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IN THE SUPREME COURT OF FLORIDA

JESSICA PATRICE ANUCINSKI,	:	
Petitioner,	:	
vs.	:	Case No. SC12-1281
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

> As observed by the Second District, the facts are simple: Anucinski entered an unbargained-for, open plea to the trial court on charges of third-degree grand theft and dealing in stolen property (a second-degree felony). The two charges arose from a single scheme or course of conduct: Anucinski stole a ring from the Tiffany & Co. store located at a mall, biked to a pawn shop located on a nearby street, and pawned the ring the same day.

Anucinski v. State, 90 So. 3d 879, 880 (Fla. 2d DCA 2012). (Appendix A); (R. 9-10, 30-31, T. 9, 12-15, 17-19, S. 92-94). The issue here concerns the appropriate legal remedy for violating section 812.025, Florida Statutes (2009), which bars convictions for both grand theft and dealing in stolen property arising from a single scheme or course of conduct following an open plea to the trial court.

The Second District agreed with the well-settled precedentthat, as a matter of fundamental error, Anucinski could not beconvicted of both grand theft and dealing in stolen property.

Anucinski v. State, 90 So. 3d at 880. And, the[1] state (by its motion for rehearing filed with the Second District) "implicitly agreed that both convictions cannot stand. . . ." *Id.* at 881 n. 1.

The Second District reversed and remanded with directions that the trial court vacate the lesser conviction and resentence Anucinski. *Id.* In doing so, the Second District rejected the legal remedy proposed by Anucinski, which was grounded on this court's decision in ***Hall v.*** State, 826 So. 2d 268 (Fla. 2002), to remand the matter to the trial court for "a factual determination as to whether she was a 'common thief' who should be convicted of grand theft or a 'trafficker in stolen property' who should be convicted of dealing in stolen property". *Id.* at 881.[2]

1 Initially the Second District agreed with Anucinski that the convictions were error AND the proper legal remedy was for the trial judge to determine which conviction to vacate. In response to the prosecutor's motion for rehearing, however, the Second District withdrew that opinion, issuing the opinion attached as Appendix A, holding the dual convictions were error BUT directing that grand theft be vacated.

2 Similar, but factually and procedurally different, issues are pending before this court, in *Williams v. State*, 66 So. 3d 360 (Fla. 2d DCA 2011), rev. granted, *Williams v. State*, SC11-1543 (Fla. September 22, 2011) and *Blackmon v. State*, 58 So. 3d 343 (Fla. 1st DCA 2011), rev. granted, 67 So. 3d 198 (Fla. 2011), concerning the legal remedy following dual convictions after jury trial of theft and dealing in stolen property.

ISSUE STATEMENT

The legal remedy for improperly convicting Anucinski, after an open, unbargained-for plea, of theft and dealing in stolen property, contrary to section 812.025, Florida Statutes (2009) is to remand that decision to the trial court to decide if she is a "common thief" guilty of theft, or a trafficker in stolen goods. The Second District entered an order vacating the less serious offense, consistent with the remedy for double jeopardy violations. Was the remedy employed by the Second District inconsistent with the legislative intent of section 812.025 and this court's decision in *Hall v. State*, 826 So. 2d 268, 271 (Fla. 2002)?

SUMMARY OF THE ARGUMENT

The legal remedy of vacating the less-serious offense, employed by the Second District in resolving the error of convicting Anucinski of theft and dealing in stolen property, improperly converts every common thief into a trafficker of stolen goods. It is also inconsistent with (1) legislative intent, (2) the binding precedent of *Hall,* and (3) the premise that fact-finding is ill-suited for appellate courts. Section 812.025[3] and *Hall* require that finders of fact determine whether defendants (like Anucinski) are "common thieves" stealing and selling property for "personal use" and guilty of theft, or members of a "criminal network of thieves and fences who knowingly deal in the redistribution of stolen property" and guilty of dealing in stolen property *Id.*

Section 812.025, unlike double jeopardy, prohibits convictions of theft and dealing in stolen property, crimes that

3 "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."

address two different evils, none subsumed by the other, and require determinations of defendant "intent." Vacating the less-serious offense (which in many instances is difficult without an evidentiary hearing and resentencing) is simply an inappropriate legal remedy, inconsistent with the legislative intent of section 812.025 and *Hall*, and as impracticable as allowing appellate judges, in other instances, to make findings of facts.

ARGUMENT

I. The appropriate remedy for violating section 812.025 after an open plea is to remand for the trial judge to make the necessary factual determination as to whether Anucinski is a "common thief" or "trafficker in stolen property" and resentence her. This remedy is consistent with the legislative intent of the statute and this court's decision in *Hall*.

Dual-conviction errors, under section 812.025, Florida Statutes, should be remanded for resolution and evidentiary hearing with the trial court for two reasons. First, the remedy is consistent with the legislative intent of the statute as found by this court, in *Hall v. State*, 826 So. 2d 268, 271 (Fla. 2002), which remanded for the trial judge to decide which conviction to vacate following an unbargained-for plea and conviction of theft and dealing in stolen property arising from the same scheme or course of conduct.[4] Second, and unlike a pure double jeopardy analysis, determining whether defendants (like, Anucinski) are common thieves or traffickers in stolen goods concern factual determinations, which like sentencing decisions, are best left to the trial courts.

4 Even if the statute was ambiguous, the rule of lenity requires that any ambiguity or situations in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense. Fla. Stat. § 775.021(1)(2009); *Kasischeke v. State*, 991 So. 2d 803, 813 (Fla. 2008).

The Second District, in *Anucinski*, acknowledged the binding precedent of *Hall*, and its "discretionary language" that the trial judge decides which conviction (or convictions) to vacate. *Anucinski*, 90 So. 3d at 881-882. But rather than apply *Hall*, the Second District attempted to "reconcile its language" with other, post-*Hall* cases that ignored the *Hall* precedent and legislative intent, dispensed with trial court discretion, and employed the vacating-of-the-less-serious-offense remedy. Two of the cases relied on by the Second District, *Williams* and *Blackmon*, are currently pending before this court to determine the appropriate legal remedy for resolving improper dual convictions after jury trial. *See Anucinski*, 90 So. 3d at 882 (citing *Blackmon v. State*, 58 So. 3d 343 (Fla. 1st DCA 2011), rev. granted, 67 So. 3d 198 (Fla. 2011), *Williams v. State*, 66 So. 3d 360 (Fla. 2d DCA 2011), rev. granted, 70 So. 3d 588 (Fla. 2011) and *Poole v. State*, 67 So. 3d 431 (Fla. 2d DCA 2011)). In reconciling these cases, the Second District too narrowly construed and applied the *Hall* decision, misinterpreted the plain meaning of section 812.025, Florida Statutes (2009), and improperly employed a "double jeopardy" analysis to conclude that "no factual determination" was left to be made by the trial judge and "in an effort to foster judicial

economy" directed the trial judge to vacate the grand theft.

A. Section 812.025 prohibits dual convictions for theft and dealing in stolen property because each crime addresses "two different evils," requiring a factual determination about the "intent" of the defendant, a determination best left to the trial courts (i.e., trial judges and juries).

Separate and distinct from constitutional double jeopardy analysis and principles, Florida law prohibits dual convictions of theft and dealing in stolen property connected by a single scheme or course of conduct:

> 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.

Fla. Stat. § 812.025 (2009). The language of this statute has not changed since 1977. *See* Laws 1977, c. 77-342, § 9.

After examining the legislative history and the intent of section 812.025, Florida Statutes, the Florida Supreme Court held that that provision applied to convictions after a plea as well as after a jury trial. ***Hall v. State***, 826 So. 2d 268, 271 (Fla.

2002)(finding "the same legislative rational militate against allowing a defendant to plead guilty to inconsistent counts, i.e., stealing property with intent to use under 812.014 or stealing property with intent to traffic in stolen goods pursuant to section 812.019."), approving, *Victory v. State*, 422 So. 2d 67 (Fla. 2d DCA 1982). The Florida Supreme Court, in *Hall*, remanded for the trial judge to determine which conviction to vacate and resentence Hall; the *Hall* court did not simply vacate the lesser offense. *Hall*, 826 So. 2d at 272.

In arriving at its decision, the *Hall* Court examined the legislative history of the Florida Anti-Fencing Act[5] and the "correlation between section 812.014, the theft statute, and section 812.019 the dealing in stolen property statute." *Id*. at 270.

> Section 812.019, which is part of the Florida Anti-Fencing Act, Chapter 77-342, Laws of Florida, is intended to punish those who knowingly deal in property stolen by others. [*State v.] Camp*, 579 So. 2d [763, 764 (Fla. 5th DCA 1999)]. The basic scenario envisions a person who steals an then sells the stolen property to a middleman (the "fence") who in turn resells the property to a third person. *See generally* G. Robert Blakely & Michael Goldsmith, *Criminal Redistribution of Stolen*

5 Section 812.014, 812.019, and 812.025, contained within the Florida Anti-Fencing Act of 1977. *Hall*, 826 So. 2d at 270 n. 5.

Property: The Need for Law Reform, 74 Mich. L. Rev. 1512 (1976). The statute punishes both the initial thief and the fence. *See* § 812.012(7), Fla. Stat. (1989). According to its legislative history, this law is

> an adaptation of the Model Theft and Fencing Act, consistent with the organization of Florida law, as proposed by G. Robert Blakely and Michael Goldsmith in their exhaustive study on stolen property law. Blakely and Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 Mich. L. Rev. 1512 (1976). That article focuses on the receivers of stolen property as the central figures in theft activities, and that the law should be *focused on the criminal system that redistributes stolen goods.* Staff of Fla. H.R. Select Comm. on Organized Crime, CS for SB 1431 (1977) Memorandum (April 7, 1977). *State v. Camp*, 596 So. 2d 1055, 1057 (Fla. 1992)(alteration in original).

Hill, 826 So. 2d at 270-271.

The *Hall* Court determined that the dealing in stolen property statute and the theft statute addressed "two different evils." ***Id.*** at 271. Dealing in stolen property was directed at "the criminal network of thieves and fences who knowingly deal in the redistribution of stolen property." ***Id.*** The theft statute was "directed toward those persons who steal for personal use and for

whom redistribution is incidental." ***Id.*** Theft for personal use, even if the "normal use is achieved by some form of transfer, distribution, dispensation, or disposition of the item" constitutes only theft, not the more serious crime of trafficking or dealing in stolen property. ***Id***. (citing ***State v. Camp***, 596 So. 2d at 1057, quoting ***Grimes v. State***, 477 So. 2d 649, 650 (Fla. 1st DCA 1985).

The ***Hall*** Court recognized that section 812.025 allowed the State to charge defendants with theft and dealing in stolen property arising from a single scheme or course of conduct, "but the trier of fact must then determine whether the defendant is a common thief who steals property with the intent to appropriate said property to his own use or to the use of a person not entitled to the use of the property or whether the defendant traffics or endeavors to traffic in the stolen property." ***Hall***, 826 So. 2d at 271. The "linchpin" of this factual determination is "the defendant's intended use of the stolen property." ***Id.***

Unequivocally, the ***Hall*** Court determined that legislative intent of section 812.025 required the trier of fact to decide whether the defendant was a thief or trafficker by determining the defendant's intent. Juries or trial judges (not appellate courts)

must evaluate the factual evidence to determine whether the defendant is a common thief or a trafficker in stolen property: "Just as the trier of fact must make a choice if the defendant goes to trial, so too must the trial judge make a choice if the defendant enters a plea of nolo contendere to both counts." *Id.*

Decisions by district courts, including the Second District, are wrong in concluding, contrary to the legislative intent of section 812.025 and *Hall*, that an appellate court can direct a determination to vacate offenses without remanding for a factual determination as to whether the defendant was a "common thief" or "trafficker in stolen property." *See e.g., Anucinski*, 90 So. 3d at 882; *Hinestroza v. State*, 867 So. 2d 1279, 1281 (Fla. 5th DCA 2004); *Toson v. State*, 864 So. 2d 552, 556 (Fla. 4th DCA 2004); *Kilmartin v. State*, 848 So. 2d 1222, 1225 (Fla. 1st DCA 2003).

Although many district courts, including the Second District, have employed the wrong legal remedy by vacating the less serious offense, rather than properly remanding for an evidentiary hearing, the Fourth District, in two post-*Hall* decisions, correctly reversed and remanded for the trial judge to determine whether the defendants were thieves or traffickers in stolen property. *See e.g., Pomaski v. State*, 989 So. 2d 721, 723 (Fla. 4th

DCA 2008)("We remand the case to the trial court to determine which charge is supported by the record and to correct the judgment to reflect either grand theft or dealing in stolen property."); L.O.J. v. State, 974 So. 2d 491, 493-4 (Fla. 4th DCA 2008)("[W]e reverse the adjudication and disposition order and remand the case to the trial court to vacate either the dealing in stolen property charge or the three counts of grand theft of a firearm and to enter a new disposition order."). The conflict should be resolved in favor of the latter Fourth District decisions because those decisions are consistent with *Hall,* give effect to the meaning of the law, and do not disadvantage defendants by always convicting them of the more serious crime, regardless of whether they are common thieves or not, subjecting defendants to harsher sentences. The contrary result converts every petit thief into a trafficker.

B. Double jeopardy analysis, principles and remedy address the unrelated problem of convicting defendants of multiple crimes subsumed by the most serious thereby requiring a remedy different from a violation of section 812.025. Applying the improper, double-jeopardy remedy of vacating the less serious offense dates to the Fifth District's pre-*Hall* decision in *Ridley* (1981), and the long-standing error should be corrected.

Section 812.025 may be unique and prone to error, but it is not difficult to apply. *Anderson v. State*, 2 So. 3d 303 (Fla. 4th DCA 2008)(J. Klein, concurring). The legislature intended the statutory jeopardy law to be employed differently from double-jeopardy principles and analysis, which permits dual- (or multiple-) conviction errors to be resolved by appellate courts remanding with directions to vacate the less serious offense or offenses. *See Raines v. State*, 19 So. 3d 331, 332 (Fla. 2d DCA 2009) (citing *Pizzo v. State*, 945 So. 2d 1203 (Fla. 2006)). Appellate courts do not make "factual" determinations in resolving double jeopardy violations because the lesser offenses "'are those in which the elements of the lesser offense are always subsumed within the greater, without regard to the charging documents or evidence at trial.'" *Id.* (citing *State v. Florida*, 894 So. 2d 941, 947 (Fla. 2005)).

In applying section 812.025, the elements of theft are not subsumed by dealing in stolen property, and most relevant is that the legislature, in crafting section 812.025, recognized that theft and dealing in stolen property addressed "two different evils." In confronting a similar remedy issue after a jury verdict, the Fourth District, in *Kiss v. State*, 42 So. 3d 810, 812

(Fla. 4th DCA 2010), reviewed cases that employed the striking-of-the-lesser-offense remedy after dual convictions by a jury and determined the courts had engaged in no analysis in devising that remedy which was rooted in a pre-*Hall* decision by the Fifth District Court:

> There are numerous cases from the district courts that have concluded that the cure to this anomaly of permitting a jury to return a verdict for both dealing in stolen property and grand theft is to strike the lesser of the two offenses. A review of these cases shows that there is no analysis given to support this remedy. The source of the misconception resides in the Fifth District Court of Appeal's decision in ***Ridley v. State***, 407 So. 2d 1000 (Fla. 5th DCA 1981), which is the cited authority for this supposed cure.

Kiss v. State, 42 So. 3d 810, 812 (Fla. 4th DCA 2010). The *Ridley* Court analogized to the double-jeopardy remedy despiteacknowledging that that remedy was not directly applicable to thelanguage of section 812.025. *Ridley v. State*, 407 So. 2d 1000,1002 (Fla. 5th DCA 1981). The *Kiss* Court determined that *Ridley* wasimproperly decided because charging defendants with grand theftand dealing in stolen property does not implicate double-jeopardy

principles, and Kiss was placed at a disadvantage because the jury was not instructed to choose between the two charges. *Kiss v. State*, 42 So. 3d at 813. The[6] jury may have convicted Kiss of the lesser offense of grand theft, rather than the more serious, dealing in stolen property. So, the *Kiss* Court remanded for a new trial.

In a later case, the First District disagreed with the *Kiss* analysis, holding the proper remedy was to vacate the lesser offense, claiming that that remedy "respects the jury's determination." *Blackmon v. State*, 58 So. 3d 343, 347 (Fla. 1st DCA 2011). The *Blackmon* Court reasoned that the vacating-the-lesser-offense remedy was consistent with the *Hall* decision because the court did not remand for Hall to withdraw his plea, but directed the trial judge to vacate either the conviction for grand theft or dealing in stolen property, and resentence Hall on the remaining conviction. *Blackmon v. State*, 58 So. 3d at 347. The *Blackmon* Court certified conflict with *Kiss*, and the issue is pending before this Court. *See Blackmon v. State*, 67 So. 3d 198 (Fla. 2011).

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6 The *Kiss* Court ordered a new trial and certified conflict with *Ridley*. The issue was not accepted by this Court until *Blackmon* certified conflict with *Kiss*.

Contrary to *Blackmon*, the remedy employed in *Ridley,* *Blackmon*, and *Anucinski* does not respect the jury or trial judge's decisions because none examined whether the defendants were "common thieves," "traffickers in stolen property," or in some circumstances, both. This determination requires more than the mere assessment of whether the stolen property was transferred, distributed, dispensed or disposed, *See Hall*, at 271 (citing *Camp*, at 1057 and *Grimes*, at 650), but whether the items were redistributed for "personal use" or as part of a "criminal network of thieves and fences." *Hall*, at 271. The appropriate remedy, following an open, un-bargained plea, is (as held by *Hall*) remand for this factual determination, not withdrawal of the plea. In a plea situation, the trial judge must determine not whether the defendant is guilty of theft and distribution of the property, but whether the defendant was a common thief distributing the property for personal use and guilty of theft, or a trafficker engaged with a criminal network of thieves and fences who knowingly deal in the redistribution of stolen property. *Hall*, at 271.

C. Florida Statute section 812.025 requires a finding of fact and factual determinations are best left to the finders of fact

(judges or juries).

Finally and unlike double-jeopardy determinations, section 812.025 requires a finding of fact to vacate convictions and concomitantly resentence defendants on fewer convictions. First, remanding with directions for the trial judge avoids evidentiary decisions about the "intent" of defendants as well as the potentially complicated sentencing scenarios ill-suited for appellate court judges. As already noted, the trial judge may vacate the more serious offense rather than the less serious offense, and thereby result in a less severe sentence. Here, if the trial judge determined, on remand, that Anucinski was not a trafficker in stolen property (and there is nothing in the current record that would suggest otherwise), but a common thief, feeding her drug and alcohol habits (and there is much in the record that supports that finding), the trial judge may reduce her overall sentence because as a common thief she is guilty only of a third-degree felony, rather than the additional second-degree felony of dealing in stolen property. Other examples, involving complicated fact determinations and re-sentencing hearings, are also likely even when the improper double-jeopardy remedy is employed in attempting to resolve cases of (1) longer sentences

that are imposed on the less-serious rather than the more serious offense, (2) sentences involving consecutive rather than concurrent sentencing, (3) sentences on multiple thefts but a single dealing in stolen property conviction, raising the difficult and fact-intensive decision about which offense or offenses may in effect be "more serious," or (4) as here, lengthy sentences or probationary terms imposed because Anucinski was convicted of two felonies, rather than one, even if the theft charge is vacated.

Determinations of fact are best left to trial judges and juries, rather than appellate judges. Double jeopardy violations are simply not analogous to the unique Florida law that proscribes convicting defendants of two different crimes, which address two different evils. The conflict among the districts should be resolved by following the well-settled precedent of *Hall*, which properly determined the legislative intent of the law and remanded for the trial judge to determine which conviction or convictions to vacate.

CONCLUSION

The Second District erred by usurping the role of the trial judge in determining whether Anucinski was a "common thief" or a "trafficker in stolen property" by reversing and vacating her conviction for grand theft. This decision ignores the legislative intent of the statute and misapplies the *Hall* decision. Since violations of section 812.025 require a determination of fact, those determinations are ill-suited for appellate judges and are best left to trial judges or juries. As such, the Second District's decision to vacate the grand theft conviction should be reversed with directions to the trial judge to hold an evidentiary hearing, determine whether Anucinski is a common thief or trafficker in stolen property, and resentence her on the remaining conviction.

APPENDIX

PAGE NO.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 8th day of April, 2013.

CERTIFICATION OF FONT SIZE

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90 So.3d 879

District Court of Appeal of Florida,

Second District.

Jessica Patrice **ANUCINSKI**, Appellant,

v.

STATE of Florida, Appellee.

No. 2D10–3557.

June 8, 2012.

Synopsis

Background: Defendant entered an open plea to charges of third-degree grand theft and second-degree dealing in stolen property in the Circuit Court, Collier County, Franklin G. Baker, J., and was adjudicated guilty of both charges. Defendant appealed.

Holdings: On rehearing, the District Court of Appeal, Villanti, J., held that:

1 statute barring convictions for both theft and dealing in stolen property in connection with one scheme or course of conduct prevented trial court from adjudicating defendant guilty of both offenses, and

2 on remand trial court was to vacate the grand theft conviction as the lesser of the two convictions.

Reversed and remanded with directions.

West Headnotes (2)Collapse West Headnotes

Change View

1**Receiving Stolen Goods**

Persons liable

Statute barring convictions for both theft and dealing in stolen property in connection with one scheme or course of conduct prevented trial court from adjudicating defendant, who entered an unbargained-for open plea to third-degree grand theft and second-degree dealing in stolen property, guilty of both offenses; charges arose from a single scheme or course of conduct in which defendant stole a ring from a jewelry store at a mall, biked to a pawn shop on a nearby street, and pawned the ring the same day. West's F.S.A. § 812.025.

1 Case that cites this headnote

324Receiving Stolen Goods

324k6Persons liable

2**Criminal Law**

Directing judgment in lower court

Appellate court would direct trial court on remand to vacate grand theft conviction as the lesser of two convictions for third-degree grand theft and second-degree dealing in stolen property, upon appellate court's determination that the dual convictions violated statute barring convictions for both theft and dealing in stolen property in connection with one scheme or course of conduct, where defendant pleaded to both crimes so there was no question of fact for the trial court as to whether defendant committed the elements of both offenses, and the factual basis for the plea sufficiently established that the two charges arose from a single scheme or course of conduct. West's F.S.A. § 812.025.

1 Case that cites this headnote

110Criminal Law

110XXIVReview

110XXIV(U)Determination and Disposition of Cause

110k1185Reversal

110k1188Directing judgment in lower court

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Opinion

VILLANTI, Judge.

After entering an open plea to charges of grand theft and dealing in stolen property, Jessica **Anucinski** appeals the trial court's adjudication of guilt on both charges. We hold that the trial court

erred in adjudicating **Anucinski** guilty of both grand theft and dealing in stolen property because section 812.025, Florida Statutes (2009), bars dual convictions arising from a single scheme or course of conduct. On the facts of this case, we reverse and remand with directions that the trial court vacate the lesser conviction and resentence **Anucinski** accordingly.

1 The facts in this case are simple. **Anucinski** entered an unbargained-for, open plea to the trial court on charges of third-degree grand theft and dealing in stolen property (a second-degree felony). The two charges arose from a single scheme or course of conduct: **Anucinski** stole a ring from the Tiffany & Co. store located at a mall, biked to a pawn shop located on a nearby street, and pawned the ring the same day. *See, e.g., Wilson v. State,* 884 So.2d 74, 77 (Fla. 2d DCA 2004) (finding a single scheme or course of conduct where the defendant "was accused of stealing and selling the same property on the same day").

Section 812.025 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.**

(Emphasis added.) In *Hall v. State,* 826 So.2d 268 (Fla.2002), the supreme court held that section 812.025 prohibits dual convictions for dealing in stolen property and grand theft arising from a single scheme when a defendant pleads nolo contendere to both charges. The court explained that each statute addresses a different evil: the theft statute intends to punish a common thief who steals for personal use and for whom redistribution is incidental, while the dealing statute intends to punish "fences" who knowingly redistribute stolen property. *Id.* at 271. *Hall* explained:

The linchpin of section 812.025 is the defendant's intended use of the stolen property. The legislative scheme allows this element to be developed at trial and it is upon this evidence that the trier of fact may find the defendant guilty of one or the other offense, but not both. The *881 legislative scheme is clear and the same legislative rationale militates against allowing a defendant to plead guilty to inconsistent counts, i.e., stealing property with intent to use under section 812.014 or stealing property with intent to traffic in the stolen goods pursuant to section 812.019. **Just as the trier of fact must make a choice if the defendant goes to trial, so too must the trial judge make a choice if the defendant enters a plea of nolo contendere to both counts.** Legislative history leads us to believe that this comports with legislative intent. **Thus, we find that section 812.025 prohibits a trial court from adjudicating a defendant guilty of both theft and dealing in stolen**

property in connection with one scheme or course of conduct pursuant to a plea of nolo contendere.

Id. (emphasis added).

Based on the language of the statute and the *Hall* decision, it is clear that the trial court could not adjudicate **Anucinski** guilty of both dealing in stolen property and grand theft arising from a single scheme. *See, e.g., Pomaski v. State,* 989 So.2d 721, 723 (Fla. 4th DCA 2008) (holding that trial court erred in accepting open plea to both grand theft and dealing in stolen property charges arising from a single scheme of stealing aluminum ramps and handrails and selling them to a scrap yard). 2 All that remains to be determined in this case is the remedy. **Anucinski** asked this court to remand for the trial court to make a factual determination as to whether she was a "common thief" who should be convicted of grand theft or a "trafficker in stolen property" who should be convicted of dealing in stolen property, and to decide which conviction to vacate based on that determination. The State has interpreted **Anucinski's** argument as a request to order the trial court to conduct an evidentiary hearing to make that determination and asks that we simply vacate the lesser conviction of grand theft.[1]

Prior to the supreme court's *Hall* decision, this court had consistently directed trial courts in cases arising out of one scheme or course of conduct to simply vacate the less serious of the two offenses, regardless of whether the case involved a plea or a trial. *See, e.g., Bishop v. State,* 718 So.2d 890 (Fla. 2d DCA 1998); *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); *Victory v. State,* 422 So.2d 67 (Fla. 2d DCA 1982).

But the procedure on remand in this case is affected by the language in *Hall.* There, as here, the defendant had been charged with, and entered a plea to, third-degree grand theft and second-degree dealing in stolen property. *See Hall,* 826 So.2d at 269. But, unlike in prior cases, the supreme court did not simply remand with directions that the lesser conviction of grand theft be vacated. Rather, it "remand[ed] with directions that the conviction be reversed on either count III or count IV" without further direction. *Id.* at 272. In reversing the dual conviction, the supreme court explained: "Just as the trier of fact must make a choice if the defendant goes to trial, so too must the trial judge make a choice if the defendant enters a plea ... to both counts." *Id.* at 271. *882 *Hall's* language suggests some level of discretion in deciding which conviction to vacate upon remand. Yet despite *Hall's* discretionary language, trial courts in post-*Hall* trial cases have been directed to simply vacate the lesser of the two convictions pursuant to section 812.025. *See, e.g., Wilson v.*

State, 884 So.2d at 77; *Blackmon v. State,* 58 So.3d 343, 347 (Fla. 1st DCA 2011); *see also Poole v. State,* 67 So.3d 431 (Fla. 2d DCA 2011) (affirming where trial court dismissed charge of third-degree grand theft after the jury returned a guilty verdict on both grand theft and dealing in stolen property); *Williams v. State,* 66 So.3d 360 (Fla. 2d DCA 2011) (same); *Simon v. State,* 840 So.2d 1173 (Fla. 5th DCA 2003). As the State has pointed out, and as the above cases illustrate, when a jury convicts a defendant of both grand theft and dealing in stolen property, trial courts do not have to engage in any determination of which conviction to vacate—they are simply directed to vacate the lesser offense. *See, e.g. Wilson,* 884 So.2d at 77. Therefore, requiring trial courts to hold an evidentiary hearing in plea cases to determine which crime a defendant is "more guilty of" seems illogical when no such analysis is required after a jury verdict.

But we are bound by *Hall,* so we must reconcile its language with the cases cited above. As we have noted in the past, while in many cases grand theft is a third-degree felony and dealing in stolen property is a second-degree felony, that is not always the case. *See Williams,* 66 So.3d at 363. In some cases grand theft can be a greater felony, depending upon the value of the stolen goods. *Id.* And dealing in stolen property is not always a second-degree felony. *Id.* Moreover, dual convictions for those crimes may be possible depending on the facts of a case. *See Wilson,* 884 So.2d at 77 (explaining that dual convictions are possible where " 'a clearly disjunctive interval of time or set of circumstances' " disrupts the flow of the defendant's conduct) (quoting *Rife v. State,* 446 So.2d at 1158). For example, if **Anucinski** had stolen several rings and only pawned one of them, that factual circumstance could allow dual convictions. Or if there had been a very long delay between the two crimes and the pawn shop had been a long distance away from the jewelry store, it could be that the two counts could be considered to arise from two separate episodes. Presumably, the broad language in *Hall* was intended to allow courts to consider those types of factors when deciding which conviction to vacate or which charge to dismiss. But absent other elements, such as the ones described above, we expect that trial courts will simply continue to dismiss the lesser charge or vacate the lesser conviction.

In this case, however, **Anucinski** pleaded to both crimes so there is no question of fact for the trial court as to whether she committed the elements of both offenses. And the factual basis for the plea here sufficiently established that the two charges arose from a single scheme or course of conduct. *See Wilson,* 884 So.2d at 77. Therefore, there is no factual determination left to be made by the trial court. Thus, in an effort to foster judicial economy, *see Simon,* 840 So.2d at 1174, we remand with directions that the trial court vacate the grand theft conviction.

Reversed and remanded for further proceedings consistent with this opinion.

ALTENBERND and LaROSE, JJ., Concur.

Parallel Citations

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Footnotes

1

We note that this case is before us on the State's motion for rehearing. Interestingly, in its original three-and-half-page appellate argument, the State did not concede that both offenses were part of a single scheme or course of conduct and, therefore, did not cite to any of the cases to which it cites on rehearing regarding a proper remedy to **Anucinski's** situation. But on rehearing, the State has implicitly agreed that both convictions cannot stand and focuses on the remedy.