furthermore, the terms of Anucinski's plea form waived her right to raise her double jeopardy claim. The form lists multiple rights that she gave up by entering her plea, including the right to be tried by a jury, the right to remain silent, and the right to have a court reporter record the proceedings. (R:30) Anucinski also gave up her "right to appeal all matters relating to the judgment and sentence to a higher court,

including the issues of [her] guilt and/or innocence[.]" (R:30) By agreeing to this term, Anucinski waived the right to raise her statutory double jeopardy claim on appeal. So even though Anucinski cannot prove, from the face of the record, that a double jeopardy violation occurred, she has also waived this claim by entering a plea. The trial court appropriately convicted Anucinski of dealing in stolen property and grand theft.

E. CONCLUSION

The state respectfully requests that this Court affirm, in part, the Second District's opinion, finding that the proper remedy in cases of statutory double jeopardy is to vacate the lesser of the two offenses. The State also submits this Court should reverse, in part, the Second District's opinion, and find the trial court properly allowed the State and Anucinski to enter into this plea on both counts, because Anucinski has not overcome her burden of proof.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Alisa Smith, Assistant Public Defender, asmith@pd10.state.fl.us, cclark@pd10.state.fl.us, appealfilings@pd10.state.fl.us, this 29th day of May, 2013.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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